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Business Litigation Report

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The Supreme Court Recalibrates Contributory Copyright Liability in *Cox Communications, Inc. v. Sony Music Entertainment*

As the justices prepare to take the bench for the new term, a review of last term's business decisions shows Cox to be among the most important. On March 25, 2026, the Supreme Court issued its decision in *Cox Communications, Inc. v. Sony Music Entertainment*, reversing a judgment of the United States Court of Appeals for the Fourth Circuit that had held an internet service provider contributorily liable for copyright infringement committed by its subscribers. *Cox Commc'ns, Inc. v. Sony Music Ent.*, 146 S. Ct. 959 (2026) ("Opinion"). The Court held that a provider of a service is contributorily liable for a user's infringement only if the provider intended its service to be used for infringement, and that the requisite intent may be established in only two ways: by showing that the provider induced the infringement, or by showing that the provided service was tailored to infringement. Because Cox did neither, the Court concluded that it was not contributorily liable. *Id.* at 964.

The decision resolves a question the Court had not previously addressed—whether an internet service provider's continued provision of service to subscribers it knows to be associated with infringement is, without more, sufficient to support contributory liability. The result was unanimous as to the judgment but divided as to the reasoning: seven Justices joined the opinion of the Court, and two Justices concurred only in the judgment while objecting that the majority had defined the universe of secondary liability too narrowly. This article summarizes the decision, including the concurrence, and then considers its implications for service providers generally—both for the design of acceptable-use policies and for the litigation that is likely to follow over where the line between lawful, general-purpose service and culpable facilitation should be drawn.

Procedural and Factual Background

Cox Communications is an internet service provider serving approximately six million subscribers, each associated with a unique Internet Protocol address. *Id.* at 965. As the Court observed, a single IP address may be shared by many individual users—a household, a coffee shop, or a college dormitory ordinarily has one address but multiple users—and a provider can identify the subscriber account associated with an address but cannot, as a general matter, distinguish among the individual users behind it or directly control how the service is used. *Id.*

Sony Music Entertainment and other major music copyright owners retained a monitoring firm, MarkMonitor, to detect infringement across the internet and trace it to particular IP addresses. Over the roughly two-year period at issue, MarkMonitor sent Cox 163,148 notices identifying

FIRM HIGHLIGHTS

Trial Lawyer Sean Suber Joins Quinn Emanuel

Sean Suber has joined Quinn Emanuel as a partner in the Chicago office, bringing a trial and appellate practice built on complex litigation, class actions, product liability, and mass torts. His background includes trial work in product liability and mass tort matters spanning agricultural biotechnology, aviation, and medical devices, along with a class action defense practice that has secured dismissals and favorable outcomes in false advertising and mislabeling suits, experience the firm points to as relevant to the litigation risk now emerging around technology and AI.

Antitrust Litigator Catie Ventura Joins Quinn Emanuel

Catie Ventura has joined Quinn Emanuel as a partner in the Washington, D.C., office, focusing on civil antitrust defense and government investigations, with a track record of trying cases built on novel legal questions. She has defended a healthcare company in the DOJ's first criminal no-poach case, helped an engineering company win a rare directed-verdict dismissal in a similar matter, secured a motion to dismiss for a nuclear power company facing wage-fixing claims, and represented the country's largest wine and spirits distributor to a favorable outcome in a monopolization suit.

Prominent UAE Litigator and Leading Arabic Drafter Kadry Zaghawa Joins Quinn Emanuel

Kadry Zaghawa has joined Quinn Emanuel as Of Counsel across the Dubai and Abu Dhabi offices, bringing more than 30 years advising clients throughout the Middle East and a standing as one of the UAE's leading Arabic drafters. His work covers shareholder disputes, commercial agency deregistration, and litigation before UAE courts at every level, along with administrative disputes before the UAE Federal Courts, major regional restructurings, and expert opinions on UAE law submitted to courts in the US, UK, South Korea, and Singapore.



subscriber IP addresses associated with alleged infringement. *Id.* Cox's subscriber agreement prohibited the use of its service to post, copy, transmit, or disseminate infringing content, and Cox maintained a graduated response system: a warning after a second notice for an account, followed by suspensions and, after a defined number of notices, termination of service. *Id.* at 965-66.

The parties characterized Cox's enforcement record differently. Sony emphasized that Cox terminated only a small number of subscribers for alleged infringement during the claim period while terminating far larger numbers for nonpayment and pointed to internal statements reflecting reluctance to act on notices. *Id.* at 966. Cox emphasized that its warning-and-suspension system curtailed the substantial majority of identified infringement. *Id.* Sony sued in the Eastern District of Virginia on theories of both contributory and vicarious liability. *Id.* A jury found for Sony on both theories, found Cox's infringement willful, and awarded one billion dollars in statutory damages. *Id.*

The Fourth Circuit affirmed as to contributory liability, reasoning that supplying a product with knowledge that the recipient will use it to infringe is the sort of culpable conduct sufficient for contributory infringement. *Id.* It reversed as to vicarious liability, concluding that Cox did not receive a direct financial benefit traceable to the infringement, and remanded for a redetermination of damages. *Id.* The Supreme Court granted certiorari on the contributory-liability question and denied Sony's cross-petition on vicarious liability. *Id.* at 967. Notably, the DMCA safe harbor was not available to Cox as a defense, because an earlier decision had foreclosed it for the

relevant period. *Sony Music Ent. v. Cox Commc'ns, Inc.*, 93 F.4th 222, 228 (4th Cir. 2024) (citing *BMG Rights Mgmt. (US) LLC v. Cox Communications, Inc.*, 881 F.3d 293, 301-305 (4th Cir. 2018)).

The Opinion of the Court

Justice Thomas, writing for a seven-Justice majority, began from the premise that the Copyright Act does not expressly impose liability on one party for infringement committed by another, and that the Court has historically been reluctant to expand secondary liability beyond the forms its precedents have recognized. Opinion at 967. Ordinarily, the Court reasoned, when Congress intends to impose secondary liability, it does so expressly; absent such language, the Court looks to the specific forms of secondary liability that predated the Copyright Act and declines to enlarge them. *Id.*

Within that framework, the Court identified two—and only two—paths to the intent required for contributory liability. The first is inducement: a provider induces infringement when it actively encourages infringement through specific acts, as the file-sharing companies did in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005), where the defendants promoted and marketed their software as a tool for infringement and built their business around that use. *Id.* The second is tailoring: a service is tailored to infringement when it is not capable of substantial or commercially significant noninfringing uses. The Court drew this second path from *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (i.e., the Betamax case), in which the sale of a video tape recorder capable of substantial noninfringing uses—such as recording programs for later personal viewing—did not

constitute contributory infringement, even though the device could also be used to infringe. *Id.* at 967-68. The Court noted that these two paths track the structure of patent law's active-inducement and contributory-infringement provisions. *Id.* at 968.

Central to the majority's reasoning was its repeated observation that mere knowledge that a service will be used to infringe does not establish the intent required for contributory liability. *Id.* The Court traced that principle through its earlier decisions, emphasizing that liability does not attach simply because a seller supplies equipment with constructive knowledge that customers may use it to infringe, and that a failure to take affirmative steps to prevent infringement is not, by itself, a basis for contributory liability. *Id.*

Applying these principles, the Court concluded that Cox neither induced infringement nor provided a service tailored to it. As to inducement, the Court found no evidence that Cox encouraged its subscribers to infringe; to the contrary, Cox discouraged infringement through its subscriber agreement and its system of warnings, suspensions, and terminations, and Sony offered no evidence of promotion or marketing directed at infringing use. *Id.* As to tailoring, the Court found that Cox's provision of internet access is plainly capable of substantial noninfringing uses and is used for a wide range of lawful purposes; Cox simply provided general internet access and did not design its service to facilitate infringement. *Id.* The Fourth Circuit's contrary rule—that supplying a product with knowledge of infringing use suffices—went beyond the two recognized forms of liability and conflicted with the Court's admonition that contributory liability cannot rest on knowledge plus inaction alone. *Id.* at 968-69.

Finally, the Court rejected Sony's argument that the DMCA safe harbor presupposes that providers serving known infringers can be held liable. The safe harbor, codified at Section 512, conditions certain protections on a provider's adoption of a policy for terminating repeat infringers in appropriate circumstances. *Id.* at 969. The Court reasoned that the DMCA does not itself impose liability on providers who serve known infringers; it creates defenses for qualifying providers. *Id.* The Court further noted that the statute expressly provides that a failure to qualify for the safe harbor does not bear adversely on a provider's separate defense that its conduct is not infringing. *Id.* The safe harbor, in the Court's view, operates as a shield and not as a source of liability.

The Concurrence in the Judgment

Justice Sotomayor, joined by Justice Jackson, concurred in the judgment but disagreed with the majority's reasoning. She agreed that neither inducement nor tailoring covered Cox's conduct, but she objected to the majority's holding that those are the only two routes to contributory liability. In her view, the Court's prior decisions did not foreclose other common-law theories of secondary liability—most notably aiding and abetting—and the majority's narrowing of the doctrine was supported by neither precedent nor statute. *Id.* She read the Court's earlier cases as defining the scope of secondary copyright liability by reference to common-law principles applied throughout the law, rather than confining it to the two specific circumstances those cases happened to address. *Id.* at 970-71.



The concurrence further argued that the majority's rule disturbs the incentive structure Congress established in the DMCA. *Id.* at 971-72. On this view, the safe harbor was designed to encourage providers to adopt reasonable anti-infringement policies in exchange for protection from liability; if providers face no realistic prospect of secondary liability regardless of what they know or do, the inducement to maintain such policies is diminished.

Despite these objections, Justice Sotomayor concurred in the judgment because, in her view, the record could not establish the intent that an aiding-and-abetting theory would require. Drawing on the Court's recent decisions in *Twitter, Inc. v. Taamneh*, 598 U.S. 471 (2023) and *Smith & Wesson Brands, Inc. v. Estados Unidos Mexicanos*, 605 U.S. 280 (2025), she explained that aiding-and-abetting liability requires conscious and culpable participation in a wrongful act with the intent to help it succeed, and that such intent ordinarily depends on knowledge of specific instances of wrongdoing. *Id.* at 973-74. Cox, she reasoned, knew only which connections were associated with infringement, not which individuals were responsible; for connections serving households, dormitories, hospitals, or downstream regional providers, Cox could not identify the actual infringers and lacked control over the intermediaries who redirected its service to

end users. *Id.* at 974-75. On that record, she concluded, Cox's conduct amounted at most to indifference, which is insufficient for aiding-and-abetting liability. *Id.*

Implications for Service Providers

The holding is narrow in two respects that bear emphasis. First, it addresses only contributory liability, leaving vicarious liability and direct liability for providers who themselves copy, host, or distribute infringing material undisturbed. Second, the Court's finding of no contributory liability rests on the particular record before the Court. The decision establishes that Cox's provision of generalized internet access to known infringers did not, in the context of its overall conduct, establish the intent required for contributory liability; it does not establish that knowing provision of internet service to repeat infringers could never, on different facts, support an inference of intent. With that scope in mind, the decision offers reasonably clear guidance for how providers can structure their conduct to reduce contributory-liability exposure. Because liability turns on intent—demonstrated through inducement or tailoring—the decision rewards conduct that affirmatively negates an inference of intent and penalizes conduct that supplies one.

Acceptable-Use Policies and Anti-Infringement Measures

The Court treated Cox's contractual prohibition on infringing use, together with its graduated system of warnings, suspensions, and terminations, as evidence that Cox discouraged rather than encouraged infringement. For service providers generally, this suggests that several categories of documentation and practice are useful in establishing the absence of infringing intent. A clear acceptable-use policy that prohibits infringing conduct, incorporated into the terms of service, supplies contemporaneous evidence that the provider does not intend its service to be used for infringement. A functioning notice-handling process—one that receives, records, and acts upon infringement notices—demonstrates responsiveness rather than indifference. Graduated enforcement measures, including warnings and the suspension or termination of service in appropriate circumstances, show corrective effort even where they do not eliminate all infringement.

Two cautions temper this guidance. First, the decision does not hold that any particular enforcement threshold is adequate or that any particular failure to terminate is safe; it holds that Cox's conduct, considered as a whole, did not establish intent. A provider whose marketing, product design, internal communications, or enforcement choices suggest an affirmative desire to facilitate infringement, rather than mere reluctance or imperfect execution, may present a materially different case. Second, the value of these measures is evidentiary rather than absolute. They help rebut an inference of intent; they do not create a categorical immunity.

Providers should also bear in mind that the DMCA safe harbor remains a separate and independently valuable protection: the reasoning of this decision concerns when liability attaches in the first instance, not whether a provider has qualified for the statutory safe harbor, and the conditions of that safe harbor—including the reasonable implementation of a repeat-infringer policy—continue to apply on their own terms.

Future Litigation: Where Is the Line?

Although the decision provides a workable framework, it leaves substantial room for dispute about its boundaries, and that uncertainty is where future litigation is likely to concentrate. The decision's logic extends naturally to other providers of general-purpose, broadly lawful functionality—cloud computing platforms, content-sharing and hosting services, and similar intermediaries—because each supplies a service capable of substantial noninfringing uses and ordinarily lacks the kind of specific,

individualized knowledge that the Court found absent in Cox's case. To that extent, the decision is favorable to such providers.

The harder questions concern the two recognized paths themselves. On inducement, future plaintiffs will likely argue that a provider's documentation, marketing, product design, or internal communications evidence an intent to encourage infringing use, while providers will respond that promoting general capabilities, or merely tolerating known misuse, is not the active encouragement that *Grokster* requires. The line between marketing a lawful capability and inducing an unlawful one will be contested on specific facts, and providers can expect that their public messaging and internal records will be scrutinized for statements that could be read as endorsing or facilitating infringement. On tailoring, plaintiffs may argue that a particular service—or a particular configuration or feature of it—is not capable of substantial noninfringing uses, an inquiry that becomes more fact-intensive as services become more specialized.

These questions arise with particular salience for emerging technologies, including artificial intelligence systems, which are general-purpose tools that can be used for both lawful and infringing ends and whose training data and outputs are already the subject of separate litigation. The decision says nothing about artificial intelligence directly, and any extension of its reasoning to that context remains untested; it is best understood as one example, alongside cloud and content-sharing platforms, of a general-purpose technology to which the framework may eventually be applied rather than as a question the Court has resolved. What the decision does establish across all of these settings is that generalized knowledge of misuse, without more, is not enough; what will remain disputed is the kind and degree of additional evidence—inducing conduct, tailoring of the service, or documentation suggesting intent—that crosses the line.

A further source of future litigation lies in the doctrinal disagreement between the majority and the concurrence. The majority's position that inducement and tailoring are the exclusive routes to contributory liability, if read broadly, may foreclose common-law theories such as aiding and abetting; the concurrence's view would preserve them. Litigants seeking to expand or contract secondary liability will press these competing readings, and lower courts will have to determine how far the majority's framing forecloses alternative theories.

Drawing Parallels Between Cox and Hikma

In laying out the standard for secondary liability, the Court noted that patent law has a “historic kinship” with copyright law and suggested that the two types of contributory copyright infringement “track patent law,” specifically infringement under 35 U.S.C. § 271(b) and 35 U.S.C. § 271(c). Then, three months later, the Court issued an opinion on the pleading standard for § 271(b) patent infringement, which repeatedly cited to Cox and other cases about copyright infringement. *Hikma Pharm. USA Inc. v. Amarin Pharma, Inc.*, 146 S. Ct. 1391, 1397, 1399-400 (2026). The Court appears to see alignment in the secondary liability standards for patent infringement and copyright infringement.

Given that, it is worth considering whether Hikma’s statements on the pleading standard for induced patent infringement should also be read to apply to pleading induced copyright infringement. We discuss *Hikma* at length in our Noted With Interest article, including a discussion of its impact on the pleading standard, and what that means practically for potential litigants.

Conclusion

Cox establishes that a service provider’s contributory liability for copyright infringement turns on intent, demonstrated through inducement or tailoring, and not on a generalized awareness that the service will be used by some to infringe. The decision provides service providers with meaningful guidance on conduct that tends to negate infringing intent, while leaving open—by its own terms and through the disagreement between the majority and the concurrence—significant questions about its application to specific services and to emerging technologies. As courts apply the framework to new facts, the practical task for providers and copyright owners alike will be to understand not only what the decision holds, but where its boundaries lie.

Lead Article

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NOTED WITH INTEREST

The Supreme Court Clarifies the Pleading Standard for Induced Patent Infringement by Skinny-Label Generics in Hikma Pharmaceuticals USA Inc. v. Amarin Pharma, Inc.



On June 4, 2026, a unanimous Supreme Court held in *Hikma Pharmaceuticals USA Inc. v. Amarin Pharma, Inc.*, 146 S.Ct. 1391 (2026) (“Opinion”), that a brand-name manufacturer had failed to sufficiently plead its claim that a generic competitor actively induced infringement of its patented method of use. The decision addresses a recurring question: when do a generic manufacturer’s public statements about a “skinny label” drug cross the line from permissible competition into active inducement of infringement under 35 U.S.C. § 271(b)?

Procedural and Factual Background

Amarin sells Vascepa®, “an ethyl ester of an omega-3 fatty acid” that is FDA approved to treat severe hypertriglyceridemia (“SH”), where triglycerides are above 500 mg/dl. *Amarin Pharma, Inc. v. Hikma Pharm. USA Inc.*, 104 F.4th 1370, 1372 (Fed. Cir. 2024). Following approval of the SH indication, Amarin also gained approval to use Vascepa® to reduce cardiovascular risk in those with triglycerides above 150 mg/dl (“CV”). *Id.* The CV indication quickly constituted over 75% of Vascepa®’s sales. *Id.* at 1374. Amarin obtained method-of-use patents covering the CV indication.



Hikma sells a generic version of Vascepa® using a “skinny label” that carves out the patented CV indication. *Id.* at 1373. During the lead-up to and launch of the generic, Hikma repeatedly referred to it as “the generic equivalent to Vascepa®” and an “AB rated” generic. *Id.* at 1373-74. Hikma advertised the generic on its website as treating “hypertriglyceridemia,” a term potentially broad enough to include both the patented CV use and the non-patented SH use. *Id.* at 1374, 1379. Hikma stated that its drug was indicated “in part” for the treatment of SH, although SH was, in fact, the only indication on the skinny label. And Hikma only stated in “small lettering” on its website that its drug is “indicated for fewer than all approved indications of the Reference Listed Drug.” *Id.* at 1373-74. Further, in press releases, Hikma referenced sales figures that included sales for the patented CV indication.

Amarin sued Hikma in the District of Delaware, alleging that the totality of Hikma’s statements—across its label, patient information leaflet, website, and press releases—induced others to infringe the patents covering the CV indication. The District Court dismissed the complaint for failure to state a claim. The Federal Circuit reversed, finding it “at least plausible that a physician could read” the statements as an encouragement to infringe. The Federal Circuit noted that “unlike any of our other [skinny label]-related decisions, this case does not reach ... appeal from a post-trial motion,” but rather is an appeal of a “motion to dismiss,” the “most nascent stage” of litigation. *Id.* at 1377. The Federal Circuit found this posture important because, “at this stage,” Amarin had not “had the benefit of fact discovery

and expert testimony” so the district court had to accept Amarin’s factual allegations as true, such as whether physicians understood Hikma’s use of the phrase “hypertriglyceridemia” as “broad enough to encompass both infringing and non-infringing uses.” *Id.* at 1379. The Supreme Court granted certiorari.

The Opinion of the Court

In a unanimous decision, the Supreme Court reversed the Federal Circuit and found that Amarin had failed to plead factual allegations that, if true, would plausibly show Hikma actively encouraged infringing uses. Opinion at 1396. The Court stated that it was combining the “well-established federal pleading standards” with the “case law defining ‘active steps’” to establish “the boundaries of a plausible induced-infringement claim.” *Id.* at 1399-1400. In doing so, the Court provided a set of guiding principles.

First, it emphasized that inducement must be based on affirmative actions as opposed to passive “omissions” or “inactions” and the audience’s potential understanding of that passivity. For example, the Court stated that even if “some medical providers could read between the lines and draw improper conclusions from the skinny label’s omission of the CV Limitation of Use and the press releases’ failure to mention that [Hikma’s] approved use was limited to the far-lesser-known SH indication,” that would be insufficient, because inducement requires “affirmative ‘statements or actions.’” *Id.* at 1402 (emphasis in original). It further critiqued the decision in *GlaxoSmithKline LLC v. Teva Pharms. USA, Inc.*, 7 F.4th 1320 (Fed. Cir. 2021) for substituting the question of “whether a defendant actively encouraged infringement through its statements” with the question of “how others may understand those statements.” *Id.* at 1400, n. 3.

Second, it rejected Hikma's argument that inducement had to be "express" and recognized that affirmative inducement can be "implicit," such as using a "suggestiv[e] name," such as using product names that encourage users to conduct infringing activity. *Id.* at 1401 (citing *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 937-38 (2005)).

Third, the Court appeared to grant a semi-safe harbor to statements that are "just complying with the law or with standard industry practice," noting that otherwise they would be "put[ting] generic manufacturers between a rock and a hard place by turning adherence to the law and industry standards into building blocks for illegal conduct." *Id.* For example, the Court stated that Hikma's label cannot support inducement, because the content of the generic drug's label is dictated by federal law. *Id.* As to "complying with ... standard industry practice," the Court only gave the example of referring to a drug as "generic Vascepa" or a "generic equivalent of Vascepa." *Id.*

The Court then looked at the remaining affirmative statements that Amarin identified as showing inducement (e.g., indicating the generic can be used for "hypertriglyceridemia," indicating that the generic is "AB rated," and publicly touting sales figures for the generic that included the patented indication) and determined that these were too "vague" to make out a plausible allegation of active steps to induce infringement. *Id.* at 1402-03.

Discussion

First, the Supreme Court leaves a number of open questions. How does the statement that you must "rule out obvious alternative explanations for the defendant's conduct" at the pleading stage mesh with the Supreme Court's acknowledgement that inducement can be based on "implicit" statements, like the "suggestive name" of a product? *Id.* at 1399-1401. How do you determine whether a statement is "just complying ... with standard industry practice" and does that include any other statements beyond just calling your product a "generic" of another drug? *Id.* at 1401. As to statements that are "standard industry practice," is the standard that they cannot be the only evidence of inducement or that the statements cannot be used as evidence at all (i.e., as part of the "building blocks" of inducement allegations)? *Id.* How "vague" of a statement is too "vague" to be plausible evidence of active inducement? *Id.* at 1402-03.

Second, it is unclear whether this case represents a shift regarding indirect inducement liability generally or whether this case will be cabined to the context of generic pharmaceuticals or skinny-labels. In support of the latter, some might note that the Opinion explains the surrounding context of skinny-label regulation and automatic substitution laws at length (*Id.* at 1396-98), that the Opinion bases the decision in part on the "standard industry practice" for generic pharmaceuticals (*Id.* at 1401), or the fact that prior cases, the parties' briefs, the amici, and the oral argument before the Supreme Court all focused on the "careful balance struck by the Hatch-Waxman Act." See, e.g., *GlaxoSmithKline LLC v. Teva Pharms. USA, Inc.*, 7 F.4th 1320, 1326, 1343-44 (Fed. Cir. 2021).

Third, as the Federal Circuit noted, perhaps the most unique and important aspect of this case is that, unlike prior skinny-label inducement cases, this Opinion is about the pleading standard rather than the ultimate merits standard. The Court did not decide whether Hikma in fact induced infringement, but only whether Amarin's complaint sufficiently pled induced infringement based on the limited set public materials available to it. This suggests a high bar, especially in the context of pharmaceutical-related cases when the most relevant information (e.g., the ANDA application) is not publicly available. Notably, Amarin was allowed to conduct discovery while the Supreme Court case was pending and told the Supreme Court during argument that it had found "substantial new evidence of Hikma's intent to infringe." Transcript of Oral Argument at 58:11-24, No. 24-889 ("Tr.") (U.S. Apr. 29, 2026). But Hikma argued that, on remand, Amarin cannot amend its complaint to include that information, which the Opinion does not address. *Id.* at 64:13-20.

As a practical matter, skinny-label generics are still not safe from induced infringement lawsuits, as the Court acknowledged that even implicit, affirmative statements could support the initiation of a suit. Opinion at 1400-01. But brand manufacturers will need to be prepared to spend additional resources during pre-suit investigations to gather evidence that skinny-label generics are affirmatively pushing their drugs for carved-out uses.

Noted with Interest

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PRACTICE AREA UPDATES

International Arbitration:

What Businesses Need to Know About the Latest Changes to International Arbitration Rules

The international arbitration landscape is undergoing a significant period of procedural reform. At the start of June, the International Chamber of Commerce's Arbitration Rules ("ICC Arbitration Rules"), the most widely used global rules for international arbitration, were updated. In 2025 and 2026, other major arbitration centers, such as the Singapore International Arbitration Centre ("SIAC"), the Korean Commercial Arbitration Board ("KCAB"), and Spain's Corte Española de Arbitraje ("CEA") have also introduced notable reforms. Common themes among the reforms include faster procedures, stronger emergency relief mechanisms, and greater integration of technology and artificial intelligence. As the leading institutions compete with each other and innovate to attract disputing parties' business, they tend to follow each other's lead. However, important differences between the institutions persist, and businesses are well-advised to understand how those differences may impact their disputes.

ICC 2026 Rules: Emphasizing Faster Awards and Emergency Ex Parte Relief

Notable developments in the new ICC Arbitration Rules include provisions aimed at ensuring the legitimacy of the arbitral process through additional protections regarding the requirement for arbitrators to identify matters that may raise doubts as to their independence and impartiality.

The new rules also focus on efficiency. Where the amount in dispute is less than USD \$4 million, expedited procedures in the ICC Arbitration Rules apply automatically (subject to the parties agreeing otherwise). The rules also introduce Highly Expedited Arbitration Provisions ("HEAP"), designed to produce a final award within three months. These provisions apply on an "opt-in" basis: parties can agree that they apply in their arbitration agreement or can agree to them after the dispute has arisen. Commercial parties facing time-sensitive disputes or seeking quick resolution rather than a procedure that may more closely approximate litigation may see HEAP as an attractive option.



The ICC has also expanded its emergency arbitration framework by expressly authorizing ex parte preliminary orders. Under the new ICC Arbitration Rules, an emergency arbitrator may issue an order without prior notice to the opposing party where advance notice would risk frustrating the requested relief. In practical terms, this allows a claimant to obtain an order preventing a respondent from dissipating assets, destroying evidence, or otherwise undermining the effectiveness of a forthcoming injunction before the respondent learns of the application. To address due process concerns, the Rules require the respondent to be heard promptly after the order is issued.

SIAC 2025 Rules: Ex Parte Emergency Relief

The SIAC is one of the leading arbitration institutions in Asia. In 2025, it was one of the first major institutions to introduce Protective Preliminary Orders (“PPOs”), allowing parties to seek urgent ex parte relief. Under SIAC’s provisions, emergency arbitrators may be appointed within 24 hours and may issue PPOs within a further 24 hours.

Other Institutional Reforms: Technology and Consolidating Case Management

Outside of the ICC and SIAC, another strong trend is AI developments and modernizing technology. For example, KCAB’s 2026 Rules introduce new provisions addressing artificial intelligence and digital filings. The rules also provide updated guidelines for virtual hearings, reflecting the reality that remote and hybrid proceedings have become a more prominent feature of international arbitration following the pandemic. In addition, the rules focus heavily on modernizing procedures for multi-contract disputes. Spain’s CEA regulations were recently reformed, and the innovations include the introduction of an ambitious new internal review mechanism. The mechanism allows parties to opt into an intra-institutional challenge procedure through which a final award may be essentially appealed to an appeal tribunal on limited grounds before any recourse to national courts.

What Businesses Should Watch For

The revised Manual consolidates the Division’s cooperation. Leading arbitration institutions tend to follow each other’s reforms. However, as their rules develop, complexity can increase, and the options available for better outcomes (both in terms of winning the case, and the process for getting there) change. Businesses should monitor these developments and ideally tailor each arbitration clause to achieve the best outcome from anticipated disputes, bearing in mind the strengths, weaknesses, and unique aspects of each set of rules.

International Arbitration Update

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Post-Grant Proceedings

35 U.S.C. § 325(d) and the Prior Art That Follows You Into Ex Parte Reexamination

35 U.S.C. § 325(d) (“Section 325(d)”) permits the U.S. Patent and Trademark Office (“USPTO” or the “Office”) to decline review when “the same or substantially the same prior art or arguments previously were presented to the Office.” By its terms, the provision reaches not only inter partes review (“IPR”) petitions before the Patent Trial and Appeal Board (“PTAB” or the “Board”) but also requests for ex parte reexamination (“reexamination”) at the USPTO. As reexamination filings have climbed, a recurring question has followed: what happens when a reexamination request presents prior art or arguments the Office has already seen, especially in a previously-filed petition for inter partes review?

A line of authority—anchored by the Federal Circuit’s decision in *In re Vivint*—confirms that prior art presented in an earlier proceeding can support denial of a later reexamination request that relies on it. But recent decisions applying that authority have pointed in different directions, leaving it unclear how far the Office will carry Section 325(d) in the reexamination setting.

The Statutory Framework

Section 325(d) exists to prevent parties from forcing the Office and patent owners to relitigate patentability questions the Office has already confronted. In the IPR context, the Board applies it through the two-step framework of *Advanced Bionics, LLC v. Med-El Elektromedizinische Geräte GmbH*, IPR2019-01469, Paper 6 (PTAB Feb. 13, 2020): whether the same or substantially the same art or arguments were previously presented to the Office and, if so, whether the petitioner has shown that the Office erred in a manner material to patentability. That framework distills the factors of *Becton, Dickinson & Co. v. B. Braun Melsungen AG*, IPR2017-01586, Paper 8 (PTAB Dec. 15, 2017), and the Office’s May 2025 precedential decision in *ECTO World, LLC v. RAI Strategic Holdings, Inc.*, IPR2024-01280, Paper 16 (PTAB June 25, 2025), which refined the “material error” inquiry at the second step.

In re Vivint: Section 325(d) Reaches Reexamination

The foundational decision is *In re Vivint, Inc.*, 14 F.4th 1342 (Fed. Cir. 2021). A challenger had filed a succession of IPR petitions against the same patent, the last of which the Board declined to institute on discretionary grounds, citing incremental, repetitive filing. More than a year later, the challenger sought reexamination of that patent, carrying over arguments from the failed petition—including two of the four patentability questions reproduced nearly word-for-word—and the Office ordered reexamination.

The Federal Circuit vacated. It held that Section 325(d) “applies to both IPR petitions and requests for ex parte reexamination,” and that the Office may reconsider an order granting reexamination on that basis. *Id.* at 1354. On the facts, it was arbitrary and capricious for the Office to deny the IPR and then grant a “nearly identical reexamination request that is even more abusive.” *Id.* The court also explained that a request may raise a “substantial new question of patentability”—the threshold showing required to order reexamination under 35 U.S.C. § 303(a)—yet still be subject to discretionary denial under Section 325(d): meeting the threshold to order reexamination does not clear Section 325(d). *Id.* at 1350.

For several years, *Vivint*’s practical effect was modest. The Office frequently distinguished it, ordering reexamination where a request added a new reference or argument, or lacked the pattern of serial filing present in *Vivint* itself. Only a small number of Section 325(d) denials in reexamination proceedings had issued through early 2026. Decisions from 2026, however, show the Office reaching opposite results on comparable facts.

Divergent 2026 Decisions

On May 22, 2026, the Office denied a request for reexamination (Reexamination No. 90/015,984) under Section 325(d). The stated basis was that the request relied on prior art and arguments overlapping with those raised in an earlier IPR petition against the same patent, which the Office had already declined to institute on discretionary grounds. See *Geotab Inc. v. Fractus, S.A.*, IPR2025-00929, Paper 12 (PTAB Sept. 12, 2025). The Office identified the overlapping grounds it treated as material, observing that the reexamination request targeted the same claims with the same prior art or combinations.

The significant feature is what the earlier IPR denial did—and did not—involve. Because the IPR had been denied on discretionary grounds, the Office never evaluated the merits of the asserted art. Yet the discretionarily denied petition was still treated as art “previously presented” sufficient to support denial of the follow-on reexamination. The decision thus indicates that an IPR petition resolved at the discretionary denial stage—without any merits determination—may nonetheless supply the Section 325(d) basis to deny a later reexamination raising the same art.

Other 2026 orders point the other way, and on facts closer to *Geotab*—reexamination ordered even though the overlapping IPR had itself been discretionarily denied. In Reexamination No. 90/016,221 (Order Granting Reexamination, July 28, 2026), the requester sought reexamination of a patent it had earlier challenged in an IPR that the Board discretionarily denied (*Monolithic Power Systems, Inc. v. Reed Semiconductor Corp.*, IPR2025-00165, Paper 13 (PTAB Apr. 14, 2026)). Several of the asserted references had appeared in that petition, but the examiner ordered reexamination. Because the discretionary denial “provided no discussion of the merits” of the overlapping art, the examiner reasoned that consideration of that art in reexamination would come “in a new light,” as “the first consideration on the merits”—and separately relied on additional references that had not been before the Office at all (*Order Granting Request for Ex Parte Reexamination*, Ex Parte Reexamination of U.S. Patent No. 7,960,955, Control No. 90/016,221, at 7-8 (U.S.P.T.O. July 28, 2026)). On those facts, the examiner concluded that denial under Section 325(d) was “not appropriate under the specific facts of this case.”

Read together, these decisions frame the current uncertainty. Both involved reexamination requests overlapping with a discretionarily denied IPR, yet *Geotab* treated that overlapping art as “previously presented” and denied reexamination, while the order in Reexamination No. 90/016,221 treated the absence of any merits evaluation in the underlying denial as a reason the art had not truly been considered—and ordered reexamination. Whether *Geotab* signals a broader tightening of Section 325(d) in reexamination or proves to be a fact-specific outlier is, at this stage, unclear.

Observations

Ex parte reexamination retains distinctive features—a substantial-new-question threshold, no *Fintiv*-style parallel-litigation inquiry, no one-year filing bar, the possibility of anonymous filing, and no statutory estoppel. The recent decisions do not disturb any of those features. What they clarify is the reach of a distinct limit: the Office’s authority to decline reexamination when the same or substantially the same prior art or arguments were previously presented to it, including in a prior IPR—and, per *Geotab*, even where that proceeding was resolved on discretionary grounds without a merits evaluation. For a patent owner confronting a reexamination request that overlaps with a prior proceeding, a timely Section 325(d) petition mapping that overlap is the mechanism through which these principles are raised. How consistently the Office will apply that limit, however, remains an open question: as the 2026 orders discussed above illustrate, overlap with a discretionarily denied IPR has produced opposite outcomes within the same year. Section 325(d) is likely to remain a focal point as the Office recalibrates its post-grant practice, and the emerging reexamination decisions will determine whether *Geotab* reflects a durable trend or an early one-off.

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VICTORIES



Groundbreaking Ruling for Chinese Client DJI Makes Quinn Emanuel Partner Litigator of the Week

Quinn Emanuel is known for its tireless and fearless advocacy, and a groundbreaking decision from the federal appeals court in Washington reflects that reputation, winning the firm its fifth Litigator of the Week award this year.

Our client in the case is Chinese drone manufacturer DJI, the world's leading commercial and recreational drone maker. It was in a tough spot. The U.S. Department of Defense had designated it a "Chinese military company," posing a risk to its reputation and business and barring work as a federal contractor.

This appellate decision is the first to address the Chinese military company provision, and comes as many of Quinn Emanuel's competitors have retreated from the Chinese market.

The 2021 provision defines the term to include companies owned by arms of the Chinese military, for example, or that contribute to the Chinese defense industrial base. The year after it passed into law, the U.S. put DJI on the list, without giving it any warning or chance to defend itself.

Our client sued, arguing that the designation violated its due process rights, lacked evidentiary support, and was inadequately explained. DJI has spent years trying to meet with DoD, learn why it was designated, obtain the underlying record, and supply proof that it is not a Chinese military company—all to no avail.

Undeniable Record

The record is clear. DJI is still owned and controlled by the three childhood friends and university professor who founded it. It makes only commercial and recreational drones used by first responders, corporations, and hobbyists, and it has strict policies prohibiting the use of its drones in combat. In short, it doesn't meet the statutory definition of a Chinese military company.

Quinn Emanuel, which took the case while it was already in progress, stressed that the Defense Department's entire rationale in the administrative record for concluding that DJI contributed to the Chinese defense industrial base—literally every word of it—was classified. So neither DJI nor the district court itself had ever seen it.

In the end, a three-judge panel of the U.S. Court of Appeals for the D.C. Circuit reversed in part and remanded a ruling by the D.C. District Court that had narrowly upheld the government's designation.

"Imagine, for example, that in the redacted portion of the report, the agency's rationale had nothing at all to do with the facts that the Secretary's attorneys now highlight in court," the panel wrote in its opinion. "As things stand, we do not know whether the Secretary considered any of that evidence, much less why he believed the evidence supported his determination."

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DJI's challenge now returns to the lower court, where our client may even be permitted to review never-yet-seen classified evidence purportedly justifying the listing.

Representing a Chinese drone maker these days isn't the easiest choice, but for us it was the only choice. And as always with Quinn Emanuel, a robust and nimble trial team was behind the win.

Our work on the case, and our dedication to the China practice, continue undiminished.

Delaware Supreme Court Reverses \$139 Billion Rescission Order, Fully Restoring Elon Musk's Compensation Package

Quinn Emanuel secured a landmark victory for Elon Musk and the Tesla Board of Directors before the Delaware Supreme Court, reversing a lower court order that had rescinded in full Musk's compensation package worth \$139 billion at the time of the Supreme Court's decision.

Following a trial before the Delaware Court of Chancery, Chancellor Kathaleen McCormick issued a January 2024 decision rescinding the compensation package, finding deficiencies in the process by which it was approved by Tesla's board and stockholders in 2018. The Delaware Supreme Court reversed that decision in a 49-page per curiam opinion issued on December 19, 2025, holding that rescission was an improper and inequitable remedy. The court found that it could not "unscramble the egg"—it could not take back six years of work and hundreds of billions in value creation simply because it had concerns about the process that produced the bargain. The court instead awarded the plaintiff, Tesla stockholder Richard Tornetta, only \$1 in nominal damages, and dramatically reduced the fee award for plaintiff's counsel from \$345 million—the largest such award in Delaware history—to \$54 million.

The case arose out of Tesla's 2018 stockholder vote approving an unprecedented performance-based compensation plan for Musk. The plan conditioned Musk's compensation entirely on the achievement of twelve tranches of hyperaggressive operational and market capitalization milestones. Tesla stockholders approved the plan by an overwhelming margin in 2018 and ratified it again in a subsequent vote. Over the following years, Musk satisfied every milestone, driving Tesla's market capitalization from roughly \$50 billion to over \$1 trillion. Tornetta, a Tesla stockholder, filed a derivative action in the Delaware Court of Chancery challenging the compensation package on the grounds that the board approval process was flawed and that the stockholder vote was not fully informed.

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The Chancery Court agreed and rescinded the package in full. Quinn Emanuel, alongside co-counsel Sullivan & Cromwell, took the appeal to the Delaware Supreme Court. The team argued that rescission was an unconscionable remedy given that Musk had already fully performed under the package and that Tesla and its stockholders had reaped the full benefit of his performance. The Delaware Supreme Court agreed, holding that equity does not permit a court to claw back years of completed performance and destroy a bargain that stockholders themselves had twice endorsed. The decision reaffirms a foundational principle of Delaware corporate law: that courts of equity will not impose disproportionate remedies that punish parties for work already done.

The ruling restores Musk's options under the compensation package, which at the time of the decision were worth approximately \$140 billion. The victory represents a defining moment for Quinn Emanuel's Delaware practice and for its broader appellate and corporate governance litigation capabilities.

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