Who's Your Daddy?: A Psychoanalytic Exegesis of the Supreme Court's Recent Patent Jurisprudence

Gretchen S. Sween
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... my sons, who should as sons have helped,
Did nothing: and, one little word from them
Was all I needed, and they spoke no word,
But let me wander on for evermore,
A banished man, a beggar. These two maids
Their sisters, girls, gave all their sex could give,
Food and safe harborage and filial care;
While their two brethren sacrificed their sire
For lust of power and sceptred sovereignty.
No! me they ne’er shall win for an ally . . . .

Sophocles, Oedipus at Colonus

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I. Introduction

Since the Bush administration took office in 2001, the U.S. Supreme Court has granted *certiorari* in and then decided a dozen patent cases.\(^2\) Considering the Supreme Court’s pronounced ideological divide, its consistency during this unprecedented incursion into patent law is even more extraordinary. In each instance it has either reversed, vacated, and/or remanded decisions of the U.S. Court of Appeals for the Federal Circuit in unanimous or nearly unanimous opinions.\(^3\) Moreover, the net result of the Supreme Court’s flurry of reversals has been to constrain, rather than expand, patent holders’ rights. And the Supreme Court’s rhetoric in formulating its patent decisions has become increasingly disdainful of the Federal Circuit, a specialized court toward which the Supreme Court had historically been quite deferential.

What message is the Supreme Court sending—and is it the same message that the Federal Circuit is receiving?

At a recent meeting of the Austin Intellectual Property Law Association (“IPLA”),\(^4\) United States District Court Judge for the Western District of Texas, Austin Division, the Honorable Lee Yeakel, suggested that he sees a coherence in the Supreme Court’s recent patent cases. The Judge’s sound observation went something like this: “If you are wondering what the

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\(^2\) Because the Supreme Court’s overall docket has *decreased* dramatically in the past twenty years, the raw percentage of patent cases on the Court’s docket underscores even more the degree to which the Supreme Court’s interest in patent cases has increased in recent years. For instance, during the 2007-2008 term, the Supreme Court heard only 72 cases, as opposed to an average of 140 cases per term in the 1980s. Thus, the fact that the Supreme Court heard even *one* patent case that term is significant—especially since the Court had heard an unprecedented *three* patent cases in the 2006-2007 term.


\(^4\) The meeting was held on June 17, 2008 at the Westwood Country Club in Austin, Texas.
Supreme Court is doing with all of these patent cases, it seems to me that the Court is telling the Federal Circuit that patent cases are no different from any other.” The High Court’s recent patent jurisprudence does indeed reveal a preference for broad, general principles while rejecting nuances developed by the Federal Circuit over the last fifteen years. But does this trend thoroughly explain the Court’s resurgent interest in a doctrinal area that many consider to be profoundly abstruse, difficult, and disembodied? And is this trend a “good” one? Is it “fair” to the patent holders, accused infringers, practitioners, and the specialized court that has been deeply immersed in these nuances for years? Is the Supreme Court’s commitment to curbing the Federal Circuit’s perceived overreaching affected by a perception that patent cases have been afforded an unfair patina and an unfair share of judicial resources based on their purported difficulty or that patent “trolls” have unfairly accumulated excessive booty at the expense of an efficient and vibrant market for technological innovation? Was it fair for Justice Scalia to characterize the Eastern District of Texas, which now has the busiest patent docket in the nation, as a “renegade jurisdiction” for its perceived role in the current patent litigation boom?5 Was it fair for the Eastern District of Texas, led by Judge T. John Ward, to craft local patent rules that transformed that district into the busiest patent docket in the nation?6 And is it fair that the Northern and Southern Districts of Texas, in an effort to attract more patent suits to their own dockets, have followed suit?7 Conversely, is it fair that patent cases have, in the past, tended to

5 Justice Scalia made this comment during oral arguments in MercExchange, L.L.C. v. eBay.

6 See, e.g., Creswell, Julie, So Small a Town, So Many Patent Suits, THE NEW YORK TIMES (Sept. 24, 2006); Nat Raymond, Taming Texas, THE AMERICAN LAWYER (Mar. 1, 2008) (exploring how Marshall, Texas, with a population of about 24,000 and no high-tech industry to speak of, became the preferred venue for patent holders to file complex, multimillion-dollar, infringement suits).

7 See Gretchen Sween, Living the Rules: The Honorable Judge Sim Lake, Texas State Bar Litigation Section, NEWS FOR THE BAR, Spring 2008; Gretchen Sween, A View from the Bench:
languish unless individual courts took a particular interest in seeing them resolved? Is it fair to assume that what may be a reasonable approach to case management will likewise be a fair way to approach the concepts underpinning patent disputes?\(^8\) What does “fair” mean anyway?

This article provides no definitive answers. Instead, it merely holds a mirror up to the Supreme Court’s recent patent-law holdings and the rhetoric through which those holdings have been conveyed. The view in the mirror suggests that something more primal, and less jurisprudential or even political, may account for the Court’s phenomenal consistency in this doctrinal area of the law.

II. Surveying the Court’s Recent Patent Cases

Recognizing the intricacies associated with intellectual property law, Congress in 1982 established the Federal Circuit and tasked this specialized court with harmonizing the law related to patents. The Federal Circuit, whose exclusive appellate jurisdiction includes, but is not limited to, all patent claims, is the only Article III appellate court whose jurisdiction is based on subject matter, not geography. After the Court’s tenth anniversary, commentators seemed to agree that the Federal Circuit had brought uniformity to patent law and ended a type of forum-

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\(^8\) Judge Yeakel and his colleague, the Honorable Sam Sparks, in Texas’s Western District have decided not to adopt special patent-specific local rules. Judge Yeakel explained this decision by stating that he and Judge Sparks do not believe that “it is fair” to treat patent cases “any differently” from other kinds of civil lawsuits—or to assume that all patent cases are best managed in a uniform fashion. Thus, Judge Yeakel’s view of the pattern in the Supreme Court’s recent patent decisions and his decision not to adopt patent-specific rules align.
shopping since all roads were leading to Rome and circuit splits could not exist. \(^9\) Thus, as John M. Golden, assistant professor at The University of Texas School of Law recently observed, when the Supreme Court reverses the Federal Circuit, the Supreme Court is not resolving inter-court conflicts, but is instead replacing the Federal Circuit’s resolutions with the Supreme Court’s own alternatives. \(^10\) Although the Supreme Court does not pretend to have special expertise in substantive patent law, during the last six years—beginning with 

\textit{Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., Ltd.}, \(^11\) decided on May 28, 2002, and culminating, for now, in \textit{Quanta Computers, Inc. v. LG Electronics, Inc.}, \(^12\) decided on June 9, 2008—the Court has been remarkably consistent in its patent opinions. Several of the Court’s key patent cases, which reflect an increasing sense of urgency about showing the specialized court who is boss, are surveyed below.

A. \textit{Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.}

In \textit{Festo}, the unanimous Court addressed the relationship between the “doctrine of equivalents” and “prosecution history estoppel,” concluding that the latter patent-specific affirmative defense was really just a variation on the broader estoppel doctrine that precludes a party from taking a position that contradicts a previous position that it has taken. \(^13\) Having


\(^12\) 128 S. Ct. 2109 (2008).

\(^13\) 535 U.S. 722.
concluded that prosecution history estoppel is not something special, the Supreme Court rejected the Federal Circuit’s patent-case-specific per se rule and replaced it with a “flexible bar rule” deemed more “consistent with our precedent”—even as the High Court admitted that it had never before “weighed the merits” of these two approaches in any previous case.\textsuperscript{14} Instead of a comparative analysis, the Court invoked nineteenth-century Supreme Court cases in which the doctrine had been formulated; it then directed courts to “balance” the arguments for prosecution history estoppel against the overall equities of the inventor’s conduct during prosecution.\textsuperscript{15} Seemingly, the Supreme Court did not believe that any intervening developments justified the Federal Circuit’s decision to modify the Supreme Court’s (very) old approach.

B. Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.

Similarly, with \textit{Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.}, the Supreme Court concluded that “arising under” jurisdiction and the well-pleaded complaint rule should apply \textit{no differently} in patent cases than it had “long governed” all other cases.\textsuperscript{16} In his opinion for the Court, Justice Scalia cites a 1913 Supreme Court case for the proposition that determining whether a case arises under patent law “cannot depend upon the answer.”\textsuperscript{17} Thus, the Court reasoned, surely a counterclaim cannot serve as the basis for jurisdiction as it “contravene[s] the longstanding policies underlying our precedents” and would, by analogy, “radically expand the class of removable cases” and “undermine” the “quick rule of thumb” that “the longstanding

\textsuperscript{14} \textit{Id.} at 738.

\textsuperscript{15} \textit{Id.} at 739.

\textsuperscript{16} 535 U.S. 826, 830 (2002).

\textsuperscript{17} \textit{Id.} at 831 (citing \textit{The Fair v. Kohler Die & Specialty Co.}, 228 U.S. 22, 25 (1913)).
well-pleaded-complaint rule” provides. The decision stripped the Federal Circuit of some of its exclusive jurisdiction, which it had defined as including any case with a patent law question—including actions where the patent claim was a request for declaratory relief based on patent infringement brought in response to non-patent claims.

C. Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.

Then, in Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc., the Court again reversed the Federal Circuit by emphasizing how “our cases” “compel a contrary result” to the one reached by the Federal Circuit. The Federal Circuit had decided to review the sufficiency of the evidence presented during trial of a Walker Process claim, whereby the accused infringer alleged that a patentee had violated federal antitrust law by seeking to enforce a patent that had been obtained by defrauding the PTO. The Federal Circuit reviewed the evidence even though the party that had lost its Rule 50(a) motion for judgment as a matter of law and then lost at trial had not filed a Rule 50(b) renewed motion for judgment as a matter of law (notwithstanding the verdict) or, alternatively, a motion for a new trial.

On one hand, the Unitherm decision is only noteworthy in being particularly unworthy of note. On the other hand, because the Court elected to take up such a seemingly prosaic issue, the opinion provides a stark example of the current Supreme Court’s keen sensitivity to all things emanating from the Federal Circuit. Unitherm first notes that the Federal Circuit had failed to follow binding regional circuit law, which required that a motion for a new trial be filed in the

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18 Id.
20 A “Walker Process claim,” named for a claim pursued in Walker Process Equipment Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172 (1965), is a type of claim brought against a patentee who has reputedly procured a patent by fraud and engaged in illicit conduct actionable under the antitrust laws.
trial court before the sufficiency of the evidence could be reviewed on appeal.\textsuperscript{21} After chiding the Federal Circuit for having “freed” itself from governing authority, the opinion devotes over a page to the full text of Rule 50 and then several pages to noting that the Court had, “on several occasions,” itself made clear that a post-trial Rule 50(b) motion is a procedural imperative—citing to the “straightforward language employed” in several dusty Supreme Court cases from 1947, 1948, and 1952 that “unequivocally establish” that motions under both Rules 50(a) and 50(b) must be made and denied before a reviewing court can presume to weigh the evidence.\textsuperscript{22} Since the appellant had not formally renewed its motion under Rule 50(b) before the trial court, the Federal Circuit should have been as “powerless” as the district court was to grant a new trial.\textsuperscript{23} Thus, the Court maintained, just because one is dealing with some stinkin’ patent case, does not permit freeing a litigant from the obligation to comply with this particular procedural hurdle.

D. Illinois Tool Works Inc. v. Independent Ink, Inc.

\textit{Illinois Tool Works Inc. v. Independent Ink, Inc.}\textsuperscript{24} operates as a bit of an exception tending to prove the rule regarding the trajectory and tone of the Supreme Court’s recent patent jurisprudence.\textsuperscript{25} In this case, an unanimous Court vacated the Federal Circuit’s opinion,

\begin{itemize}
\item \textsuperscript{21} \textit{Unitherm}, 546 U.S. at 398-9.
\item \textsuperscript{22} \textit{Id.} at 398-401.
\item \textsuperscript{23} \textit{Id.} at 404.
\item \textsuperscript{24} 547 U.S. 28 (2006).
\item \textsuperscript{25} Similarly, \textit{Merck KGAA v. Integra Lifesciences I, Ltd.}, 545 U.S. 193 (2005) serves as an exception that nevertheless proves the rule. In \textit{Merck}, the Supreme Court vacated the Federal Circuit’s decision and remanded for further proceedings—as per the trend described here. But the issue in the case simply did not allow for the kind of condemnatory tone evident in several of the Supreme Court’s recent patent-law opinions. \textit{Merck} involved the proper interpretation of a relatively \textit{recent} statutory exemption to the long-standing definition of patent infringement.
\end{itemize}
concluding that “the presumption of market power in a patented product” should not “survive as a matter of antitrust law” since, due to an act of Congress, that presumption had already met its demise in patent law. The Court’s holding rests expressly on the conclusion that the legitimacy of tying arrangements should not be affected simply because “a tying product is patented.” In this respect, the opinion perfectly reflects the trend described here. What is markedly different is the Court’s gentle tone.

But in reversing the Federal Circuit here, the Court had no cause to chastise the Federal Circuit for blazing new territory because, as the Supreme Court notes, the Federal Circuit had made “a careful review of the ‘long history of Supreme Court consideration of the legality of tying arrangements’” and had then placed “special reliance” on seminal Supreme Court antitrust

embodied in 35 U.S.C. § 271(a). Thus, the Court had no basis to harangue the court below for failing to follow an older Supreme Court precedent—although, in explaining its decision to reverse, the Court did invoke Eli Lily & Co. v. Medtronic, Inc., 496 U.S. 661 (1990). But the latter had merely declined to limit the infringement exemption to submissions under particular statutory provisions that regulate drugs, whereas Merck addressed the specific issue “whether uses of patented inventions in preclinical research, the results of which are not ultimately included in a submission to the Food and Drug Administration (FDA), are exempted from infringement by 35 U.S.C. § 271(e)(1).” 545 U.S. at 195. The Federal Circuit had found that the section 271(e)(1) safe-harbor provision did not apply to the accused infringer because the testing in question was not clinical testing whose results would be supplied to the FDA; rather, the Federal Circuit had reasoned, the testing had involved “general biomedical research to identify new pharmaceutical compounds.” Id. at 201 (quoting 331 F.3d at 866). The Supreme Court concluded that the Federal Court’s reading of the statutory exception was overly narrow and that the statutory exemption should instead be understood to encompass “all uses of patented inventions that are reasonably related to the development and submission of any information under the FDCA.” Id. (emphasis retained). The Court then remanded the case for a sufficiency-of-the-evidence review based on the “proper construction of § 271(e)(1)” that the Court had just adopted. Id. at 208. The net result of the decision, as with all others discussed here, was to narrow the rights of patent holders.

26 575 U.S. at 28.

27 Id.
decisions from the 1940s. 28 Indeed, *Illinois Tool* repeatedly quotes with approval the Federal Circuit’s deferential statements regarding its “duty . . . to follow the precedents of the Supreme Court until the Court itself chooses to expressly overrule them.” 29 One could hardly ask for more humility from a subordinate. Accordingly, in *Illinois Tool*, the Court was able to proceed magnanimously, pursuing in measured terms “a fresh examination of the history of both the judicial and legislative appraisals of tying arrangements” and ultimately bringing the rules for proving a tying claim involving a patented product in line with modern dictates for all other cases involving such arrangements. 30

E. eBay Inc v. MercExchange LLC

*eBay Inc v. MercExchange LLC* 31 stands in stark contrast to *Illinois Tool*. With *eBay*, the Court pointedly rejected the Federal Circuit’s established position regarding injunctions, holding unanimously that an injunction should not *automatically* issue upon a finding of patent infringement as per the standard interpretation of key patent statutes. 32 Instead, the Supreme Court directed district courts to weigh the same four factors *traditionally* used to determine whether an injunction is warranted.

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28 *Id.*

29 *Id.* at 33.

30 *Id.*


32 *See, e.g.*, 35 U.S.C. § 154(a)(1) (“Every patent shall contain … a grant to the patentee … of the right to exclude others from making, using, offering for sale, or selling the invention….“); 35 U.S.C. § 283 (“The several courts having jurisdiction of cases under this title may grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable.”).
In retrospect, it is telling that the Supreme Court’s order granting the writ of certiorari in *eBay* directed the parties to brief the following issue: “**Whether this Court should reconsider its precedents**, including *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U.S. 405 (1908)?” Continental Paper Bag did not play any meaningful role in the briefing presented to the Court in arguing for or against granting cert; rather, the Supreme Court’s decision to underscore the existence of this 100-year old Supreme Court case in its order telegraphs its perception that the Federal Circuit had ignored (what should have been binding) precedent. In any event, the *eBay* petitioner and many amici who urged the Court to hear the appeal effectively characterized the case so as to arouse the Court’s ire against the Federal Circuit and its view that proving infringement created a virtually irrefutable presumption that an injunction would issue.\(^{34}\) And the strategy worked.

The text of the Court’s *eBay* opinion begins with the word “Ordinarily.”\(^{35}\) Indeed, the decision regarding how to secure an injunction is based entirely on the understanding of what is “ordinarily” done—under “well-established,” “familiar,” “traditional equitable considerations” embodied in several Supreme Court cases cited in the majority opinion.\(^{36}\) That is, the Court made its decision to smack down the Federal Circuit’s decision to reverse the district court’s initial denial of a permanent injunction, because the Federal Circuit had not undertaken the

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35 547 U.S. at 390.

36 *Id.* at 390, 391, 392.
“ordinary” analysis, but had instead applied a rule that the Federal Circuit itself had developed in patent cases, which eBay characterizes as “a major” and unjustified “departure” from the ordinary.\textsuperscript{37} The Court pointedly explains that the Federal Circuit’s error is its “categorical” assertion that, once infringement and validity are found in the patent holder’s favor, \textit{denying} permanent injunctions is “unusual,” “exceptional,” “rare;” that is, the Federal Circuit’s perception that patent cases are a breed apart is, according to eBay, the very linchpin of the lower court’s error.\textsuperscript{38}

Some Justices even felt moved to scold the Federal Circuit for failing to see that doling out injunctions to prevailing patentees encourages some firms to seek patents (and the bargaining chip associated with the threat of an injunction) “not as a basis for producing and selling goods but, instead, primarily for obtaining licensing fees.”\textsuperscript{39} This particular reprimand is noteworthy since it is the U.S. Constitution that affords patentees the exclusive right to obtain licensing fees from those who would use the patentee’s invention; and because it is a monopoly right, a patent holder can lawfully refrain from offering anyone a license or from producing any goods embodying that patent.\textsuperscript{40} As the Supreme Court itself observed over forty years ago, “[a] patent

\textsuperscript{37} \textit{Id.} at 392.

\textsuperscript{38} \textit{Id.} at 393-4.

\textsuperscript{39} \textit{Id.} at 395 (Kennedy, Stevens, Souter, and Breyer, JJ., concurring).

\textsuperscript{40} Additionally, the patent statute makes clear that it is neither “misuse” nor an “illegal extension of the patent right” for a patentee to “refuse[] to license or use any rights to the patent.” 35 U.S.C. § 271(d). \textit{See also In re Indep. Serv. Org. Antitrust Litig. CSU, LLC}, 203 F.3d 1322, 1326 (Fed. Cir. 2000) (“There is ‘no reported case in which a court has imposed antitrust liability for a unilateral refusal to sell or license a patent’”) (citation omitted); \textit{Intergraph Corp. v. Intel Corp.}, 195 F.3d 1346, 1363 (Fed. Cir. 1999) (“the antitrust laws do not negate the patentee’s right to exclude others from patent property”); \textit{SCM Corp. v. Xerox Corp.}, 645 F.2d 1195 (2d Cir. 1981) (holding that there is no liability arising from a patentee’s refusal to license its patents). \textit{See also Applera Corp. v. MJ Research Inc.}, 389 F. Supp.2d 344, (D. Conn. 2005) (“A patent owner is not required either to sell licenses for use of its patents or to permit others to act
empowers the owner to exact royalties as high as he can negotiate with the leverage of that monopoly.”

Apparently, several Justices, whose ideological inclinations run the gamut, are so affronted by the Federal Circuit’s efforts to protect those who would obtain licensing fees under their patents that they lost sight of the Court’s own historic understanding that a patent monopoly is not conditioned on the promise that the patentee will produce and/or sell goods. Instead, that monopoly is a function of the Framers’ express directive that Congress pass laws “[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.”

F. MedImmune, Inc. v. Genetech, Inc.

In MedImmune, Inc. v. Genetech, Inc., with Justice Thomas as the lone dissenter, the Supreme Court reversed the Federal Circuit’s dismissal of a declaratory judgment action for lack of subject-matter jurisdiction. The Federal Circuit had required that, before seeking declaratory relief, a party must have actually breached the operative license before filing suit. But the

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41 Brulotte v. Thys Co., 379 U.S. 29, 33 (1964) (but finding that post-expiration royalties were nothing less than an effort by the patentee to extend the term of his monopoly beyond that granted by law).

42 U.S. CONST. art. I, § 8, cl. 8 (emphasis added).

Supreme Court decided that the Federal Circuit had dismissed the case based on an improper premise derived by ignoring an old Supreme Court decision that the current Supreme Court felt was directly on point.

The facts relevant to *MedImmune* are fairly straightforward. The parties had entered into a license agreement whereby Genetech had granted MedImmune the right to make, use, and sell an antibody that the agreement stated was covered by an issued patent and a pending patent application. Despite the agreement that it had signed and its decision to continue paying royalties under the agreement that it then sought to invalidate, MedImmune later filed a declaratory judgment action, contending that its accused product did not infringe any valid Genetech patent claim. The district court held, and then the Federal Circuit affirmed, that dismissing the declaratory judgment claims was required by *Gene-Probe Inc. v. Vysis, Inc.*, which stands for the proposition that a licensee, having executed a license agreement, has no standing to challenge the validity, enforceability, or scope of a patent.

In deciding *MedImmune*, the Supreme Court rejected the rule that the Federal Circuit had announced (not long before) in *Gene-Probe*, which had in turn controlled *MedImmune* below. The Supreme Court explained that, in deciding *Gene-Probe*, the Federal Circuit had imposed an inordinately narrow interpretation on a (much older) Supreme Court case, *Altvater v. Freeman*, which, the Court held, should have dictated a different result in *Gene-Probe*. Importantly, in deciding *Gene-Probe*, the Federal Circuit had expressly distinguished *Altvater*, finding the threat of a government sanction to be the dispositive fact in *Altvater*. But the Supreme Court dismissed

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44 359 F.3d 1376 (Fed. Cir. 2004).

45 *Id.* at 1381.

46 319 U.S. 359 (1943).
as specious the distinction between the threat of suit brought by the government rather than a private actor and held that an accused infringer need not “risk treble damages and the loss of 80 percent of its business, before seeking a declaration of its actively contested legal rights.”

Moreover, the Court insisted that paying royalties under a license agreement did not imply a promise not to challenge the patents covered by that agreement. The Court reasoned that there should not be, and therefore is not, a legitimate difference between the litigant who fails to break the law when facing the threat of governmental action and the litigant who fails to breach a private contract for fear of risking an infringement suit (and the possibility of treble damages and an injunction).

But the opinion disregards a critical question: does it make economic or ethical sense to execute a license agreement, wherein one agrees to pay royalties based on the existence of certain intellectual property, and then to challenge the very basis for one’s commitment to pay those royalties, i.e., the existence of presumptively valid, enforceable patents? Instead, the Supreme Court focused, once again, on the Federal Circuit’s reliance on its own rule rather than on the Supreme Court’s older precedent. Justice Scalia’s opinion for the Court even notes that the district court, convinced that it was bound by the Federal Circuit’s *Gene-Probe* rule, dismissed the case “despite its ‘serious misgivings’” about that rule. Thus, in reversing the Federal Circuit, Justice Scalia managed to shame the son by praising the grandchild’s superior sense of deference, ironically, by noting the grandson’s public critique of the very father to whom the grandson had ostensibly deferred.

G. *KSR Int’l Co. v. Teleflex Inc.*

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47 *MedImmune*, 127 S. Ct. at 775.

48 *Id.* at 776.
KSR Int’l Co. v. Teleflex Inc., another unanimous Supreme Court decision, addresses the proper test for ascertaining “obviousness” sufficient to invalidate a patent under 35 U.S.C. § 103. The decision’s net result is to make obviousness easier to prove by eliminating the requirement of an express “suggestion to combine” particular prior art references. More specifically, the case addressed whether KSR had been entitled to summary judgment based on the contention that the inventor had merely added an element to an extant design to create a variation on a adjustable automobile pedal in a way that would have been obvious to one of ordinary skill in the relevant art. The Supreme Court reversed the Federal Circuit—which had reversed the district court. And the Supreme Court’s reversal again relied on the invocation of an older standard, embodied in an older Supreme Court case, *Graham v. John Deere Co. of Kansas City*, which the Court believed that the Federal Circuit had (inappropriately) supplanted.

Below, the Federal Circuit had reversed the grant of summary judgment in favor of KSR after applying its “teaching, suggestion, or motivation” or “TSM” test to analyze the lone claim that Telefex was asserting against KSR. The Federal Circuit’s (more recently crafted) test required proof that “some motivation or suggestion to combine the prior art teachings” existed in the prior art itself, in the nature of the problem, or in the body of knowledge available to a person ordinarily skilled in the art. During oral argument, Justice Scalia derided the Federal Circuit’s

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50 Id. at 1734.


53 *See Al-Site Corp. v. VSI Int’l, Inc.*, 174 F.3d 1308, 1323-24 (Fed. Cir. 1999).
TSM test as “irrational” “gobbledygook;” and Chief Justice Roberts added that the test’s only value seemed to be to enhance the patent bar’s profitability. The Court’s opinion denigrates the TSM test as “contrary to § 103 and our precedents,” “rigid,” a confining “formalist conception” with an “overemphasis on the importance of published articles and the explicit content of issued patents.” By contrast, the Court describes the analytical methodology embodied in Graham and “our [other] cases” as “an expansive and flexible approach” and a “functional approach.”

Indeed, KSR repeatedly notes that the “correct analysis” is found in “earlier instructions” announced “over a half century” before. Thus, the Supreme Court’s displeasure palpably thunders—insisting that “our precedents make clear” that “[u]nder the correct analysis, any need or problem known in the field of endeavor at the time of invention and addressed by the patent can provide a reason for combining the elements in the manner claimed.”

KSR’s subtext appears to be that the Court simply does not believe that it is fair to give someone a patent on an invention that any old person could see was an obvious next step—thus, the “correct analysis” for judging obviousness, the Court seems to say, is little more than an intuitive thing. At least a court “need not seek out precise teachings directed to the specific subject matter of the challenged claim, for a court can take account of the inferences and creative

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55 127 S. Ct. at 1735, 1739, 1741.
56 Id. at 1731, 1739.
57 Id. at 1742, 1739.
58 Id. at 1741, 1742 (emphasis added).
59 Id. at 1742.
steps that a person of ordinary skill in the art would employ.” As a corollary, the Court implies that the Federal Circuit’s approach had been unduly liberal and elitist in its insistence that the germane prior art be scrutinized for evidence of some “teaching, suggestion, or motivation” as a prelude to an obviousness analysis. Indeed, the Court’s understanding of “person of ordinary skill in the art” in KSR is more akin to the generic “ordinary person” that is employed as a standard in other doctrinal areas—as when assessing the “duty of care” under tort law.

H. Microsoft Corp. v., AT&T Corp.

The Microsoft Corp. v. AT&T Corp. opinion issued the same day as KSR. While Microsoft does not contain the same reproachful tone evidenced in KSR, the basic architecture of the holding is the same: the Federal Circuit erred in reaching its patent-holder protective conclusion, and that conclusion was out of joint with an older Supreme Court decision regarding the basic principle underlying the case. The Court tersely summarizes both the issue and its conclusion at the outset:

Does Microsoft’s liability extend to computers made in another country when loaded with Windows software copied abroad from a master disk or electronic transmission dispatched by Microsoft from the United States? Our answer is “No.”

Then, the substantive portion of Justice Ginsburg’s opinion for the nearly-unanimous Court provides an extended discussion of a 35-year-old Supreme Court case, Deepsouth Packing Co. v.

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60 Id. at 1741 (emphasis added).


62 Id. at 1750-51.

63 Justice Stevens was the loan dissenter; and Chief Justice Roberts did not participate in the case.
that had actually prompted Congress to enact section 271(f)—the statutory provision at issue in the Microsoft case. According to the current Court, in deciding Deepsouth back in 1972, the Supreme Court had simply interpreted “our patent law as then written,” commenting “that it was ‘not an infringement to make or use a patented product outside of the United States’”—even though the accused infringer had willfully assembled and used the accused machine outside of the United States so as to circumvent U.S. patent law and then imported the product that resulted from the extraterritorial use of the infringing machine. Indeed, the Microsoft opinion acknowledges unapologetically that section 271(f)(1) was “specifically intended . . . as a response to” Deepsouth and explains that the new provision had indeed expanded “the definition of infringement to include supplying from the United States a patented invention’s components.” Thus, the Court clarifies that Deepsouth was part of a dialectical process whereby the Supreme Court had, in its view, simply applied patent law “as written;” Congress, not liking the results, had then rewritten the law; and now, in Microsoft, the Court was being asked to interpret the amended law—but would again “resist” giving the new statutory


Indeed, in contextualizing the Deepsouth opinion in Microsoft Corp. v. AT&T Corp., the Court reached far further back to a nineteenth-century case, Brown v. Duchesne, 19 How. 183 (1857), to justify the holdings of both Deepsouth and Microsoft. See Microsoft, 127 S. Ct. at 1752.

Id. at 1751.

Id. at 1752. The provision provides in relevant part:

Whoever . . . supplies . . . from the U.S. all or a substantial portion of the components of a patented invention, . . . in such manner as to actively induce the combination of such components outside of the U.S. in a manner that would infringe . . . if such combination occurred within the U.S., shall be liable as an infringer.

language “an expansive interpretation.”

The Court justifies its restraint by reminding that section 271(f) constitutes an exception to the “general rule” that U.S. patent law does not apply beyond the United States: “[t]he presumption that United States law governs domestically but does not rule the world applies with particular force in patent law” because this “traditional understanding” is embedded in the Patent Act itself.

Understanding why applying the “general rule” may not be entirely fair requires some context. Microsoft, in the United States, provides “master disks” containing Windows to foreign PC manufacturers, who copy the contents onto PC hard drives. Microsoft had stipulated that the PCs, acting in concert with the software, infringed the patent that AT&T had asserted. The only issue on appeal was whether the software on the master disks were “components” under section 271(f)(1) such that AT&T was entitled to assert its patent rights against Microsoft; the Federal Circuit had held that software is fairly characterized as a ‘component’ under the statute. Yet despite the parties’ stipulation, the Supreme Court concluded that AT&T’s patent was not infringed by a computer “standing alone” or by software that was not yet installed—facts that are as difficult to refute as they are inconsequential. That is, Microsoft does not create Windows so that it will sit on a shelf, just as its customers (i.e., PC manufacturers) do not buy Windows software to install on computers that no one will ever run. The Court, however, was not moved by these practical realities. Instead, it decided that software cannot be classified

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68 Microsoft, 127 S. Ct. at 1751.

69 Id. at 1758 (emphasis added).

70 Id. at 1753.

71 Id.

72 Id. at 1750.
as a component “until it is expressed as a computer-readable ‘copy,’ e.g., on a CD-ROM.”

And having concluded that “[a]bstract software,” detached from an activating medium “is an idea without physical embodiment, and as such, it does not match §271(f)’s categorization,” the Court found that software is not a “combinable component” as countenanced by section 271(f); therefore, section 271(f) does not apply to foreign software sales because foreign-made copies of software are not “supplie[d]” from the United States—even though the original from which the copies did emanate from the United States.

Thus, Microsoft clearly reflects the Supreme Court’s belief that patent holders’ rights (under section 271(f) or otherwise) should be construed as narrowly as possible. What is less clear, however, is why the Court viewed AT&T’s position as requiring an “expansive” or “dynamic” interpretation of section 271(f) when the statute was specifically enacted to expand the reach of U.S. patent law. Similarly, it is unclear why the Court felt compelled to dare Congress to make any further “adjustments” to the provision that “it deems necessary or proper” to close any further “loophole” or “other arguable gaps” “if it finds such action warranted”—as Congress had tried to do by enacting section 271(f) in the first place. Yet the last section of Microsoft is devoted entirely to schooling AT&T—and really the Federal Circuit that it was reversing—on the Judiciary’s proper role vis-à-vis the legislative branch. While subtle, the Court’s final directive to the Federal Circuit is decidedly acerbic: “[i]f the patent law is to be adjusted better ‘to account for the realities of software distribution,’ 414 F.3d at 1370, the

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73 Id. at 1753.

74 Id. at 1750-51.

75 Id. at 1751.

76 Id. at 1749-50; 1759-60.
alteration should be made after focused legislative consideration, and not by the Judiciary forecasting Congress’ likely disposition.” The rhetorical tactic of incorporating text from the Federal Circuit’s opinion into the Supreme Court’s conclusion gives the reversal a particularly icy sting.

I. Quanta Computers, Inc. v. LG Electronics, Inc.

Last June, the Supreme Court issued its most recent patent law decision in Quanta Computers, Inc. v. LG Electronics, Inc. Quanta is the High Court’s first major pronouncement on the doctrine of “patent exhaustion” in sixty-six years—since it decided United States v. Univis Lens Co. In reversing the Federal Circuit, the Supreme Court again stressed the vitality of its own, considerably older decision.

The basic concept of exhaustion—that a patent holder’s monopoly in a patented article is relinquished once a patent holder makes the first unconditional grant to a licensee under a U.S. patent—has been a recognized patent-law principle for over 150 years. Then, in Univis, the Supreme Court addressed how far a patent holder could go, without implicating federal antitrust law, to retain its control over a patented product after an initial grant had been made. The Court ultimately nullified explicit restrictions in the license agreements between Univis, which held a patent covering a method for grinding lenses, and its licensees. The relevant provision in these agreements required that, as a condition of the license to buy blank lenses from Univis’s licensees, the downstream purchasers, who actually ground the lens blanks pursuant to Univis’s patented method for sale to consumers, had to sell those lenses at a price dictated by Univis. The United States government sued Univis, alleging that this practice constituted an antitrust


78 316 U.S. 241, 249 (1942).
violation. Univis argued that it had the right to condition a license to use its lens patent and that those conditions could apply to downstream retailers. The Supreme Court disagreed, holding that a patent holder cannot contract to expand a patent monopoly that would otherwise have been “exhausted” upon the first authorized sale of a product substantially embodying the patented invention. The Univis court also emphasized that a patentee cannot evade the antitrust laws by using the patent laws as a shield. In short, just because a patent holder could find a willing contract partner, the patent holder could not, by contract, evade the exhaustion doctrine.

During the 66 years since Univis, the Federal Circuit has carved out several exceptions to the exhaustion doctrine. For instance, the Federal Circuit has held (1) that a patentee can contract around exhaustion by imposing clear conditions at the time of a sale—as long as the patented article has some substantial non-infringing use; 79 (2) that method claims are never exhausted; 80 and (3) that sales made outside the United States are not “first sales” under a U.S. patent such that exhaustion is triggered. 81 In Quanta, the contemporary Supreme Court addressed two of the Federal Circuit’s departures from Univis and similar cases, holding that exhaustion applies to method, not just apparatus, claims, and expressly denying a patent owner’s right to seek royalties after a first authorized sale of a product that uses that method. Moreover, Quanta suggests that patent holders cannot limit the scope of a license as it applies to those downstream of the initial licensee—at least not to the extent previously recognized by the Federal Circuit.


81 See Jazz Photo Corp. v. International Trade Com’n, 264 F.3d 1094 (Fed. Cir. 2001).
From a 30,000-foot perspective, some key facts in *Quanta* and *Univis* are analogous. But in truth, the meaningful differences between the Depression-era eyeglass lens market and the contemporary, transnational PC market are legion. In short, the complexities and scale associated with the underlying technology, the methods for combining the components at issue, and the economics that drive the process are incomparable.

The facts underlying the *Quanta* case are as follows. South Korea’s LG Electronics (“LGE”) had entered into a broad cross-license with Intel that covered microprocessors, chipsets, and methods for combining those products with other products (memory and buses). Simultaneously, LGE and Intel also executed a “Master Agreement” that sought to condition the scope of LGE’s license as to customers downstream of Intel—but without affecting the broad license granted to Intel itself. Intel sold processors and chipsets to computer manufacturers, such as Quanta, under the LGE license. When these sales were made, Intel gave the computer manufacturers notice that the sale did not include a license to combine those products with anything other than Intel products. But in order to make competitively priced products, the computer manufacturers combined the licensed Intel products with non-Intel memory and buses to make computer systems designed for the consumer market. LGE then sued the computer manufacturers for infringing a method patent covering the process of combining Intel microprocessors, chipsets, memory, and buses to form a computer system.

Carefully tracking the specific facts underlying *Quanta*, the Supreme Court reached the following conclusions:

- methods are embodied in products;
- method claims are exhausted when a license authorizes a licensee to sell components or products that substantially embody the patents that include those method claims;
• the first sale of a product that substantially embodies a method claim or that is covered by an apparatus claim exhausts any patent monopoly in those claims;

• the only reasonable use for the Intel products at issue in this case was to combine them to make computer systems;\textsuperscript{82}

• everything inventive was embodied in the microprocessors and chipsets that Intel was licensed to sell to the computer manufacturers; and

• once Intel sold the microprocessors and chipsets under a license, the method claims that covered combining those products with others to make a computer system were exhausted because the latter process did not involve any innovation.

Most notably, the Supreme Court adopted Quanta’s position, thereby rejecting the Federal Circuit’s view that method claims can never be exhausted.\textsuperscript{83} Again, the Court’s opinion conveys downright indignation, stating that the Federal Circuit’s view of exhaustion “would allow patent holders to avoid exhaustion entirely by inserting method claims in their patent specifications.”\textsuperscript{84} The Court insists that its holding will, by contrast, prevent artful drafting “to make an end-run around exhaustion” that would in turn permit the grave “danger” that “any downstream purchasers of [a computer system] could nonetheless be liable for patent infringement.”\textsuperscript{85} Yet, the Court’s reasoning ignores the practical reality that no patentee is likely to sue the end-user of a consumer good that practices a patent—particularly when the patent only covers a small feature within a subcomponent of an apparatus that is made up of numerous complex subcomponents, as is the case in virtually all patent infringement suits that accuse personal computers.

\textsuperscript{82} Interestingly, this same premise—that the components only function as part of a computer system—was rejected in \textit{Microsoft v. AT&T}.

\textsuperscript{83} \textit{Quanta}, 128 S. Ct. at 2113.

\textsuperscript{84} \textit{Id.} at 2117.

\textsuperscript{85} \textit{Id.} at 2118.
Further, the *Quanta* decision disregards the patent-law specific meanings of several key terms, such as “components” and “license.” *Quanta* rests on the premise, for instance, that, where “essential features” or a device “substantially embodies” are present in a device, any method claims covering that device are exhausted. But this premise ignores the long-standing notion that *all* limitations in a patent are equally important such that there really can be no “essential” components among limitations setting forth the elements of a given invention.

Similarly, the *Quanta* decision uses the term “license” as if it means “permission” instead of recognizing that, in the context of intellectual property law, a “license” specifically means an affirmative grant of rights made under a patent.

*Quanta* ultimately raises as many questions as it resolves. For example, the opinion does not address whether LGE’s attempt to limit the scope of the license downstream of its licensee would have been successful if the limitation/condition had been in the cross-license that governed the transaction between Intel and Quanta instead of in the separate “Master Agreement” between LGE and Intel; the opinion only hints at such a possibility. Likewise, *Quanta* does not address whether a “first sale” must occur in the United States in order to trigger exhaustion—even though the same sales could be the subject of infringement allegations.

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86 *Id.* at 2119 (emphasis added).

87 A patent examiner is supposed to review each claim—and corresponding limitations—in a patent for compliance with every statutory requirement for patentability. *See, generally, MANUAL OF PATENT EXAMINING PROCEDURE § 707* (citing 37 CFR 1.104(b)).

88 *Quanta*, 128 S. Ct. at 2122.

89 *Id.* at 2121-22 (“In any event, the provision requiring notice to Quanta appeared only in the Master Agreement, and LGE does not suggest that a breach of that agreement would constitute a breach of the License Agreement. Hence, Intel’s authority to sell its products embodying the LGE Patents was not conditioned on the notice or on Quanta’s decision to abide by LGE’s directions in that notice”).
regardless of where the first sale occurred. Further, *Quanta* does not resolve whether breach of contract damages may still be available where a licensee breaches an express condition in a written license even if the patentee cannot seek to recover from the licensee under patent law because exhaustion will have cut the patentee off from any patent-related royalty stream.\(^90\) Additionally, *Quanta* did not address the related doctrine of implied license—and thus an implied license can still be disclaimed in an agreement with a licensee.\(^91\)

The Court’s opinion does, however, send at least one unambiguous message: the Supreme Court had a case on point (*Univis*), yet the Federal Circuit had inappropriately departed from that case’s pellucid pronouncements. Moreover, as in *eBay*, the Supreme Court’s irritation, arising from its perception that the Federal Circuit had gone off the reservation, is quite conspicuous. The opinion begins with the assertion that: “For over 150 years this Court has applied the patent doctrine to limit the patent rights that survive the initial authorized sale of a patented item.”\(^92\) Then, the Supreme Court unequivocally announces that the Federal Circuit is being thoroughly rebuffed:

*The Court of Appeals for the Federal held that the [exhaustion] doctrine does not apply to method patents at all and, in the alternative, that it does not apply here because the sales were not authorized by the license agreement. **We disagree on both scores.***\(^93\)

\(^{90}\) *Id.* at 2122, n.7 (“We note that the authorized nature of the sale to Quanta does not necessarily limit LGE’s other contract rights. LGE’s complaint does not include a breach-of-contract claim, and we express no opinion on whether contract damages might be available even though exhaustion operates to eliminate patent damages.”).

\(^{91}\) *See, e.g.*, *Zenith Elecs. Corp. v. PDI Communications*, --- F.3d ----, 2008 WL 1734195 (Fed. Cir. April 16, 2008) (finding implied license derived from express licenses between patentee and manufacturers).

\(^{92}\) *Quanta*, 128 S. Ct. at 2113.

\(^{93}\) *Id.*
The opinion is then peppered with phrases emphasizing the “longstanding” nature of the doctrine that is embodied “in 19th-century cases” that have “repeatedly held” positions contrary to the Federal Circuit’s. 94 Thus, *Quanta*, in categorically reversing the Federal Circuit on two exhaustion-related points but nonetheless avoiding numerous, interrelated nuances associated with the doctrine, is not focused so much on illuminating a substantive, patent-law doctrine as much as it is about establishing dominance.

III. Psychoanalyzing the Court’s Consistency

The recent patent cases discussed above reflect the Supreme Court’s inclination to shift the balance of power away from patent holders by relying on older, simpler precedents—although these precedents did not necessarily arise in analogous circumstances or even in patent infringement disputes. Of course, the Supreme Court’s implicit message that patent cases are just cases like any other is, in one sense, quite correct. That is, litigation is litigation, and “thinking like a lawyer” (or like a judge) is critical to navigating any lawsuit judiciously. But that does not mean that it is appropriate or “fair” to treat legal issues in a Procrustean manner. 95

There may be sound reasons why a specialized court has crafted special rules that deviate in certain ways from similar, broadly applicable principles that were formulated by a court of general jurisdiction.

94 *Id.* at 2115.

95 This metaphor is derived from the story of Procrustes, a mythological Greek miscreant who offered unsuspecting guests a special iron bed in which to sleep. If the guest was too tall, Procrustes would amputate the excess length; and if the guest was too short, he would stretch his victim on the rack until the guest “fit” the bed. But in fact, no one ever fit the bed because Procrustes would adjust it upon sizing his victims up from afar so as to ensure a mismatch. Procrustes was eventually outsmarted by Theseus, the same Greek hero responsible for founding Athens and for giving Oedipus, the ostracized king of Thebes, his final resting place.
As elegant as the Court’s consistency may be, that very consistency across the ideological divide is suspect because it suggests a preference for simplicity in a context that is not especially amenable to simplicity. Indeed, the complexity of intellectual property law is what prompted Congress to create the Federal Circuit—not because this complexity is a “problem” to be eradicated, but because complexity is a core characteristic of patent law. The Federal Court’s mandate has been to tease out the complexities in a doctrinal area whose underlying subject matter is peculiarly dynamic (and thus complex): human innovation. Thus, by insisting that patent cases be treated like any other, by issuing holdings that routinely rest on older, simpler precedents, and by rejecting subject-specific nuance, the Supreme Court has implicitly challenged a key justification for the Federal Circuit’s very existence.

Why would the Supreme Court feel compelled to pursue such a fundamental assault upon the Federal Circuit?

If one accepts the premise that the institutional relationship between the Supreme Court and the Federal Circuit is analogous to a father-son relationship,\(^96\) the Supreme Court’s recent patent opinions, when considered collectively, expose a pronounced desire on the part of the father to make it clear to the son who is boss. In turn, the uncanny repetition of this reminder from the patriarch suggests a degree of anxiety about the son’s growing significance. This anxiety is quite understandable if one considers the context in which this particular father has found himself: a generalist confronting concepts that have evolved in an esoteric area of law.

\(^96\) This metaphor is intentionally gendered male because, in both Freudian analysis and in the Greek myths upon which Freud relied, the psychological dynamic between father and son is quite distinct from the dynamic between father and daughter. For instance, in Oedipus at Colonus, Oedipus’s daughters dutifully serve and nurture Oedipus throughout his years in exile, whereas his sons pursue their own self-interested quest for power. But the descriptions of the Supreme Court as “father” and the Federal Circuit “son” in this article have nothing to do with the gender of the courts’ members and certainly are not intended to imply any slight to the esteemed female members of the courts.
replete with its own peculiar argot, in a cultural epoch where technological innovation moves at
mind-boggling speed, and where businesses’ intellectual property is often more valuable than
hard assets whose worth is far easier to quantify. The labyrinth of arcane, patent-specific
jurisprudential concepts is decidedly difficult to negotiate—even for profoundly intelligent
human beings such as Supreme Court Justices. And even profoundly intelligent, accomplished
patriarchs can be reluctant to admit that their upstart sons may have craft a better, more nuanced
solution to a complex problem.⁹⁷

Members of the Highest Court in this land would likely bristle at the suggestion that its
approach to adjudicating appeals in patent cases reflects a struggle for dominance between father
and son. A traditional Freudian, however, would quickly counter that denial is a natural, initial
response to being confronted with uncomfortable, latent truths buried in one’s psyche. And at
least within the hermetic realm of psychoanalysis, the road to self-awareness requires that one
recognize the patterns and symbols that reveal the repressed anxieties that lie beneath the surface
of consciousness. Only by exhuming the artifacts of the unconscious and exposing them to the
light of Reason can one see, and then address, the latent anxieties that unwittingly affect one’s
behavior—in ways that may not be as facially reasonable as the Ego is inclined, a priori, to
believe.⁹⁸ And, again, according to the psychoanalytic model, symbolic clues as to what is really
a foot occasionally float to the surface when we let our guard down, thereby beckoning us to
unearth them.⁹⁹ The subterranean exploration recommended here focuses on the Psyche of the

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⁹⁸ See, generally, Sigmund Freud, THE INTERPRETATION OF DREAMS (1899); Sigmund Freud,
PSYCHOPATHOLOGY OF EVERYDAY LIFE (1901).
Supreme Court *qua* father, and that father’s decision to reassert its influence in a particular area after being otherwise engaged for the preceding fifty years.

But can Freud really provide a decent road map for this exploration?

Freud might well have been interested in *Egyptian Goddess, Inc. v. Swisa, Inc.*, the most recent by-product of the dialogue between the Federal Circuit and the Supreme Court. This recent, unanimous, *en banc* Federal Circuit decision suggests that the son may be cognizant of at least one of the patterns in the father’s recent patent-law jurisprudence described above. In *Egyptian Goddess*, the Federal Circuit discarded its own 20-year-old “point of novelty” test for design patent infringement and reverted back to a 137-year-old Supreme Court standard articulated in *Gorham v. White*, 81 U.S. 511 (1871). The latter test that was, heretofore, described *only* in this lone 1871 case asks what an “ordinary observer,” upon comparing two competing designs, would recognize as infringing. Thus, the Federal Circuit has resurrected a broader, simpler standard—in a development that resonates with irony since this standard should actually make it *easier* for a certain category of patent holders to prevail, whereas the Supreme Court’s recent decisions have all resulted in *curtailing* patent holders’ rights. Also, Freud might have deemed it significant that this case is seemingly appeal-proof—because the plaintiff successfully attacked the legal test at issue, yet the Court still found that the patentee’s design had not been infringed; therefore, although the defendants lost on the legal issue, the infringement claim against them was dismissed.

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100 2008 WL4290856, __ F.3d __ (Sept. 22, 2008).

101 *Id.*
But the fact is, Freud, who believed that a father’s death was “the most important event, the most poignant loss, of a man’s life”\(^{102}\) and who sired six children, had precious little to say regarding the father’s perspective. Freud’s most famous theory—of the Oedipal conflict—was formulated shortly after his own father’s death and focuses almost exclusively on the son’s perspective. And in Moses and Monotheism (1938), written during the last year of Freud’s life, Freud still focused primarily on the son’s perspective (specifically, the longing of Christianity, the son, to supplant Judaism, the “retrograde” father-religion). But assuming that Freud was right that all sons experience feelings of profound ambivalence about their fathers—loving them, hating them, desiring to supersede them, and feeling guilty about the resulting conflict simultaneously—then surely the son who grows up to become a father must experience his own anxieties attributable to the belief that his children unconsciously long to take over. Because Freud himself did not address this likelihood, “inverse Freud” will have to do.

Freud based his Oedipal theory on a Greek mythic hero, Oedipus. Yet Oedipus did not simply kill his father and then blithely marry his mother. Indeed, he did not know his biological father; he killed a stranger in an act of self-defense. He later married a somewhat older woman who was, unbeknownst to either of them, his mother and the widowed queen of the stranger whom Oedipus had killed some time before. And by the time Oedipus learned the messy truth about the events that had culminated in his marriage and coronation, he himself was a father. The self-inflicted punishment that followed—which entailed gouging his eyes out and then wandering in exile—was dramatic, but it was not the end of Oedipus’s story. Oedipus grew old. And the great tragedian, Sophocles, who wrote the play that so inspired Freud,\(^{103}\) also wrote a

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\(^{102}\) Sigmund Freud, THE INTERPRETATION OF DREAMS, Preface (2d ed. 1908).

\(^{103}\) Sophocles, Oedipus the King, c. 429 B.C.E.
play about the last days of this ill-fated hero, Oedipus at Colonus, which focuses on a very
different kind of identity crisis: an older man’s fear of insignificance and his quest for
absolution.

The exegesis of the High Court’s recent patent cases presented here places special
emphasis on the tone and rhetorical tactics that characterize these decisions. In this sense, this
article follows the lead of Hamlet (a favorite in certain psychoanalytic circles104). When Hamlet
decides to employ a roving band of actors to put on a play in hopes of catching “the conscience
of a king,” Hamlet provides the Players with some sound advice. He urges them to:

Suit the action to the word, the word to the action, with this special observance,
that you o’erstep not the modesty of nature: for any thing so o’erdone is from the
purpose of playing, whose end, both at the first and now, was and is, to hold as
’twere the mirror up to nature: to show virtue her feature, scorn her own image,
and the very age and body of the time his form and pressure.105

Holding “as ‘twere the mirror up to” the Supreme Court’s patent opinions reveals a dynamic that
is not explained simply by the internal logic of any discrete case. And implicit in this exercise is
the suggestion that something may be (slightly) rotten in the state of Denmark. While it is
indisputable that stare decisis is a bedrock principle of the Anglo-American legal system, a
specialized court may have legitimate reasons for deviating or extrapolating from older decisions
that emanated from a court of general jurisdiction. And the Court could be unduly privileging
stare decisis over sensitivity to the sui generis aspects of patent law. In short, the Court’s
consistent insistence that it is unfair to treat patent cases differently from others may not really be
fair—if to be fair means to proceed with detachment from bias and predispositions but with
special sensitivity to the peculiar nuances of a particular context.

The Supreme Court has recently denied the writs of *certiorari* in a number of appeals of high-profile patent disputes,\(^{106}\) yet the current term will include at least one (quasi) patent case: *Carlsbad Technology Inc. v. HIF Bio Inc.*\(^{107}\) A principal reason for the Supreme Court to grant *certiorari* would seem to be to correct what the Supreme Court sees as an error on the Federal Circuit’s part. But if this proves to be the case with *Carlsbad*—and the Supreme Court reverses the Federal Circuit on the jurisdictional question presented—then this would also mean that the Court would be diverging for the first time from the trend of scaling back the rights of patent holders and the scope of the Federal Circuit’s jurisdiction. Whether the Court will agree to hear any of the appeals in patent cases that are still pending—and whether any opinions that follow would fit the pattern described in this article—remains to be seen. In any event, the subtext of the Supreme Court’s remarkably consistent approach to patent law in recent terms merits, in all due “fairness,” further scrutiny.

IV. Conclusion

The net result of the remarkable consistency of the Supreme Court’s recent patent opinions may be to weaken the patent system, which could in turn hinder the kind of innovation

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\(^{106}\) The Court has, for instance, denied writs of *certiorari* in *EchoStar Communications Corp. v. TiVo Inc.* (U.S., No. 08-179, *review denied* 10/06/08), which appealed the Federal Circuit’s conclusion that a $73.5 million jury award against EchoStar for infringing a patent on time-shifting television signals was supported by substantial evidence, and in *Nuijten v. Dudas* (U.S., No. 07-1404, *review denied* 10/06/08), which appealed the Federal Circuit’s ruling that signals embedded with information that allows those signals to place digital watermarks on electronic data files are unpatentable because they do not fit into any of the four categories of patentable subject matter delineated in 35 U.S.C. § 101. But the cases presented to the Supreme Court recently, including *Carlsbad Technology*, have largely involved procedural, rather than meaty, substantive questions of patent law.

\(^{107}\) On October 14, 2008, the Court granted *cert.* in this case where the issue presented is whether, after declining to exercise supplemental jurisdiction under 28 U.S.C. § 1367(c), a district court’s decision to remand a case that hinged on the question of inventorship could be reviewed; a unanimous panel of the Federal Circuit concluded that it could not. U.S., No. 07-1437.
that the system is meant to foster. Such a development would not be particularly good—at least not from the perspective of the Granddaddy of all Progenitors, the Framers of our nation’s founding document, who directed Congress to so to special lengths to “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.”108 Certainly, the leitmotif apparent in the Supreme Court’s patent cases and the increasingly reproachful tone through which its opinions are conveyed warrant a closer look.