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Whose Rules Rule? Federal Circuit Review of Divergent USPTO and District Court Decisions

Lisa A. Dolak¹

I. INTRODUCTION

The potential utility of reexamination in the context of patent litigation has caught the attention of litigants,² commentators,³ and courts.⁴ A number of factors have been identified as

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² See, e.g., Scott A. McKeown, *Reexamination Strategies Concurrent With Litigation*, 1031 PLI/PAT 113, 117 (2011) (“The strategies and case studies that follow illustrate patent reexamination as a multi-purpose litigation tool that is increasingly leveraged in the U.S. to improve defensive posture and drive early settlement. Over 1000 Patent reexamination filings were filed in 2010, the vast majority of which are conducted concurrent to district court and/or ITC litigation.”); Gregory V. Novak, *Concurrent Reexamination as a Strategic Patent Litigation Defense Tool*, 1020 PLI/PAT 797, 799 (2010) (“With increasing frequency, infringement litigation defendants are seeking parallel United States Patent Office (PTO) reexaminations.”).

Mr. Novak has also noted the power of reexamination in the settlement context:

One of the most immediate and direct ways a reexamination can influence litigation is to aid in reducing a settlement amount and, in some cases, inducing a settlement. In our experience, more than half of the seventy plus reexaminations we prepare every year are never filed because the case ultimately settles. In many of these cases, the reexaminations are a driving force to either reduce the settlement or to induce settlement.

See *id.* at 805.

³ See, e.g., *id.* See also Robert Greene Sterne, Jon E. Wright, and Lori A. Gordon, *Reexamination Practice With Concurrent District Court Litigation Or Section 337 USITC Investigations*, 1031 PLI/PAT 165, 171 (2011) (“High-profile cases involving reexaminations and co-pending litigation include *NTP, Inc. v. Research in Motion, Ltd.* (patents found to cover the Blackberry), *TiVo v. Echostar*, (TiVo's DVR patents), *i4i v. Microsoft*, (patent covering XML functionality), *Uniloc v. Microsoft*, (patent covering anti-piracy protection), *Cordis v. Abbott*, (drug eluting stents). These high-profile cases, some involving highly profitable products or large damage awards highlight the critical interplay between the parallel universes of the courts and the PTO.” (citations omitted)).

⁴ See, e.g., *Lederer v. Newmatic Sound Systems, Inc.*, No. 10-CV-0271 (JS)(AKT), 2011 WL 31189, *3-4 (E.D.N.Y. Jan 4, 2011) (granting an infringement defendant's motion to stay litigation pending reexamination, noting that “The PTO has particular expertise in evaluating patentability, and its reexamination will help the Court understand the issues and, should the PTO invalidate some of Plaintiff's claims, reduce the length and complexity of this litigation.”); *Yodlee, Inc. v. Ablaise Ltd.*, Nos. C-06-07222 SBA, C-06-02451 SBA, C-07-01995 SBA, 2009 WL 112857, *6 (N.D.Cal. Jan. 16, 2009) (“A

contributing to an increase in the number of parallel federal court patent litigation and U.S. Patent and Trademark Office (“USPTO”) reexamination proceedings. For example:

Two primary factors have contributed to the increased use of reexamination as an alternate or additional venue to challenge patent validity where district court litigation has been initiated. First, in 2005, the PTO streamlined reexamination by creating the Central Reexamination Unit (“CRU”), making it a more viable venue for post-grant validity challenges. The CRU's sole responsibility is handling reexaminations. . . . [I]f the continued growth in the number of reexamination filings is an indication, its formation has put teeth into a process previously perceived as pro-patent owner and plagued by delay and uncertainty.

Second, the legal landscape surrounding patent validity has been in great flux. The Supreme Court's 2007 decision in *KSR Int'l Co. v. Teleflex, Inc.* dramatically changed the applicable standard governing determinations of a claimed invention's obviousness, articulating a more flexible standard than the prior teaching-suggestion-motivation standard from the [U.S. Court of Appeals for the] Federal Circuit. That decision alone appears to have cast serious doubt on the validity of many issued patents.⁵

Concurrent litigation and reexamination proceedings, although related in that they concern the same patent(s) and (typically, presumably) at least some of the same claims, proceed independently. Unless interrupted by dismissal or an interlocutory appeal, for example, district court litigation will generally proceed to a final judgment, from which the losing party (or parties) can appeal to the Federal Circuit. Reexamination, once ordered by the USPTO, will culminate in the issuance of a reexamination certificate confirming, cancelling, or reciting the amendment of the claims at issue, unless the proceeding is terminated prior to completion. A patent owner who is dissatisfied with a USPTO rejection in reexamination has the option of appealing first to the USPTO Board of Patent Appeals and Interferences, and ultimately to the Federal Circuit. Thus, in any given situation involving concurrent litigation and reexamination proceedings, there is the possibility that the Federal Circuit will encounter issues in appeals from determinations of the district court and the USPTO relating to the scope or validity of the same patent claims, which issues have traveled to the court on separate tracks.

If that happens, the procedural paths by which those issues reach the Federal Circuit will not be the only, or even the most significant difference. Although the range of potential validity

reexamination means that the Court and the parties will not need to waste their efforts, ‘attempting to resolve claims which may be amended, eliminated, or lucidly narrowed by the patent reexamination process and the expertise of its officers,’ and everyone will benefit from the certainty afforded by the reexamination.”).

⁵ Sterne, et al., *supra* note 3, at 171-72.

(patentability, more precisely) challenges in reexamination is narrower than in district court litigation,⁶ the governing standards are quite different in district court litigation:

In civil litigation, a challenger who attacks the validity of patent claims must overcome the presumption of validity with clear and convincing evidence that the patent is invalid. . . . In [USPTO] examinations and reexaminations, the standard of proof – a preponderance of evidence – is substantially lower than in a civil case; there is no presumption of validity.⁷

Additionally, “unlike in district courts, in reexamination proceedings ‘[c]laims are given ‘their broadest reasonable interpretation, consistent with the specification. . ..’” Accordingly, as the Federal Circuit has, noted, “the two forums take different approaches in determining validity and on the same evidence could quite correctly come to different conclusions.”⁸

For this reason, in *Ethicon, Inc. v. Quigg*, the Federal Circuit held that “if the district court determines a patent is not invalid, the [USPTO] should continue its reexamination. . . .”⁹ And it has expressly rejected a patent owner’s argument that “allowing an executive agency to find patent claims invalid after an Article III court has upheld their validity – violates the constitutionally mandated separation of powers, and therefore must be avoided.”¹⁰ Because “the court’s final judgment and the examiner’s rejection are not duplicative – they are differing proceedings with different evidentiary standards for validity . . . there is no Article III issue created when a reexamination considers the same issue of validity as a prior district court proceeding.”¹¹

Accordingly, there is the possibility of divergent outcomes in the district court and USPTO. For example, a claim or claims could be held to be not invalid and infringed in the district court, but unpatentable by the Board of Patent Appeals and Interferences in a reexamination. The infringement defendant could appeal the district court judgment, while the patent owner appeals the Board’s decision. Alternatively (although it would seem less likely as to a particular validity issue, given the governing claim construction and validity standards), the district court could declare a claim or claims to be invalid while the USPTO declares its intent to issue a reexamination certificate confirming their patentability.

⁶ Reexamination may be ordered if a “substantial new question of patentability” is raised by one or more patents or printed publications. 35 U.S.C. § 303.

⁷ *In re Swanson*, 540 F.3d 1368, 1376 (Fed. Cir. 2008) (citations omitted).

⁸ *Ethicon, Inc. v. Quigg*, 849 F.2d 1422, 1428 (Fed. Cir. 1988).

⁹ *Id.* at 1428-29.

¹⁰ *Swanson*, 540 F.3d at 1378.

¹¹ *Id.* at 1379 (citations omitted).

So what happens when the Federal Circuit is faced with (arguably) conflicting USPTO and district court determinations? In recent years, we've begun to receive relevant guidance, as the Federal Circuit has been asked to weigh in and decide "whose rules rule" in a variety of circumstances. The following summarizes what we've learned in the process, and identifies some questions that remain for decision.

II. KEY FEDERAL CIRCUIT RULINGS REGARDING DIVERGENT COURT AND USPTO RULINGS

First, on the often critical issue of claim construction, the Federal Circuit has ruled that the USPTO is not bound by a district court's claim construction.¹² In *In re Trans Texas Holdings Corp.*, the Federal Circuit rejected the patent owner's argument that the Board should have given preclusive effect to the district court's *Markman* order, noting that the USPTO was not a party to the district court litigation at issue.¹³ It further observed that "[c]laims are given 'their broadest reasonable construction, consistent with the specification, in reexamination proceedings,'" and upheld the Board's obviousness rejection, because the patentee "relied only on its erroneous claim construction in arguing" non-obviousness.¹⁴

What if the proceedings at the district court have gone beyond claim construction to a judgment that the claims at issue are valid and infringed, while reexamination of those same claims is pending? We have only non-precedential guidance from the Federal Circuit at this point, but in *Standard Havens Prod., Inc. v. Gencor Indus., Inc.*,¹⁵ a Federal Circuit panel reversed a district court's refusal to stay a permanent injunction and damages proceedings, stating:

As a matter of law, . . . if the reexamination decision of unpatentability is upheld in the court action under 35 U.S.C. § 145 (1988), the injunction would thereby immediately become inoperative. In addition, if a final decision of unpatentability means the patent was void *ab initio*, then damages would also be precluded. Therefore, the injunction should have been stayed. Thus in either event, . . . the reexamination proceeding "would control" the infringement suit.¹⁶

¹² *In re Trans Texas Holdings Corp.*, 498 F.3d 1290, 1298 (Fed. Cir. 2007).

¹³ *Id.* at 1297-98 (but noting that in *In re Freeman*, 30 F.3d 1459, 1469 (Fed. Cir. 1994), it "held that a patentee in a [USPTO] proceeding was barred by issue preclusion from asserting a claim construction already rejected in a district court action brought by the patentee against a third party").

¹⁴ *Trans Texas*, 498 F.3d at 1298-99.

¹⁵ 996 F.2d 1236, 1993 WL 172432 (Fed. Cir. 1993) (unpublished disposition).

¹⁶ *Id.* at *1. See also *Flexiteek Americas, Inc. v. Plasteak, Inc.*, No. 08-60996-CIV, 2010 WL 2976859, at *6-7 (S.D. Fla. July 20, 2010) (terminating a permanent injunction in light of a USPTO Advisory Action in reexamination maintaining a rejection of the sole claim of the patent at issue, "find[ing] that the

Changing the facts just a bit, what if the Federal Circuit has already upheld a district court determination that certain claims are not invalid, but the Board subsequently affirms a rejection of those claims in reexamination? On the patentee's appeal from such a Board decision in *In re Swanson*,¹⁷ the Federal Circuit affirmed the Board decision affirming the USPTO rejection.¹⁸ According to the court:

[the relevant statutory] language and legislative history, as well as the differences between the two proceedings, lead [to the conclusion] that Congress did not intend a prior court judgment upholding the validity of a claim to prevent the [USPTO] from finding a substantial new question of validity regarding an issue that has never been considered by the [USPTO]. To hold otherwise would allow a civil litigant's failure to overcome the statutory presumption of validity to thwart Congress' purpose of allowing for a reexamination procedure to correct examiner errors, without which the presumption of validity would never have arisen.¹⁹

Swanson thus illustrates that even a final (i.e., non-appealable) court decision upholding claim validity is not binding on the USPTO – a principle rooted in the different standards governing such determinations in the district courts and in the USPTO.²⁰

In ruling that allowing a reexamination to proceed in the face of a Federal Circuit decision upholding a judgment that pertinent claims are not invalid does not raise constitutional concerns,²¹ the court in *Swanson* did state “[i]n contrast, an attempt to reopen a final federal court judgment of infringement on the basis of a reexamination finding of invalidity might raise constitutional problems.”²² The Federal Circuit avoided this potential constitutional problem in

[USPTO's] Advisory Action . . . is a decision made after a thorough examination of the matter conducted by a body which holds particular expertise in such cases”, and noting that “[i]f the [patentee is] not successful [in appealing the USPTO decision], the Defendants could have their business impaired for years by an invalid patent if the Permanent Injunction is not terminated.”).

¹⁷ 540 F.3d 1368 (Fed. Cir. 2008).

¹⁸ *Id.* at 1382.

¹⁹ *Id.* at 1378.

²⁰ See M.P.E.P. § 2286(IV). However, “deference will ordinarily be accorded [by the USPTO] to the factual findings of the court where the evidence before the Office and the court is the same.” *Id.* Note further that such a determination made against a litigant who is also an *inter partes* reexamination requester will act as an estoppel against that party. See M.P.E.P. § 2686(V).

²¹ See *supra* note 11 and accompanying text.

²² *Swanson*, 540 F.3d at 1379 n.5.

its rulings on appeals in parallel district court and USPTO proceedings concerning the same patent in *In re Translogic Tech., Inc.*²³ and *Translogic Tech., Inc. v. Hitachi, Ltd.*²⁴ In the former, the Federal Circuit affirmed a Board decision affirming a USPTO holding of obviousness.²⁵ Then, in a non-precedential opinion issued on the same day, the court held that “[i]n light of this court’s decision in [the former], this court vacates the district court’s decision [that the patent was not invalid and infringed] and remands this case to the district court for dismissal.”²⁶

Thus in a number of cases, the Federal Circuit has reaffirmed the importance of looking to the differing standards governing district court and USPTO proceedings in considering the effects of divergent outcomes. It has held that affirmed USPTO determinations of unpatentability in reexamination “trump” federal court rulings of no invalidity, noting that the fact that a particular litigant did not succeed in establishing that claims are invalid by clear and convincing evidence does not preclude a USPTO determination that those claims are unpatentable under a different, less exacting standard. And a Federal Circuit panel, in a non-precedential disposition, directed a district court to stay a permanent injunction pending the conclusion of a reexamination proceeding.

Each of the above discussed cases involved district court decisions upholding validity. What, by contrast, is the effect of a court determination of invalidity or unenforceability? The USPTO is not bound by a non-final decision, but a final court decision of invalidity or unenforceability will preclude a USPTO determination that a substantial new question of patentability exists as to the affected claims in reexamination.²⁷ And upon a final decision of invalidity or unenforceability affecting all the claims for which reexamination has been requested, the USPTO will terminate its proceeding.²⁸

²³ 504 F.3d 1249 (Fed. Cir. 2007).

²⁴ 250 Fed. Appx. 988, 2007 WL 2973955 (Fed. Cir. 2007) (unpublished disposition).

²⁵ *In re Translogic Tech., Inc.*, 504 F.3d 1249, 1262 (Fed. Cir. 2007).

²⁶ *Translogic Tech., Inc. v. Hitachi, Ltd.*, 250 Fed. Appx. 988, 2007 WL 2007 WL 2973955 at *1 (Fed. Cir. 2007) (unpublished disposition).

²⁷ MPEP §2286 (II) (“A non-final holding of claim invalidity or unenforceability will also not be controlling on the question of whether a substantial new question of patentability is present. Only a final holding of claim invalidity or unenforceability (after all appeals) is controlling on the Office. In such cases, substantial new question of patentability would not be present as to the claims held invalid or unenforceable.”); *Ethicon v. Quigg*, 849 F.2d 1422, 1428-29 (Fed. Cir. 1988).

²⁸ MPEP § 2286(IV) (“If all of the claims being examined in the reexamination proceeding are finally held invalid or unenforceable, the reexamination will be vacated by the CRU or TC Director as no longer containing a substantial new question of patentability and the reexamination will be concluded.”).

III. OPEN QUESTIONS

Despite the Federal Circuit's treatment of issues relating to divergent court and USPTO rulings, a number of open questions remain. For example, what about the constitutional problem potentially raised by a litigant's attempt to reopen a final judgment of infringement in light of a reexamination determination of unpatentability? In *Swanson*, the Federal Circuit noted that "[t]he Supreme Court has repeatedly held that 'Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch.'"²⁹ But it held that the USPTO rejection at issue there did "not disturb [its] earlier holding" affirming the district court's conclusion that the jury could properly have found that the defendant had not met its clear and convincing evidence burden.³⁰ A final judgment of infringement – not at issue in *Swanson* – could stand on different footing. In cases where reexamination has been initiated prior to such a judgment and that judgment is appealed, the Federal Circuit could avoid the issue by staying the appeal pending the outcome of the reexamination. This course of action would be consistent with the court's treatment of the parallel *Translogic* appeals and its non-precedential disposition in *Standard Havens*. Inevitably, however, it seems that the court will have to confront the constitutional issue it has thus far managed to avoid.

Another open question – at least for the time being – is whether the USPTO is bound by a Federal Circuit (as opposed to a district court) claim construction. This issue was raised, but not decided, in *In re Suitco Surface, Inc.*³¹ There, the patentee argued "that the Board should have been bound by [the Federal Circuit's] earlier construction of" a particular claim term in reviewing an anticipation rejection in reexamination.³² The court held that it "need not address [that] argument because even under the broadest-construction rubric, the [USPTO's] construction is unreasonable."³³

The issue has re-emerged, however, in the now pending³⁴ appeals in *In re NTP, Inc.*³⁵ There, the patentee has argued:

²⁹ *Swanson*, 540 F.3d at 1378-79 (quoting *Plaut v. SpendThrift Farm*, 514 U.S. 211, 219 (1995) and citing *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113-14 (1948) ("It has . . . been the firm and unvarying practice of Constitutional Courts to render no judgments not binding and conclusive on the parties and none that are subject to later review or alteration by administrative action.")).

³⁰ *Swanson*, 540 F.3d at 1379.

³¹ 603 F.3d 1255 (Fed. Cir. 2010).

³² *Id.* at 1260.

³³ *Id.*

³⁴ As of this writing.

³⁵ *In re NTP, Inc.*, Nos., 2010-1243, 2010-1254, 2010-1263, 2010-1274, 2010-1275, 2010-1276, 2010-1277, 2010-1278 (Fed. Cir. 2010).

This Court's claim constructions for the terms “electronic mail system,” “originated information,” and “gateway switch,” and “originating processor” in the litigation involving the '960 Patent are presumed to apply for similar terms of related patents. *Omega Eng'g, Inc. v. Raytek Corp.*, 334 F.3d 1314, 1334 (Fed. Cir. 2003) (“we presume, unless otherwise compelled, that the same claim term in the same patent or related patents carries the same construed meaning”). Under the principles of estoppel and *stare decisis*, the Appellant and the district courts are bound by this Court's ordered claim constructions; thus, those constructions are the broadest reasonable interpretation for the claim terms. *See Medrad, Inc. v. MRI Devices Corp.*, 401 F.3d 1313, 1319 (Fed. Cir. 2005) (“We cannot look at the ordinary meaning of the term ... in a vacuum. Rather, we must look at the ordinary meaning in the context of the written description and the prosecution history.”); *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 979 (Fed. Cir. 1995) (en banc), *aff'd*, 517 U.S. 370 (1996) (“when his patent has received the interpretation of the Supreme Court of the United States the inventor can maintain his privilege, as thus interpreted, *against all opponents without further controversy in reference to its true limitations*”) (emphasis added).³⁶

The USPTO responded:

NTP implies the Board should have followed this Court's construction from a parallel infringement suit involving the '960 patent. Notably, different construction standards apply at the PTO than in court and therefore, the agency is not bound to follow a court's construction. *In re Zletz*, 893 F.2d 319, 321 (Fed. Cir. 1989) (“the mode of claim interpretation that is used by courts in litigation ... is not the mode of claim interpretation that is applicable during prosecution”). Differences in the construction standards are also justified since no validity presumption applies during prosecution. *See In re Morris*, 127 F.3d 1048, 1054-55 (Fed. Cir. 1997). And, that principle applies during reexamination. *See Ethicon v. Quigg*, 849 F.2d 1422, 1427 (Fed. Cir. 1988). Accordingly, the agency is not bound to follow a court's claim construction. *Id.* at 1428-29. *See also In re Trans Texas Holdings Corp.*, 498 F.3d 1290, 1295 (Fed. Cir. 2007).³⁷

³⁶ Brief of Appellant at 22-23 n. 19, *In Re NTP, Inc.*, No. 2010-1274 (Fed. Cir. June 1, 2010), 2010 WL 2602469 at *61 (emphasis in original) (internal citations to parties' briefs omitted).

³⁷ Brief for Appellee at 11 n.8, *In Re NTP, Inc.*, No. 2010-1274 (Fed. Cir. Oct. 1, 2010), 2010 WL 4203864 at *62 (emphasis in original) (internal citations to parties' briefs omitted).

In reply, the Appellant elaborated:

4. This Court's Claim Interpretation Acts As A Universal Estoppel Against All Parties, Including The PTO

This case raises the fundamental question of whether this Court's prior interpretation of the *exact same claim terms* - which is indisputably controlling in any future litigation involving those terms -- has any preclusive effect on the Patent Office in this reexamination. Appellant believes this issue to be one of first impression.⁴

⁴In the only case Appellant is aware of where this issue has arisen, *Suitco Surface*, the Court declined to address it, finding the Board's interpretation unreasonably broad on other grounds. 603 F.3d at 1260.

Specifically, in *NTP, Inc. v. Research in Motion, Ltd.*, 418 F.3d 1282, 1294-1311 (Fed. Cir. 2005), this Court construed the terms “electronic mail system,” “originated information,” “gateway switch,” and “originating processor.” Those claim interpretations are now the *law of the land*; they are binding on every litigant and district court in the nation. The Director, however, asserts that this Court's claim interpretations are not binding on it. Director's Br. at 20 n.8. In support of its assertion, the Director argues the following: first, that a different claim interpretation standard applies in reexamination than in litigation, *id.*, citing *In re Zletz*, 893 F.2d 319, 321-22 (Fed. Cir. 1989); and second, that the Patent Office is not bound by a district court's claim interpretation ruling, *id.*, citing *In re Trans Texas Holdings Corp*, 498 F.3d 1290, 1295 (Fed. Cir. 2007).

Appellant does not dispute either of these rulings by this Court. Indeed, the rationale for each is well-established. As this Court explained in *Zletz*, during examination claims are given their broadest reasonable interpretation so as “to fashion claims that are precise, clear, correct, and unambiguous” by removing any “uncertainties of claim scope.” 893 F.2d at 321-22. The inquiry during examination is thus “patentability of the invention as ‘the applicant regards’ it.” *Id.* at 322, citing 35 U.S.C. §112, ¶2. And in *Trans Texas*, the Court explained that the Patent Office could not be collaterally estopped by a district court's claim interpretation because the Office “was not a party to the district court litigation.” 498 F.3d at 1296-97.

Neither of these rationales, however, apply here. Unlike the patentee in *Trans Texas*, Appellant is not arguing *collateral* estoppel, which only acts against parties who have had a full and fair opportunity to litigate the disputed issue. Rather, Appellant submits that the Federal Circuit's claim interpretation operates as a kind of *universal* estoppel, which acts against everyone in the world, including the Patent Office. The Federal Circuit is effectively the final arbiter of what claim terms mean: though district courts can differ with each other, and with the Patent Office, over the meaning of claim terms, they cannot contradict the Federal Circuit, which always has the final word.

Also inapposite is *Zletz's* rationale for why the broadest reasonable interpretation standard applies during reexamination: to remove “uncertainties of claim scope.” 893 F.2d at 322. Simply put, once the Federal Circuit has construed a claim, *there can be no uncertainties of claim scope*. In this case, Appellant has not amended the claim terms in any way during reexamination. Accordingly, they are the *exact same* claim terms this Court construed in the *RIM* litigation five years ago. Thus, with no possibility of Appellant -- or anyone else -- ever obtaining a different (much less a broader) interpretation of the claims, there is no justification for construing the terms differently in reexamination. Or, put another way, the only reasonable interpretation -- broadest or otherwise -- *is* the Federal Circuit's interpretation.³⁸

The Appellant thus concedes that the USPTO is not collaterally stopped by even the Federal Circuit's claim construction ruling, but argues that the rationale underlying the “broadest reasonable construction” rule has (or should have) no application under the particular circumstances of the *NTP* case: the situation where the claims at issue have been effectively “cabined” in scope by a final Federal Circuit ruling. The essence of the argument is that because the “broadest reasonable construction” rule is intended as a hedge (against the risk of uncertain claim scope), once the risk is gone, so is the need for the rule. As of this writing, how, and even whether, the court will decide this question (given the other issues pending in the *NTP* appeal) is unknown.

IV. CONCLUSION

Over twenty years ago, in a decision reversing a district court judgment holding that that USPTO had the power to stay a reexamination proceeding pending the outcome of parallel district court litigation, the Federal Circuit stated “[t]he awkwardness presumed to result if the

³⁸ Reply Brief of Appellant at 4-5, *In Re NTP, Inc.*, No. 2010-1274, (Fed. Cir. Nov. 8, 2010), 2010 WL 4952510, *5-8 (emphasis in original) (internal citations to parties' briefs omitted).

PTO and court reached different conclusions is more apparent than real.”³⁹ Thus far, the court seems to have skillfully mediated the somewhat thorny thicket that has grown out of the Congress’s creation of separate venues for the resolution of questions relating to patent validity. The jurisprudential challenges of this area of the law seem likely to grow, however, as litigants and potential litigants continue to make creative use of the tools Congress, the courts, and the USPTO have given them, making an already quite complicated area even more complex.

³⁹ *Ethicon*, 849 F.2d at 1429.