

David McCombs, Phillip Philbin, Brett Bostrom, Katharyn Zagorin Author IP Law Article in SMU Annual Texas Survey

September 6, 2019 David McCombs, Brett Bostrom

PRACTICES Intellectual Property Litigation, Patent Office Trials, Patents, Trademark and Advertising, Intellectual Property

This article surveys significant developments in intellectual property (IP) law during the past year (i.e., 2018 or the Survey period). This article reviews IP law developments that are likely to be influential in the evolution of Texas IP jurisprudence. Thus, the cases cited focus on the decisions of the U.S. Supreme Court and the U.S. Court of Appeals for the Federal Circuit. For developments in trademark and copyright law, although the U.S. Court of Appeals for the Fifth Circuit's authority is binding, other circuits are considered highly persuasive.

The U.S. Supreme Court decided several cases involving IP issues during this Survey period. In patents, the Supreme Court considered the constitutionality and statutory compliance of the U.S. Patent and Trademark Office (PTO) *Inter Partes* Review (IPR) program. In these cases, the Supreme Court teetered between expansive and limited views of the PTO's authority to adjudicate and develop its own rules and procedures. The Supreme Court also addressed the ability to recover foreign lost profits under 35 U.S.C. § 284. The Federal Circuit weighed in on when summary judgment is appropriate for determinations of subject matter eligibility under 35 U.S.C. § 101, which aspects of the PTO's discretion to institute an IPR are subject to appeal, and whether patents assigned to Native American tribes can be shielded from challenges at the PTO under tribal immunity.

In trademark, the U.S. Court of Appeals for the First Circuit considered whether a debtor in a bankruptcy proceeding can reject a previously-granted trademark license, while the Federal Circuit weighed in standards for secondary meaning and likelihood of confusion. The U.S. Court of Appeals for the Ninth Circuit addressed the balance between the public interests in freedom of expression and avoiding consumer confusion. Finally, the U.S. Court of Appeals for the Fifth Circuit clarified which aspects of a television show can receive trademark protection. In copyright, the Federal Circuit addressed to what extent computer code that is copied and incorporated into a program can be considered a fair use

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