# Court clog DA

### Notes

This is the court clog DA. It argues that the plan would cause so many lawsuits that the federal court system would not be able to handle it. To be able to explain this da well, you’ll need to know what each of the four parts of the DA say. If you are affirmative, you can find affirmative answers to every part of this da in the aff answers section at the bottom of the file.

**Uniqueness**: The negative wants to make their uniqueness argument (arguments about why the status quo is doing something that is good) is that the courts are able to manage their caseload now. They do not have excessive backlogs and they are not overburdened by cases now. They also want to make the argument that patent, trademark, and copyright cases are not clogging the courts now because there aren’t very many of them.

**Link:** Against each aff, you want to win that the plan would result in more lawsuits because there would be more instances of IPR infringement.

**Internal link and impact:** The negative’s impact scenario is that an efficient court system can successfully handle climate litigation that can help prevent climate change. Courts can fill an important gap when policymakers in congress will not pass climate regulations.

# Neg- Court Clog DA

## 1nc

### 1nc court clog da vs patents

#### The next offcase position is the court clog da

#### The courts are managing increased caseloads now—slower filings and technology are decreasing overload

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Yet, while these concerns were still reflected in our latest survey, many of these challenges have receded, making room in many respondents’ minds for a clearer path toward more positive outcomes. For example, while increasing caseloads continue to be the biggest change that respondents said they had experienced in the past two years, the portion of our survey saying that has decreased. So too have the portions of our survey citing increases in case delays and court backlogs greatly diminished as well.

And even though more than half of respondents (56%) said they expect to experience staffing shortages in the coming 12 months, that was down from the past 12 months when almost two-thirds (64%) reported staffing shortages.

Overall, it seems that courts and their workers are enjoying broader engagement with technology solutions, especially around such critical areas as evidence collection and storage as digital storage and certain case-material sharing and management tools are seeing more acceptance across the board.

#### The plan clogs the courts by encouraging applications that lack true inventive concepts

Alex Moss, 24 - the executive director of the Public Interest Patent Law Institute. She was previously at the Electronic Frontier Foundation and a patent litigator at Sullivan & Cromwell. After graduating from Stanford Law School, she served as a judicial clerk to the Honorable Timothy B. Dyk of the U.S. Court of Appeals for the Federal Circuit. Letter to Senators Durbin, Coons, Tillis, and Representatives Issa and Lofgren on the Patent Eligibility Restoration Act of 2023, signed by American Civil Liberties Union, Electronic Frontier Foundation, Generation Patient, Public Citizen, Public Interest Patent Law Institute, and the R Street Institute. 1/30, <https://static1.squarespace.com/static/60e5457fb89be21d705fa914/t/65b9687cbb120871dd820938/1706649724600/Public+Interest+Letter+re+PERA+-+01.30.24.pdf> //DH

• Patent eligibility law is clear and works well.

An ACLU study found that the Federal Circuit affirmed 89% of district court decisions finding patents ineligible in the five years following the 2014 Alice decision.20 From 2013 through 2020, decisions applying § 101 had an affirmance rate of 65% when appealed to the Federal Circuit and decided in precedential opinions, higher than the circuit’s overall affirmance rate of 56%.21 From 2014 through 2020, district court and agency decisions addressing § 101 were affirmed at a higher rate than decisions under other sections of the Patent Act (§§ 102, 103 or 112).22 Moreover, the Federal Circuit was asked to review nearly three times as many decisions relating to § 103 as decisions relating to § 101.23 Section 101 cases constituted only 4% of all appeals.24

Federal Circuit judges have explicitly acknowledged that the test set forth by the Supreme Court for assessing subject matter eligibility is clear and the Federal Circuit’s application of the test to individual cases is consistent. Indeed, Federal Circuit Judge Alan D. Lourie emphasized in a concurring opinion accompanying the court’s per curiam Order in Athena Diagnostics, Inc. v. Mayo Collaborative Services, LLC, “our cases are consistent.”25 He further recognized that in the context of diagnostic methods in particular, the distinction between eligible and ineligible subject matter is “a clear line.”26 Despite dissenting in that case, Chief Judge Kimberly A. Moore acknowledged the clarity and certainty of current patent eligibility jurisprudence.27

Some Federal Circuit judges have expressed distaste for the Supreme Court’s patent eligibility jurisprudence, often appearing to be motivated by sympathy for concerns expressed by patent owners.28 But these statements generally reflect the judges’ policy views rather than any confusion regarding the proper application of existing law. Such policy preferences have no bearing on the clarity of the current law or its ability to produce predictable outcomes.

Moreover, some judges have explicitly acknowledged the value of the Supreme Court’s clarification of patent eligibility law. For example, Judge Haldane Robert Mayer, whose tenure on the Federal Circuit spans 34 years, asserted that “[b]efore the Supreme Court stepped in to resuscitate section 101, a scourge of meritless infringement suits clogged the courtrooms and exacted a heavy tax on scientific innovation and technological change.”29 Judge Mayer called the current § 101 framework “an expeditious tool for weeding out patents clearly lacking any ‘inventive concept.’”30

#### Court clog prevents hurdles to the success of litigation that is necessary to solve climate change

Banda and Fulton 17 (Dr. Maria L. Banda is an international lawyer. She is currently the Graham Fellow at the University of Toronto Faculty of Law, a member of the World Commission on Environmental Law, and a Visiting Attorney at the Environmental Law Institute. Scott Fulton is President of the Environmental Law Institute and a member of the United Nations Environment Programme's International Advisory Council on Environmental Justice. He is a former U.S. Environmental Protection Agency General Counsel, Environmental Appeals Judge, environmental prosecutor, and environmental diplomat. “Litigating Climate Change in National Courts: Recent Trends and Developments in Global Climate Law” Environmental Law Reporter News & Analysis, Vol. 47, Issue 2 (February 2017), pp. 10121-10134. Accessed 7/15/2024 via University of Michigan Online Library) wtk

First, national judges are by and large successfully adapting their traditional role of administration of justice to the new challenges posed by climate change litigation. Presented with a number of novel and urgent legal questions, they have increasingly held their own governments accountable under national constitutional principles, implementing legislation, or common-law doctrines. Since 2013, as one court noted, courts have increasingly "recognized the role of the third branch of government in protecting the earth's resources that it holds in trust."' 1 6 1 Thus, though climate litigation will continue facing different substantive and procedural hurdles in different jurisdictions-from standing to the political question doctrinecourts have demonstrated that, generally, they are rising to the task and using the tools at their disposal for administration of justice in this emerging area.

This trend can be greatly enabled by making the emerging cross-jurisdictional jurisprudence in this area more readily accessible to judges around the world. Likewise, climate literacy training aimed at building judicial awareness of climate science, climate impacts, and climate resilience imperatives can help equip judges to perform their traditional role of administering justice in the context of this global phenomenon.

Thus far, constitutionally protected environmental rights have represented the most straightforward vehicle for climate litigants in some jurisdictions (e.g., Norway), although litigation based on broader rights (e.g., to enforce fundamental constitutional rights to life and property) has also provided a viable strategy in other jurisdictions (e.g., Pakistan). In still other jurisdictions, courts have relied on the language of environmental statutes and common-law doctrines to mandate agency rulemaking or more effective implementation of climate policies (e.g., Foster). A number of lawsuits may not even present climate change as the core issue, but may have an indirect impact on climate mitigation or adaptation efforts by 161. Foster et al. v. Washington Dep't of Ecology, No. 14-2-25295-1 SEA, Order Denying Motion for Order of Contempt and Granting Sua Sponte Leave to File Amended Pleading (Wash. Super. Ct. Dec. 19, 2016) (citingJuliana and Urgenda). regulating conventional pollutants in a manner that may have climate co-benefits (e.g., Gbemre).

The experience to date suggests that courts are more willing to exercise an active role in guiding regulatory development where the statutory framework has proven ineffective (e.g., Leghari), as well as where States' actions to avert climate harm are seen as out of step with national policy or international commitments (e.g., Urgenda). Resort to international legal principles as a means of defining the scope of the State's legal obligation appears to occur most frequently when the content of national law is ambiguous (e.g., Urgenda; Leghari), and in legal systems that permit a direct uptake of international law.

Second, while courts to date have been unwilling to impose civil liability on private entities, especially in the United States where the majority of these suits has been brought, emerging science appears likely to feed additional litigation insofar as it helps to address some of the causation and apportionment hurdles that have made these cases challenging. Also, additional and collateral avenues for private-sector accountability may emerge. For example, following the announcement that several state attorneys general and the Securities and Exchange Commission in the United States are investigating energy companies for allegedly misleading investors and the public about climate change, a securities fraud class action was filed against an energy company relating to climate change and non-disclosure of climate-related risks. 162

Finally, while few national judges to date have been called upon to adjudicate transnational climate claims, several recent cases, supported by emerging climate research, appear likely to lead to an increase in cases of this kind.

Overall, the number of climate lawsuits is unquestionably on the rise, positioning the courts for an increasingly vital role in ensuring climate-related accountability, enabling resiliency, and contributing to a sustainable future.

#### Warming causes extinction.

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Though by no means certain, CCC causing global extinction is possible due to interrelated factors of non‐linearity, cascading effects, positive feedbacks, multiplicative factors, critical thresholds and tipping points (e.g. Barnosky and Hadly, 2016; Belaia et al., 2017; Buldyrev et al., 2010; Grainger, 2017; Hansen and Sato, 2012; IPCC 2014; Kareiva and Carranza, 2018; Osmond and Klausmeier, 2017; Rothman, 2017; Schuur et al., 2015; Sims and Finnoff, 2016; Van Aalst, 2006).7

A possibly imminent tipping point could be in the form of ‘an abrupt ice sheet collapse [that] could cause a rapid sea level rise’ (Baum et al., 2011, p. 399). There are many avenues for positive feedback in global warming, including:

* the replacement of an ice sea by a liquid ocean surface from melting reduces the reflection and increases the absorption of sunlight, leading to faster warming;
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Though there are also avenues for negative feedback, the scientific consensus is for an overall net positive feedback (Roe and Baker, 2007). Thus, the Global Challenges Foundation (2017, p. 25) concludes, ‘The world is currently completely unprepared to envisage, and even less deal with, the consequences of CCC’.

The threat of sea‐level rising from global warming is well known, but there are also other likely and more imminent threats to the survivability of mankind and other living things. For example, Sherwood and Huber (2010) emphasize the adaptability limit to climate change due to heat stress from high environmental wet‐bulb temperature. They show that ‘even modest global warming could … expose large fractions of the [world] population to unprecedented heat stress’ p. 9552 and that with substantial global warming, ‘the area of land rendered uninhabitable by heat stress would dwarf that affected by rising sea level’ p. 9555, making extinction much more likely and the relatively moderate damages estimated by most integrated assessment models unreliably low.

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#### The plan clogs the court with a treadmill of litigation

Mantegna 24 (Micaela Mantegna, Affiliate at the Berkman Klein Center at Harvard University (United States) and the Center for Technology and Society at San Andres University (Argentina). “ARTificial: Why Copyright Is Not the Right Policy Tool to Deal with Generative AI” *Yale Law Journal* Volume 133, 4/22/2024. Accessed 5/27/2024. https://www.yalelawjournal.org/forum/artificial-why-copyright-is-not-the-right-policy-tool-to-deal-with-generative-ai) wtk

3. GAI Copyright Litigation Is Expensive, Complex, and Unsustainable

As shown by the general overview of GAI in Part I, GAI models are complex and diverse in terms of techniques and approaches. These models often lack transparency, either due to their inherently opaque technical nature or because the law limits access to them, making the model a black box.131

If one considers this technical complexity of AI, and add to the mix:

a) the complexities of copyright law (considering how contextual and fact intensive it is);

b) the particularities of copyright litigation (considering how expensive and long the process can be, with uncertain outcomes, particularly when related to technology);132

c) and moreover, the atomized nature of the myriad of individual authors, works and data that go into a training dataset;

one can’t help but conclude that copyright litigation might not be an optimal solution. What would await artists is a “litigation treadmill” of sorts. A myriad of artists from all over the world and different disciplines would potentially have to litigate against multiple GAI developers, in a context where technology is dynamic and rapidly evolving. Imagine having to identify your works in each GAI model and sue each company only to discover after lengthy trials, that there is a sprout of new models out there using your works, and that you will have to sue again.

What’s more, as has happened before in the history of copyright and technology litigation,133 the outcome of a case could potentially inspire developers to create technical workarounds to circumvent the latest verdict, forcing artists to start the litigation game all over again.

There is also a pragmatic argument to consider: AI companies will fight to protect their investment in their product, and, by these companies own accounts, these models cannot be useful without including copyrighted content. As OpenAI clearly stated in its submission to the House of Lords

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#### Contributory liability subjects platforms to constant lawsuits and witchhunts for damages

Rian C. Dawson, 2016 – JD, Indiana University Maurer School of Law. “Wiggle Room: Problems and Virtues of the

Inwood Standard” Indiana Law Journal, Iss. 2, Article 9, <https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=11200&context=ilj> //DH

But the Tiffany standard is more than just Inwood for services. In addition to what it takes from Inwood, Tiffany creates a more defined and practical gray area within which courts can apply the knowledge requirement.155 Importantly, the Tiffany standard demands more than general knowledge but less than specific knowledge.156 It also leaves open alternative knowledge theories, such as willful blindness. The Second Circuit stated: "For contributory trademark infringement liability to lie, a service provider must have more than a general knowledge or reason to know that its service is being used to sell counterfeit goods. Some contemporary knowledge of which particular listings are infringing or will infringe in the future is necessary."157 This holding keeps with Inwood's narrow standard but also aligns with the Supreme Court's subsequent interpretations of Inwood in other cases.158 It rightly rejects general knowledge. If general knowledge were enough, online service providers would constantly be embroiled in contributory infringement actions merely because of their business model. In Tiffany, eBay conceded that it knew generally that there were counterfeit Tiffany goods on its site.159 With a case so easy to prove—all a plaintiff would need to show is that counterfeiting occurred somewhere on the site without having to provide an example—online service providers would be subject to witch hunts for damages simply because direct infringers chose the provider's site as a sales platform. Moreover, "some contemporary knowledge" is not as narrow as specific knowledge.160 This is a kinder standard to the plaintiff, as it is not as stringent and leaves open the window of circumstantial evidence. Additionally, contemporary knowledge ensures that the online service provider is not being sued merely for its business model, but instead because there were genuine infringing acts occurring that the provider knew of and should have stopped.

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* higher ocean temperatures may lead to the release of methane trapped under the ocean floor, producing runaway global warming.

Though there are also avenues for negative feedback, the scientific consensus is for an overall net positive feedback (Roe and Baker, 2007). Thus, the Global Challenges Foundation (2017, p. 25) concludes, ‘The world is currently completely unprepared to envisage, and even less deal with, the consequences of CCC’.

The threat of sea‐level rising from global warming is well known, but there are also other likely and more imminent threats to the survivability of mankind and other living things. For example, Sherwood and Huber (2010) emphasize the adaptability limit to climate change due to heat stress from high environmental wet‐bulb temperature. They show that ‘even modest global warming could … expose large fractions of the [world] population to unprecedented heat stress’ p. 9552 and that with substantial global warming, ‘the area of land rendered uninhabitable by heat stress would dwarf that affected by rising sea level’ p. 9555, making extinction much more likely and the relatively moderate damages estimated by most integrated assessment models unreliably low.

## 2nc/1nr

### \*\*\*uniqueness\*\*\*

### they say: courts clogged now

#### Court clog is declining—modernization is preventing backlog

Judicial Shop 24 (Judicial Shop, “DISCOVER STRATEGIES TO MAKE COURT RUN MORE EFFICIENTLY” 2/8/2024. Accessed 7/11/2024. <https://judicialshop.com/blogs/news/discover-strategies-to-make-court-run-more-efficiently>) wtk

Courts nationwide are implementing modernization principles, leveraging digital technology and data-driven strategies to improve efficiency and accessibility. With the rise of legal tech, courts are prioritizing streamlined case processing and sentencing reforms, aiming to reduce delays and enhance overall system effectiveness.

Additionally, global shifts towards online court proceedings during crises reveal a commitment to embracing modernization for improved efficacy. These efforts underscore a concerted push by court leaders to better serve litigants while addressing budget constraints, increasing caseloads, and workforce limitations.

#### Court filings are down

Butler 23 (Megan Butler, Reporter at Courthouse News Service, citing the Judicial Businesses Report from the Office of U.S. Courts. “US courts saw drop in case filings, uptick in judge complaints in 2022” 3/14/2023. Accessed 7/15/2024. <https://www.courthousenews.com/us-courts-saw-drop-in-case-filings-uptick-in-judge-complaints-in-2022/>) wtk

The latest Judicial Business report from the Administrative Office of the U.S. Courts provides statistical data about federal caseloads by circuit, district and offense for the fiscal year ending Sept. 30, 2022, compared with data for prior years.

Total case filings in U.S. district courts fell 18% last year to 343,253. Civil case filings declined 20% to 274,771, and criminal filings dropped by 8% to 68,482.

#### Stats prove caseloads are declining—prefer long-term trends

Cass 22 (Ronald A. Cass is an American legal scholar. He has been president of Cass & Associates since 2004 and is dean emeritus of Boston University School of Law. “On Expanding Federal Courts” Spring 2022. Accessed 7/11/2024. <https://www.nationalaffairs.com/publications/detail/on-expanding-federal-courts>) wtk

One final element to consider before adding federal judgeships involves the practical needs of the courts themselves. Politics aside, the arguments most assiduously advanced in support of adding seats to the bench focus on difficulties in the timely processing of cases, backed by data indicating that the federal courts have witnessed a significant increase in caseloads. But a closer examination of these data reveals serious reason to doubt the need to add a significant number of judgeships to manage existing caseloads. At the very least, it supports taking a modest approach to the issue rather than rushing to expand the judiciary.

Turning first to the appellate level, advocates of creating additional judgeships have repeatedly asserted that the U.S. courts of appeals are facing a crisis due to the rising number of cases. Yet while the appellate caseload did increase from the 1970s through the 1990s, it leveled off afterward and then began to decline. The number of cases filed in the federal courts of appeals in 2020 was almost 10% below the number filed in 2000.

Not only are case numbers falling, but the time taken to reach decisions is, too. Though termination times rose precipitously in the 1970s, they leveled off during the following two decades and, after an uptick in the early 2000s, have shown signs of trending downward again. Since 2010, the median time for deciding cases in the federal courts of appeals has been lower each year in the past decade (from 2011 to 2020) than it was in the decade's first year. The difference is even more dramatic when compared with termination times from three decades earlier: In 1990, the median time it took the federal courts of appeals to close a case was over 15 months — roughly 69% higher than it was in 2020 and more than double what it was in 2016.

These data should temper the view that judges have reached their breaking point in terms of workload. As it appears, rising efficiency in the courts' handling of appellate filings has more than compensated for increases in case numbers. Four developments in particular explain why appellate courts have become more efficient at completing cases and, in turn, why judicial expansions are not necessary to help judges handle their caseloads.

### they say: patent litigation high

#### Patent lawsuits have decreased and remain constant

Unified Patents, 2024 - Unified is a 350+ international membership organization that seeks to improve patent quality and deter unsubstantiated or invalid patent assertions in defined technology sectors “Patent Dispute Report: 2023 in Review” 1/8, <https://www.unifiedpatents.com/insights/2024/1/8/patent-dispute-report-2023-in-review> //DH

2023 was an eventful year for the patent world. The USPTO sought comments on the ANPRM and Patent Eligibility Restoration Act. The Unified Patent Court (UPC) launched. Pressure mounted in the EU to create a SEP commission. Despite the implemented changes or those proposed, litigation levels remained constant. IP Edge continues to be notably absent, but others, like Jeffrey M. Gross and Intellectual Ventures, have increased their assertions.

Highlights:

Litigation was down 12.5%, PTAB was down 11.4%, and Reexams were up 6.7%

With disclosure requirements and referral for disbarment in Delaware, the EDTX became the hotspot for NPE activity, although the WDTX was only 54 cases behind.

Litigation remained on par quarter-by-quarter with a standard deviation of 28.2 cases, even without IP Edge.

#### *Alice* deters patent litigation

Nikola L. Datzov, 23 – Assistant Professor of Law, University of North Dakota School of Law. “THE ROLE OF PATENT (IN)ELIGIBILITY IN PROMOTING ARTIFICIAL INTELLIGENCE INNOVATION” 92 UMKC L. Rev. 1 \*, Nexis Uni, accessed via University of Michigan //DH

[\*36] B. Alice's Impact on AI Inventions

The conversation regarding the impact of Alice often focuses on the number of court decisions that have substantially increased since the Supreme Court handed down its decision in 2014. Importantly, however, the impact of Alice goes far beyond just judicial decisions. Many cases are voluntarily resolved in the face of an Alice challenge (whether or not a motion is filed in court), many patent applications processed by the USPTO never lead to litigation, and, of course, many inventors and companies make decisions on whether to even pursue patent protection in light of the current state of the law. In short, court decisions are merely the tip of the Alice iceberg. All of this culminates in what some have argued to be weak patent protection for AI, at least in some industries.216 As such, to understand Alice's true impact in AI, it is important to consider its role beyond just the judicial opinions that have reached a final decision. Even still, in evaluating the impact of Alice to AI (as broadly defined)217 in the courts, at the USPTO, and in the business world, existing empirical data shows its impact to be far more limited than some have argued.

### they say: copyright litigation high

#### Broad trends prove trademark cases are declining

USSC 22 (United States Sentencing Commission, “Quick Facts — Copyright and Trademark Offenses” August 2022. Accessed 7/15/2024. <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Copyright_FY21.pdf>) wtk

IN FY 2021, 57,287 CASES WERE REPORTED TO THE U.S. SENTENCING COMMISSION.

* 36 INVOLVED COPYRIGHT AND TRADEMARK OFFENSES.1
* COPYRIGHT AND TRADEMARK OFFENSES HAVE DECREASED BY 56.1% SINCE FY 2017.

### they say: trademark litigation high/SAD suits

#### Judges and online platforms are curtailing the use of SAD cases now

Bea Swedlow and David Roulo, 2023 - Bea Swedlow is a partner and David Roulo is an associate at Honigman LLP“Concerns Emerging On TM Cases Against Undisclosed Parties” Law360 Expert Analysis - Corporate, 6/21, Nexis Uni, accessed via University of Michigan //DH

Third-Party Service Providers Are Objecting to the Remedies in Schedule A Cases

Courts are not alone in pushing back on these cases. As discussed above, plaintiffs generally seek an order directed to third-party domain name providers requiring they disable defendants' webpages and for e-commerce platforms to freeze defendants' assets. This is critical to plaintiffs' recovery because, without appearing, plaintiffs can never discover the identity of the defendants. Thus, plaintiffs only recovery comes from the seizure of assets frozen in connection with the TRO/PI. Though some courts express concern with asset freezes so early in a case, they have generally complied with plaintiffs' requests.

This outcome changes when third-party platforms object. In February, MD LLC brought another Schedule A case, filing the standard TRO/PI motion.[30] MD argued the TRO should cover the online marketplaces because they provide the service the defendants use to sell the counterfeit products.[31] Three nonparties, including eBay, appeared and objected, arguing the asset freeze was "overbroad."[32]

The objection worked - at least temporarily. On May 4, the court granted the TRO as to all non-objecting nonparties, but denied the injunction as to the objectors, at least temporarily, and ordered expedited discovery on the issue.[33] Discovery and briefing on the issue concluded on June 20.[34] The outcome of eBay's motion could result in a seismic shift in the incentive for parties and firms to file these suits.

#### Broad trends prove trademark cases are declining

USSC 22 (United States Sentencing Commission, “Quick Facts — Copyright and Trademark Offenses” August 2022. Accessed 7/15/2024. <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Copyright_FY21.pdf>) wtk

IN FY 2021, 57,287 CASES WERE REPORTED TO THE U.S. SENTENCING COMMISSION.

* 36 INVOLVED COPYRIGHT AND TRADEMARK OFFENSES.1
* COPYRIGHT AND TRADEMARK OFFENSES HAVE DECREASED BY 56.1% SINCE FY 2017.

### \*\*\*Patent links\*\*\*

### they say: pera reduces court clog

#### PERA increases court clog

Wayne Brough, 24 - policy director for R Street’s Technology and Innovation team. He manages product flow on technology policy issues while also continuing his own research in competition policy and intellectual property. Prior to R Street, Wayne was the president of the Innovation Defense Foundation. Wayne received his PhD in economics from George Mason University, with a focus in industrial organization and public choice. “Congress Wants to Revive Patents but May Strangle Innovation and Damage Health Care Access Instead” R Street Institute (a public policy think tank), 4/3, <https://www.rstreet.org/commentary/congress-wants-to-revive-patents-but-may-strangle-innovation-and-damage-health-care-access-instead/> //DH

Patent eligibility, or the fundamental question of what is patentable, is currently under congressional review. Sens. Thom Tillis (R-N.C.) and Chris Coons (D-Del.) have introduced the Patent Eligibility Reform Act (PERA) to reform Section 101 of the U.S. Patent Act, which defines what can be patented. But some of the proposed changes do much more than clarify patent eligibility, aiming instead to reverse a series of Supreme Court decisions issued in response to growing concerns over patent abuse and its chilling effects on innovation. More importantly, while the Supreme Court has consistently held that “laws of nature, natural phenomena, and abstract ideas” are not patentable, these legislative proposals attempt to upend that position and expand the scope of patent eligibility directly contra to court rulings.

Enhancing Innovation or Creating Monopolies?

In many ways, recently proposed changes would return the patent system to policies of the late 1990s and early 2000s, when the courts were beset with patent litigation originating from excessive claims of patentability. Allowing companies to patent abstract business methods or practices prompted a surge in lawsuits targeting other companies using similar business processes—even obvious or commonsense practices. While broader patent eligibility strengthens the hand of patent owners, the impact on innovation is less clear. Research has found that such overly broad patents generate excessive litigation while creating significant barriers to entry that limit competition. This ultimately sparked the Supreme Court rulings that established new limits on the possibility of patenting abstract concepts or inventions.

#### Empirically – expanding patent eligibility increases a flood of infringement suits

David Jones, 2024 – executive director of the High Tech Inventors Alliance. Statement Before the Subcommittee on Intellectual Property U.S. Senate Committee on the Judiciary, Hearing on “The Patent Eligibility Restoration Act – Restoring Clarity, Certainty, and Predictability to the U.S. Patent System” 1/24, <https://www.judiciary.senate.gov/imo/media/doc/2024-01-23_-_testimony_-_jones.pdf> //DH

d. Expanding patent eligibility to include non-technological innovations would cause real and substantial harms.

While patents on football plays and marriage proposals are not themselves of much concern to HTIA, they demonstrate the vastness of the non-technological subject matter that falls between what is currently patent eligible and what would be eligible under PERA. As amply demonstrated by the history of patent litigation in this country, HTIA’s concerns are more than credible, given the well-documented harm imposed on HTIA members (and many others) by the assertion of patents for non-technological “inventions” such as business methods prior to the Alice decision. Having experienced the flood of lowquality patents claiming business methods “on a computer” in the wake of the introduction of personal computers and a second flood of similarly harmful patents claiming nontechnological processes performed “on the internet,” HTIA members and other similarly-situated technology companies were forced to absorb billions of dollars of additional (and completely unnecessary) litigation costs in order to defend themselves against infringement suits based on patents—mostly involving obvious implementations of business methods—that were invalid under Supreme Court caselaw and should never have been issued.

In addition to these very sizeable direct economic costs, tech companies have also experienced first-hand the substantial business distractions, disruption, and uncertainties associated with the meritless—but all too often profitable—assertion of invalid patents. The expansion of patent eligibility to nontechnological subject matter is of particular concern to HTIA due to the decreased availability of review by the PTAB—largely as a result of the practice of discretionarily denying meritorious petitions – and because the PTAB is not allowed to consider patent ineligibility as grounds for cancellation in an inter partes review. Based on these very negative first-hand experiences and the well-documented litigation abuses that resulted from these past booms in patenting, HTIA and its members would urge Congress not to squander America’s current technological advantages with respect to critical emerging technologies such as artificial intelligence and quantum computing by repeating these past mistakes.

Some argue that concerns about extending patent eligibility to non-technological subject matter should be dismissed because problematic patents would be screened out by sections 102, 103, and 112. This argument is refuted by historical experience. The truth is that, prior to Alice, patents on equally “silly” (and seemingly obvious) inventions—such as swinging sideways on a swing21 or exercising a cat using a laser pointer22—were not screened out by other statutory requirements but rather were issued. More importantly, this argument misses the point that allowing the patenting of nontechnological processes undermines the core purpose of the patent system irrespective of whether the activity at issue is novel, non-obvious, and adequately enabled and described. For example, there is evidence that the availability of patent protection for business methods directly harmed investment in technological R&D.23 Disincentivizing investment in technological innovation is the opposite of the purpose of patent protection—and the opposite of what would promote U.S. competitiveness and economic growth.

#### Expansion to non-technological subject matter causes a flood of patent litigation and cannibalizes R&D - empirically

David Jones, 2024 – executive director of the High Tech Inventors Alliance. Statement Before the Subcommittee on Intellectual Property U.S. Senate Committee on the Judiciary, Hearing on “The Patent Eligibility Restoration Act – Restoring Clarity, Certainty, and Predictability to the U.S. Patent System” 1/24, <https://www.judiciary.senate.gov/imo/media/doc/2024-01-23_-_testimony_-_jones.pdf> //DH

There are other reasons to believe that expanding patent eligibility to non-technological subject matter would harm the interests of the United States. According to one empirical study, financial patents were litigated at a rate at least 27 times greater than other patents.24 Given that the median cost of defending a patent suit in which more than $25 million is at stake is around $5 million, even a more modest expansion of patent eligibility to include only business methods would impose billions of dollars of deadweight loss on the U.S. economy. Additionally, it is likely that allowing patents on non-technical subject matter would have the effect of crowding out patents on (and investment in) technological advancements. It is typically much more cost effective to obtain patents on non-technological subject matter because such innovations (e.g., novel business methods) can be conceived with little or no investment in R&D. This means that incurring the high cost of engaging in technological innovation would place a company at a competitive disadvantage relative to those who obtain equivalent exclusive rights to non-technological innovations, which would disincentivize investment in technological R&D.

#### If we win the link, it turns case—court clog prevents review of patents

Jeanne C. Fromer 10, Associate Professor at Fordham Law School, JD from Harvard Law School, MS in Electrical Engineering and Computer Science from the Massachusetts Institute of Technology, BA from Columbia University, “Patentography”, New York University Law Review, 85 N.Y.U.L. Rev. 1444, November 2010, Lexis

The principal goal of the American patent system is to stimulate innovation, as manifested in the Constitution's articulation of Congress's power "To promote the Progress of … useful Arts, by securing for limited Times to … Inventors the exclusive Right to their … writings and discoveries." Stimulation occurs by rewarding inventors with a time-limited exclusive patent right for taking two steps they typically would not otherwise take: to invent in the first instance and to reveal information to the public about these inventions, thereby enabling other innovators to build on earlier insights. The government will grant a utility patent for an invention only if it is novel, nonobvious "at the time the invention was made to a person having ordinary skill in the art," and "useful." The Patent Act also requires disclosure of certain content within the patent by calling for a "written description," "enablement," and "best mode." The written-description requirement ensures that the inventor is in possession of the claimed invention. To enable the invention, the patent applicant must demonstrate in the specification to "any person skilled in the [relevant] art [how] … to make and use the [invention]" without "undue experimentation." Also, the patent applicant must set out "the best mode contemplated by the inventor of carrying out his invention." The best mode requirement is met so long as the [\*1451] patent document objectively discloses the best mode that the inventor subjectively conceived by the time the inventor filed the patent application.

Patents are granted after successfully undergoing examination by the Patent and Trademark Office (PTO), an administrative agency within the Department of Commerce, to ascertain that an invention meets the patentability conditions and that the description in the patent application satisfies the disclosure requirements. The patent's scope is defined principally by its claims, which "particularly point[] out and distinctly claim[] the subject matter which the applicant regards as his invention." The patent right permits the patentee to exclude others from practicing the invention claimed in the patent for a term of typically twenty years from the date the patent application was filed.

With this primer on substantive patent law, I turn to the institutional structure of patent litigation, focusing on both district courts and the Federal Circuit. Section A sets out the venue rules in the district courts. Section B discusses the Federal Circuit, the centralized and specialized appeals court for almost all patent litigation. Section C then describes the interaction between the district courts and the Federal Circuit by laying out the standards under which the Federal Circuit reviews patent decisions by the district courts.

A. Venue Rules in District Courts

Patent litigation is generally distinct from other federal causes of action, in that there is but one choice - the Federal Circuit - for almost all appeals from whichever district court a litigant chose as the court in the first instance. However, given patent law's permissive venue rules, a patent plaintiff may frequently choose to initiate a lawsuit in virtually any federal district court. [\*1452]

In the American patent system, the power to adjudicate patent disputes is vested exclusively in the federal courts. Venue rules dictate which of these courts can entertain particular patent cases, assuming personal jurisdiction over the defendants also exists in that court. Venue rules typically seek to ensure a convenient forum for litigation, particularly for the defendant, who has been haled into court, but these rules differ depending on the type of patent suit and status of the defendant.

### \*\*\*copyright links\*\*\*

### they say: copyright plan reduces court clog

#### Unclear copyright ownership guarantees extensive litigation over licensing

Hansen and Brooke 23 (David Hansen, Executive Director of the Authors Alliance. Rachel Brooke, Senior Staff Attorney of the Authors Alliance. “RE: Policy Study on Artificial Intelligence, Docket Number 2023-6” 10/30/2023. Accessed 5/24/2024. https://www.regulations.gov/comment/COLC-2023-0006-8976) wtk

Third, even for commercially valuable works that are not orphaned, copyright ownership is far from clear for many works, making remuneration at scale destined for protracted litigation. While existing compulsory licensing regimes focus on areas of practice where licensing and transfer of rights has largely been standardized, most other areas of copyright do not have such clarity. For example, even with commercially published books, publication contracts, i.e., private agreements between authors and publishers, take a wide variety of approaches to allocating ownership rights across geographic locations, formats, and time. Whether, for example, using works as training materials for AI models would constitute an “electronic work” under those licenses would be an important question. This issue has been litigated and remains unresolved and largely unresolvable without close examination of each contract.57

#### Even minor infringements would trigger waves of litigation

Brough and Nazeri 23 (Wayne T. Brough, Policy Director of Technology and Innovation at the The R Street Institute. Ahmad Nazeri, the R Street Institute, “Artificial Intelligence and Copyright: Notice and Request for Public Comment” public comments before the U.S. Copyright Office. 10/30/2023. Accessed 5/25/2024 from https://www.regulations.gov/comment/COLC-2023-0006-8302) wtk

Introducing a licensing requirement for the development and adoption of generative AI systems would have profound economic implications.

•Barrier to Entry: Given the vast number of works an AI training dataset might need to use—and the fact that thousands or millions of individuals might own those works—obtaining licenses for all underlying content becomes a significant challenge. This could act as a barrier to entry for smaller companies or startups that lack the resources to negotiate and secure such licenses.

•Increased Costs: The process of identifying, negotiating and securing licenses for every individual piece of content in a dataset would be resource-intensive. These increased costs could be passed on to consumers or could deter companies from pursuing certain AI-driven projects altogether.

•Stifling Innovation: The sheer complexity and cost associated with obtaining licenses might discourage innovation. Companies might opt for safer, less ambitious projects to avoid potential copyright pitfalls, thereby limiting the advancement of AI technologies.

•Monopoly Concerns: Only large entities, like tech giants, that have the resources to navigate the licensing landscape or have already amassed vast amounts of data might be able to compete effectively in the AI space. This could lead to a monopolistic environment where only a few players dominate, thereby reducing competition and potentially stifling innovation.

•Economic Incentives for Litigation: Given the structure of copyright remedies, even small-value infringements can lead to lawsuits due to the potential for statutory damages. This could encourage opportunistic lawsuits, further increasing costs for AI developers.

### \*\*\*trademark links\*\*\*

### they say: e-commerce plan reduces court clog

#### Studies prove – empirically increased protection causes a flood of litigation

Davidson Heath and Christopher Mace, 2020 – professors of business at the University of Utah. “The Strategic Effects of Trademark Protection” The Review of Financial Studies 33 (2020) 1848–1877, Oxford University Press, accessed via University of Michigan //DH

To study the causal effects of varying trademark protection we exploit the Federal Trademark Dilution Act (FTDA) of 1996, which granted additional legal protection to “famous" trademarks until its key provision was nullified in 2003 by a U.S. Supreme Court decision. We find that the FTDA raised treated firms’ operating return on assets by an average of 1.7 percentage points (pp), equal to 12% of their average pretreatment profits. The FTDA was followed by a sharp increase in trademark lawsuits under the new provision and by reduced entry and turnover in affected goods and service classes, consistent with our hypothesis that the FTDA raised the expected cost of entry into affected product markets. Treatment effects were strongest in firms that faced moderate entry threat ex ante, consistent with strategic entry deterrence as a mechanism.

#### Even if platforms comply, they still risk facing massive new litigation

Engine, 2020 - Engine is a non-profit technology policy, research, and advocacy organization that bridges the gap between policymakers and startups. Comment submitted to US Patent and Trademark Office, “Re: Comments of Engine Advocacy in Response to Secondary Trademark Infringement Liability in the E-Commerce Setting, Docket No. PTO-T-2020-0035,” 12/28,

<https://downloads.regulations.gov/PTO-T-2020-0035-0008/attachment_1.pdf> //DH

Trademarks are pervasive across the globe. There are over 2.6 million active trademarks in the U.S. alone.15 It would be impossible for a new e-commerce platform to learn, monitor, and identify alleged infringement of that many marks in the millions of products that are (or could be) posted on these sites. Volume is not the only problem—it is complex to identify specific instances of trademark infringement. Trademark owners are much better suited to know what might confuse their consumers and know what products they have authorized.16 Without trademark owners identifying infringement in the first instance, platforms will both over- and under-police, unintentionally blocking legitimate content and letting some infringement slip through the cracks.17

Likewise, technology and filters are not a solution, as these are both very expensive and inherently limited.18 As we have previously explained in the copyright context:

Technology and filters have many inherent limitations which make them incapable of fully addressing online infringement. Filtering technology is imperfect, with often high false positive rates. It is categorically incapable of answering fact-specific questions of infringement, like fair use, licensing, and the exclusion of unprotectable ideas. But these filters are also out of reach for most startups. The most sophisticated tools are so expensive that the development costs are orders of magnitude above what a startup could afford. Off-the-shelf tools, which cannot screen much content on a multimedia platform, are also too expensive for early-stage companies to license and maintain. All filters are limited in the type of content they screen. And for many types of content, there are no filters. Finally, technology is easily circumvented. Users intent on uploading infringing content can easily modify files to avoid the filters.19

Indeed, the measures certain platforms deploy to try and prevent trademark infringement are not perfect, and counterfeiters already find ways around these measures. Even for platforms spending the most, and deploying the most sophisticated technology, it is impossible to keep trademark infringers off e-commerce platforms. For example, counterfeiters can just change their name or repost infringing items under a new name or different account.20

The limits of filters—which will fail sometimes (likely often)—and the fact that startups would be incapable of identifying and removing all infringement on their own also brings substantial litigation cost and risk. Expanding platform liability over users’ alleged IP infringement would put early-stage companies at risk of being sued out of existence. It would also discourage entrepreneurs and investors from developing new technology or pursuing new e-commerce business models. Internet platforms, in particular, have been able to innovate and launch because they do not have to hire teams of lawyers to brace for litigation when users are accused of infringement. And investors would be reluctant to fund emerging e-commerce platforms if they knew the money would go to cover liability for user infringement.21

#### The plan causes over-enforcement on a massive scale

Jonathan Berroya, 2021 - Senior Vice President and General Counsel, Internet Association. Testimony before the Subcommittee On Courts, Intellectual Property, and The Internet Judiciary Committee U.S. House of Representatives. The SHOP SAFE Act: Stemming the Rising Tide of Unsafe Counterfeit Products Online. 5/27, <https://docs.house.gov/meetings/JU/JU03/20210527/112713/HHRG-117-JU03-Wstate-BerroyaJ-20210527.pdf> //DH

The SHOP Safe Act would create significant and unreasonable impediments for small and "micro" businesses that rely on platforms to sell and resell products to other businesses and consumers. The bill would make it difficult for such businesses to use trademarks to describe the products they are offering, by requiring platforms to use reasonable technological tools to scan nearly every third-party listing or advertisement that includes a trademark, and to rely on such automated processes to make determinations that brand-trained experts are expected to make in every other legal context, including in alleging copyright infringement under the DMCA. Technology is not perfect, and by threatening platforms with legal liability if they fail to take action to remove potential "false positives," the bill would incentivize overenforcement at a potentially massive scale. The bill would also require companies to impose punitive consequences on sellers who have used trademarks that are presumed to be counterfeit—including permanently banning them from the platform, but the draft language is remarkably devoid of any semblance of due process to allow sellers to confront brand owners and assert that their use of a trademark was valid.

#### Lack of a clear definition of ‘counterfeiting’ weaponizes enforcement

Eric Goldman, 2021 – professor of law at Santa Clara Law. “The SHOP SAFE Act Is a Terrible Bill That Will Eliminate Online Marketplaces” Technology and Marketing Law Blog, 9/28, https://blog.ericgoldman.org/archives/2021/09/the-shop-safe-act-is-a-terrible-bill-that-will-eliminate-online-marketplaces.htm //DH

What is “Counterfeiting”? The bill defines “counterfeit mark” as “a counterfeit of a mark” (I can’t make this up). But there’s actually a lot of confusion about what constitutes counterfeiting. See, e.g., my post about the trademark enforcements involving the “EMOJI” word mark, where they take the position that a marketplace item using the term “emoji” in the product name or description “counterfeits” their mark (seriously, look at the example from their exhibit and tell them that’s not bogus). A similar issue arises with print-on-demand services, where trademark owners take the position that any variation of their mark being manufactured onto a good constitutes counterfeiting, even if it’s parodic or an obvious joke. Thus, the bill’s grammar restricting the “use of counterfeit marks” potentially covers a much wider range of activity than classic piratical counterfeiting. Trademark owners will weaponize that ambiguity.

### they say: safe harbor solves

#### The actual knowledge requirement is the only shield against litigation – but the plan dilutes it

Patricia E. Campbell, 2023 - Law School Professor and Director of the Intellectual Property Law Program at the University of Maryland Carey School of Law “Debugging the Trademark Laws: The Lanham Act and Counterfeit Microelectronics,” 31 TEX. INTELL. PROP. L.J. 211 (2023). Hein Online. Accessed via University of Michigan //DH

Moreover, if parts were purchased on e-commerce platforms, the online marketplace or service provider is typically immune from suit under the rule created in Tiffany (NJ) Inc. v. eBay Inc.335 There, the court held that for contributory trademark infringement liability to exist, a service provider must have more than a general knowledge or reason to know that its service is being used to sell counterfeit goods. "Some contemporary knowledge of which particular listings are infringing or will infringe in the future is necessary."336 The requirement of actual knowledge has created a safe harbor for e-commerce platforms.

#### The safe harbor from liability is too weak and invites litigations

Andrew Ligon Fant, 2022 - J.D. Candidate, 2023, University of Georgia School of Law. “Reconsidering the Willful Blindness Doctrine in Contributory Trademark Infringement,” 29 J. INTELL. PROP. L. 318 (2022). Available at: https://digitalcommons.law.uga.edu/jipl/vol29/iss2/3 //DH

The most problematic part of the SHOP SAFE Act is its requirement that online marketplaces implement a program to “expeditiously” take down counterfeit listings the platform is reasonably aware of.152 The Act adopts a very broad view—similar to the “reason to know” standard that the Tiffany court rejected153—of when an online marketplace should be reasonably aware of the use of a counterfeit mark.154 If an online marketplace has a program but perhaps does not take down counterfeit listings “expeditiously,” it may be exposed to liability despite good faith efforts. This could be a reasonable outcome if the marketplace could otherwise avail itself of a safe haven through reasonable efforts, but the requirement for such a program is actually an eligibility requirement for the safe haven.

The Act purports to create a safe haven, but the numerous exceptions to the rules and reliance on reasonableness muddy the waters and invite litigation.155 One such exception is found in the Act’s definition of “repeated use of a counterfeit mark”: “[u]se of a counterfeit mark by a third-party seller in 3 separate listings within 1 year shall be considered repeated use, except when reasonable mitigating circumstances exist.”156 What qualifies as a reasonable mitigating circumstance is anyone’s guess.

### \*\*\*climate change\*\*\*

### they say: courts don’t solve climate change

#### Courts solve climate change—empirics prove they are the most effective

Carlarne 21 (Cinnamon Piñon Carlarne 21, 19th President and Dean of Albany Law School, was the Associate Dean for Faculty & Intellectual Life at The Ohio State University Moritz College of Law, leading international expert in environmental and climate change law policy with a deep commitment to environmental equity and social justice. “The Essential Role of Climate Litigation and the Courts in Averting Climate Crisis” Ohio State Legal Studies Research Paper No. 592, SSRN, 2021. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3761850>) wtk

More specifically, climate litigation7 draws on a long history of environmental litigation. From the earliest days, litigants turned to the courts to ensure the implementation, enforcement, and evolution of environmental law. Courts have served as the guardians and, at times, the architects of the rule of law in the environmental context in jurisdictions as varied as the United States, South Africa, and India.8

The role that the courts have and continue to play in shaping environmental law reflects a long history of adversarial legalism9 and an abiding faith in the ability of the courts to be unbiased arbiters of legal disputes as well as visionaries of change.

Climate litigation is thus neither an aberration nor a new phenomenon. The expanding body of climate litigation responds to profound state failures to protect their citizenry from the dire threats that climate change poses. Moreover, it tracks a history of citizens turning to the courts to identify and enforce fundamental rights when the political branches fail to do so, and reaffirms the long-standing role and responsibility of the judiciary in maintaining the integrity of the rule of law and ensuring the wellbeing of the nation and its people, particularly in moments when the state fails to respond to urgent social, scientific, and political challenges.10 Building on a long history of effective environmental litigation, climate litigation is playing and incontrovertibly important role in shaping the rule of the law around climate change.

#### Litigation is the most likely avenue to create effective climate solutions

Abelkop 13 – PhD Candidate @ Indiana (Adam, “Tort Law as an Environmental Policy Instrument,” 92 Or. L. Rev. 381)

Moreover, even if the scientific and economic foundations of statutes are sound, the regulatory rules developed to enforce them may not necessarily be workable. In some instances, EPA staff might "lack [the] field experience and exposure to industry" that are necessary to write high quality regulations. 343 And, even when rules are workable, environmental regulations in particular are extraordinarily complex and technocratic: Perhaps the central defining feature of environmental law in the United States is its mind-numbing complexity and detail… . Today there is no serious question that environmental law is the most [444] complicated and detailed body of law the world has ever known; we have won the (dubious) distinction of representing the "state of the art" in legal complexity and detail. 344 The bottom line is that environmental regulation - whether expressed through standards or rules, the common law or regulation - will challenge the understanding of citizens, businesses, judges, regulators, and representatives simply because the environment and the various pathways by which pollution may harm it and human health are fantastically complex.

A fundamental element in the discussion of efficiency and institutions, therefore, is the capacity of those institutions to gather and make use of information. 345 Information is the life force of environmental and public health protection. The development of environmental statutes and regulations requires immense amounts of scientific and economic data on, for example, the chemical and physical processes that generate the pollution externality, the chemical and biological reactions that occur when ecosystems and humans are exposed to the pollution in varying amounts and over varying periods of time, the costs and benefits of available pollution abatement technologies, and the costs and benefits of various policy instruments. The cost of gathering information, therefore, represents an acute transaction cost, making it an important factor to consider in comparative institutional analysis. 346

Many scholars assume that the information gathering capacity of regulatory agencies far exceeds that of the judicial system. 347 However, information asymmetries skewed toward regulated industries greatly limit regulatory authorities' information gathering capabilities. 348 Imperfect as it is, the inclusion of judicial institutions in the regulatory process is vitally important in many environmental [445] policy-making contexts because of the judicial system's ability to facilitate information gathering for three primary reasons.

First, the design of many regulations requires access to information that only private citizens have regarding the nature and extent of the harm. 349 The plaintiff knows more about the cost of her injury than anyone else, and the defendant knows more about the cost of precaution or abatement than anyone else. 350 From a purely theoretical economic perspective, this makes rational sense. To design an efficient regulatory scheme - one that maximizes social welfare - regulators need to know the slopes of both the social marginal cost curve and the social marginal benefits curve of the target populations. Marginal costs and benefits could take the form of abatement costs and benefits (e.g., the costs of controlling pollution and the benefit to individuals from less exposure to pollutants) or emissions costs and benefits (e.g., the cost of harm from pollution and the benefits of production). Most of this information comes from private individuals and entities. Environmental goods are notoriously hard to price, 351 and all parties have an economic incentive to exaggerate costs. 352

Because regulators have access to imperfect information, the regulations they design often provide inefficient under-protection in some instances and overprotection in others 353 : "When one combines the elusiveness of the problem with the indeterminacy of its cause and multiplies that by the number and diversity of the people whose lives the agency is attempting to change, the probability of error is very high indeed." 354

Of course, agencies do have a range of information gathering techniques available to them. As Justice Breyer notes, regulatory agencies collect information from regulated industries, public interest [446] groups, external experts, and government research offices. 355 In addition, agencies attain information through public comments received during the notice and comment process and through participants in negotiated rulemaking procedures. 356 In spite of information asymmetries and barriers to regulatory information gathering, agencies do gather and generate an incredible amount of data that they use to promulgate some of the most sophisticated regulatory programs ever designed. 357

Liability standards of care, on the other hand, are broad enough to apply to the gamut of harms to human health and the environment that regulations may be too narrow to protect against. Moreover, private litigation has facilitated the generation of a great deal of public health data on many industrial chemicals and pharmaceuticals, most prominently tobacco and asbestos. 358 Although litigants develop tort law one case at a time, the accumulation of precedent over time has incorporated private information into robust public standards of care: A public regulatory scheme could not hope to match the negligence system in terms of its scope, detail, and encapsulation of private information. To do so would require public agents to discover ex ante how much a potential victim would be hurt by a specific injury, and how much it would cost a potential injurer to avoid the injury. Even if the parties were able to provide this information ex ante, their incentives to do so honestly would be weak. 359

Second, private attorneys are often more effective at uncovering misconduct than regulatory agencies - a strength of the adversarial [447] system. 360 The tort system empowers private litigators with the capacity to compel their opponents to disclose full and complete information during pre-trial discovery and provides attorneys with incentives to "spend the resources necessary to copy and organize documents, take depositions, and fight … efforts to resist discovery." 361 Plaintiffs' attorneys are willing to spend those resources because the court can often shift those costs to the tortfeasor as attorneys' fees when the plaintiff emerges victorious.

Third, the tort system does not rely exclusively on the deterrent effects of precedent to send signals to the market. Indeed, companies must often purchase liability insurance to protect themselves in the case of an accident. 362 Insurance companies gather massive amounts of information in order to price risk into premiums, and premiums in turn send price signals to businesses about their levels of risk. In this way, the tort system marshals insurance companies as secondary standard-setters. One limitation to this attribute of tort law, though, is that many insurance policies often exclude coverage for toxic torts. 363

In addition to its information-gathering function, tort law may facilitate more effective enforcement of public regulation and vice versa. Knowing that private litigators could uncover misconduct or manipulation of the regulatory process, industry may be more candid when working with or providing information to regulatory agencies. 364 Private litigation may also produce information that may be useful in regulatory settings. For example, "an ecosystem services nuisance case is likely to generate information about natural capital and ecosystem service values that would not normally be produced from regulatory programs, yet which could be generalizable to many other similar settings and added to the storehouse of information." 365 [448] Moreover, information generated through litigation could facilitate regulatory enforcement actions. 366 For example, private litigation against DuPont for injuries from the perfluorooctanoic acid (PFOA) that it used in its Teflon manufacturing process revealed documents that encouraged EPA to bring a TSCA enforcement action against the company, which settled for $ 16.5 million. 367 In more extreme cases, a series of tort suits on a novel harm could prompt the federal and state governments to enact entirely new environmental statutes 368 or highlight inadequacies of existing ones. 369 Operating in the opposite direction, information gathered by regulatory agencies can be used in litigation or to enhance tort law's deterrent effect by increasing firms' awareness of their liability exposure. 370

Fourth, regulatory agencies encounter asymmetries in information that are skewed in favor of industry. 371 For example, to determine whether a certain practice or product meets safety or performance standards or licensing requirements, agencies often rely on information submitted by the regulated firms themselves. Regulatory agencies, including EPA, are "heavily dependent upon regulated entities for the scientific information that they need to support effective regulation." 372 The primary environmental statutes do not require companies to submit all relevant data on the risks associated with their activities and products, nor do the statutes empower EPA with a great deal of authority to require companies to submit that information. 373 Even though EPA does have some limited authority to affirmatively subpoena information or require companies to generate new data that it believes it needs, political pressures and limited [449] resources have discouraged EPA from liberally using this authority. 374 Even when EPA does acquire information, it sometimes yields to industry requests to shield that data from public disclosure by classifying it as confidential business information. 375

Moreover, it is not uncommon for regulatees to withhold or provide misleading scientific information to regulators. 376 For many practices and products - pharmaceuticals and industrial chemicals, for example - regulated firms generate or receive commissioned data on safety hazards and risks confidentially. 377 Upon finding results counter to its business interests, a company might elect to withhold the data from the regulator on the justification that the information is unreliable or invalid. 378 Even when the data is both reliable and valid, some companies decide to withhold it from the government - often illegally - out of fear that the data will incite adverse regulatory or enforcement action. 379 Examples of products for which companies have withheld important scientific data include pharmaceuticals such as bendectin, the MER-29 anti-cholesterol drug, and the morning sickness drug; dozens of pesticides; and tobacco. 380 Regulatees may manipulate data as well in efforts to secure favorable regulatory outcomes. 381 One strategy that pharmaceutical manufacturers have used has been to "ghost write" seemingly impartial epidemiological studies supporting their products. 382 More egregious examples include toxicological studies for pesticides that were outright forged. 383 A more subtle approach has been for companies to employ consultants to publish articles discrediting studies that find their products to have adverse effects on human health or the environment. 384 The adversarial nature of the judicial system makes tort law less susceptible to such data manipulation.

#### Courts are the key actor for climate solutions

Carlarne 21 (Cinnamon Piñon Carlarne 21, 19th President and Dean of Albany Law School, was the Associate Dean for Faculty & Intellectual Life at The Ohio State University Moritz College of Law, leading international expert in environmental and climate change law policy with a deep commitment to environmental equity and social justice. “The Essential Role of Climate Litigation and the Courts in Averting Climate Crisis” Ohio State Legal Studies Research Paper No. 592, SSRN, 2021. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3761850>) wtk

Courts are bound to answer the legal claims raised by climate litigation and fulfil their obligation to uphold the fundamental rights of the citizenry. Amidst the cavern of state failures, citizens ‘have one last opportunity to vindicate their core rights—the judiciary’.72 As we crash toward an ‘impending point of no return’, 73 the judiciary cannot decline this responsibility. To do so would be to hasten the demise of democracy and undermine the rule of law. If the political branches and the judiciary continue to hold hands in the suicide pact of inaction ‘history will not judge us kindly. When the seas envelop our coastal cities, fires and droughts haunt our interiors, and storms ravage everything between, those remaining will ask: Why did so many do so little?’74

The question we should be asking is not whether the courts have a role to play in resolving legal disputes and identifying fundamental rights; they do, they have, and they will. This is the role that courts are designed to play. The question is how brave will the judiciary be in assuming its proper role as a co-equal branch of government and in protecting the citizenry from one of the gravest threats to humankind.

### they say: climate change doesn’t cause extinction

#### Climate change outweighs all other risks

Edmond 23, BSc at University of St. Andrews, climate analyst (Charlotte, “Climate change: 5 charts from the IPCC report that show why every increment of warming matters,” <https://www.weforum.org/agenda/2023/03/climate-change-ipcc-emissions-risks-net-zero/>)//BB

Failing to act on climate change will have serious consequences in multiple ways. We will lose large numbers of animal species because they will be unable to adapt to the new environment they face, and ecosystems will collapse. Rising temperatures and humidity will also pose threats to human health and well-being, and risk making some areas unliveable. And food yields and supplies will all be hit, with crops and animals killed by temperature extremes, droughts and floods. Climate-related risks dominate the World Economic Forum’s Global Risks Report 2023, with failure to mitigate climate change perceived as the biggest number risk facing the world over the next 10 years. Natural disasters, extreme weather events, biodiversity loss and ecosystem collapse are also top concerns.

#### Warming causes all other impacts

Cribb ’17 [Julian; 2017; Principal of Julian Cribb & Associates, Fellow of the Australian Academy of Technological Sciences and Engineering, former Director of National Awareness at the Commonwealth Scientific and Industrial Research Organisation; *Surviving the 21st Century*, “The Baker,” Ch. 4, p. 91-93; DML]

This event, known as the Palaeocene-Eocene Thermal Maximum or PETM, happened only about ten million years after the dinosaurs were smashed by an asteroid impact. This ‘hyperthermal’ period took place quite suddenly (in geological terms)—in less than 2000 years—and lasted for about 170,000 years before the planet again cooled. The heat spike was accompanied by a major wipe-out of ocean life in particular, though most small land mammals survived. Investigating the records of old marine sediments Zeebe was able to show there had been a sharp, 70 %, leap in atmospheric CO 2 concentrations at the time. However, he concluded there was only sufficient carbon available to force the climate to warm by 1–3 °C and that some other mechanism must have been triggered by the initial warming, which then drove the Earth’s temperature to fever pitch, up by another 4–6 °C (Zeebe et al. 2009). This process is the ‘ runaway global warming ‘ which now menaces us.

The significance of PETM is that it appears that about the same volume of carbon was dumped by natural processes into the Earth’s atmosphere and oceans as humans are currently dumping with the burning of fossil fuels and clearing of the world’s forests—about 3 trillion tonnes in all—and it was this that triggered the hyperthermal surge in planetary heating.

As to the mechanism that could suddenly release a huge amount of extra carbon into the atmosphere and oceans and project global temperatures up by 6–9 °C, the most likely explanation is the one described at the start of this chapter—the rapid melting and escape of billions of tonnes of frozen methane, CH 4 , currently locked in tundra and seabed sediments. This phenomenon, dubbed the “clathrate gun ” (Kennett et al. 2003), is now linked by scientists not only with the PETM event but also, according to palaeontologist Peter Ward, with the Great Death of the Permian, the worst annihilation in the history of life on Earth (Ward 2008). The significance of the clathrates is that they consist of methane, a gas that is 72 times more powerful than CO 2 as a climate forcing agent in the short run, and 25 times stronger over a century or so. The clathrates could be released by a process known as ‘ ocean overturning ’, a shift in global current patterns caused by moderate warming, which brings warmer water from the surface down into the depths, to melt the deposits of frozen gas. Unlocking several trillion tonnes of methane would cause global temperatures to rocket upwards sharply. Once such a process gets under way, most experts consider, warming will happen so fast it is doubtful if humans could do anything to stop it even if they instantly ceased all burning of fossil fuels.

This ‘double whammy’ of global warming caused by humans releasing three trillion tonnes of fossil carbon which then precipitates an uncontrollable second phase driven by the melting of all or part of the five trillion tonnes of natural methane deposits (Buff et & Archer 2004) is the principal threat to civilisation in the twenty-first century and, combined with nuclear conflict (Chap. 4), to the survival of the human species.

The IPCC’s fifth report states that the melting of between 37 and 81 % of the world’s tundra permafrost is ‘virtually certain’ adding “There is a high risk of substantial carbon and methane emissions as a result of permafrost thawing ” ((IPCC 2014a), p. 74). This could involve the venting of as much as 920 billion tonnes of carbon. However, the Panel did not venture an estimate for methane emissions from the melting of the far larger seabed clathrates and a number of scientists have publicly criticised the world’s leading climate body for remaining so close-lipped about this mega-threat to human existence. The IPCC’s reticence is thought to be founded on a lack of adequate scientific data to make a pronouncement with confidence—and partly to fear of the mischief which the fossil fuels lobby would make of any premature estimates. However, it critics argue, by the time we know for sure that the Arctic and seabed methane is escaping in large volumes, it will be too late to do anything about it.

The difficulty is that no-one knows how quickly the Earth will heat up, as this depends on something that cannot be scientifically predicted: the behaviour of the whole human species and the timeliness with which we act. Failure to abolish carbon emissions in time will make a 4–5 °C rise in temperature likely. As to what that may mean, here are some eminent opinions :

• Warming of 5 °C will mean the planet can support fewer than 1 billion people—Hans-Joachim Shellnhuber, Potsdam Institute for Climate Impact Research (Kanter 2009)

• With temperature increases of 4–7 °C billions of people will have to move and there will be very severe conflict—Nicholas Stern, London School of Economics (Kanter 2009)

• Food shortages, refugee crises, flooding of major cities and entire island nations, mass extinction of plants and animals, and a climate so drastically altered it may be dangerous for people to work or play outside during the hottest times of the year—IPCC Fifth Assessment (IPCC 2014b)

• Corn and soybean yields in the US may decrease by 63–82 %—Schlenker and Roberts, Arizona State University (Schlenker & Roberts 2009a)

• Up to 35% of the Earth’s species will be committed to extinction—Chris Thomas, University of Leeds (Thomas et al. 2004)

• Total polar melting combined with thermal expansion could involve sea levels eventually rising by 65 m (180 ft), i.e. to the 20th floor of tall buildings, drowning most of the world’s coastal cities and displacing a third or more of the human population (Winkelmann et al. 2015)

• Intensified global instability, hunger, poverty and conflict. Food and water shortages, pandemic disease, disputes over refugees and resources, and destruction by natural disasters in regions across the globe—Chuck Hagel, US Secretary for Defence (Hagel 2014)

• “Almost inconceivable challenges as human society struggles to adapt… billions of people forced to relocate.… worsening tensions especially over resources… armed conflict is likely and nuclear war is possible”— Kurt Campbell, Center for Strategic and International Studies (Campell et al. 2007).

• “Unless we get control of (global warming), it will mean our extinction eventually”—Helen Berry, Canberra University (Snow & Hannam 2014).

#### And, warming’s a conflict multiplier that makes every other scenario worse

Scheffran 16, Professor at the Institute for Geography at the University of Hamburg and head of the Research Group Climate Change and Security in the CliSAP Cluster of Excellence and the Center for Earth System Research and Sustainability, et al (Jürgen, “The Climate-Nuclear Nexus: Exploring the linkages between climate change and nuclear threats,” <http://www.worldfuturecouncil.org/file/2016/01/WFC_2015_The_Climate-Nuclear_Nexus.pdf>)

Climate change and nuclear weapons represent two key threats of our time. Climate change endangers ecosystems and social systems all over the world. The degradation of natural resources, the decline of water and food supplies, forced migration, and more frequent and intense disasters will greatly affect population clusters, big and small. Climate-related shocks will add stress to the world’s existing conflicts and act as a “threat multiplier” in already fragile regions. This could contribute to a decline of international stability and trigger hostility between people and nations. Meanwhile, the 15,500 nuclear weapons that remain in the arsenals of only a few states possess the destructive force to destroy life on Earth as we know multiple times over. With nuclear deterrence strategies still in place, and hundreds of weapons on ‘hair trigger alert’, the risks of nuclear war caused by accident, miscalculation or intent remain plentiful and imminent. Despite growing recognition that climate change and nuclear weapons pose critical security risks, the linkages between both threats are largely ignored. However, nuclear and climate risks interfere with each other in a mutually enforcing way. Conflicts induced by climate change could contribute to global insecurity, which, in turn, could enhance the chance of a nuclear weapon being used, could create more fertile breeding grounds for terrorism, including nuclear terrorism, and could feed the ambitions among some states to acquire nuclear arms. Furthermore, as evidenced by a series of incidents in recent years, extreme weather events, environmental degradation and major seismic events can directly impact the safety and security of nuclear installations. Moreover, a nuclear war could lead to a rapid and prolonged drop in average global temperatures and significantly disrupt the global climate for years to come, which would have disastrous implications for agriculture, threatening the food supply for most of the world. Finally, climate change, nuclear weapons and nuclear energy pose threats of intergenerational harm, as evidenced by the transgenerational effects of nuclear testing and nuclear power accidents and the lasting impacts on the climate, environment and public health by carbon emissions.

# Aff answers to court clog da

## 2ac materials

### 2ac vs court clog da—patents

#### 1. Non-unique—the courts will hear a tsunami of lawsuits about regulations now

Katz 24 (Eric Katz, Senior Correspondent for Government Executive. “Will recent Supreme Court rulings 'devastate the functioning of the federal government?'” 7/1/2024. Accessed 7/11/2024. <https://www.govexec.com/management/2024/07/will-recent-supreme-court-rulings-devastate-functioning-federal-government/397795/>) wtk

Last week, the court overturned the precedent known as Chevron deference, which said broadly that courts must defer to agencies when interpreting ambiguous statutory language. In Relentless and Loper Bright v. Commerce Department, the court ruled in a 6-3 decision—the same tally in all three of the recent rulings—that the judiciary, not federal agencies, should resolve questions of law according to their own judgment. In Jarkesy v. Securities and Exchange Commission, it ruled that agencies issuing civil penalties should defend those decisions in federal court rather than solely in in-house tribunals.

The court dealt yet another blow to federal agencies on Monday, deciding in Corner Post v. Federal Reserve that it must strike down the existing six-year statute of limitations to sue the government over a rule. Instead, the court said, the clock starts whenever a party can claim to suffer an injury as a result of an agency-issued rule. In this case, a truck stop in North Dakota challenged a cap on debit-card processing fee issues by the Federal Reserve.

Like the other cases, the fallout from Corner Post is likely to be widespread: agencies will see no time limit on the challenges they face from their rules and regulations. Any regulated party can sue at virtually any time, leaving agencies to constantly defend themselves in court even decades after issuing a rule.

In her dissent, Associate Justice Ketanji Brown Jackson warned of the consequences, particularly when taken in conjunction with the court’s other recent decisions.

“At the end of a momentous term, this much is clear: the tsunami of lawsuits against agencies that the court’s holdings in this case and Loper Bright have authorized has the potential to devastate the functioning of the federal government,” Jackson wrote. “That result simply cannot be what Congress intended when it enacted legislation that stood up and funded federal agencies and vested them with authority to set the ground rules for the individuals and entities that participate in…our economy and our society.”

Bridget Dooling, a law professor at Ohio State University who served for 10 years in the White House's Office of Information and Regulatory Affairs, including as its deputy chief, said the cumulative impact of the decisions could open the floodgates of new litigation against federal agencies.

“Now it is open season on the regulatory state,” Dooling said.

#### 2. Non-unique— patent litigation is high because of the vagueness of the Alice/Mayo framework

David J. Kappos, 24 - attorney and former government official who served as Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office from 2009 to 2013 “Written Testimony to the U.S. Senate Judiciary Subcommittee on Intellectual Property Regarding PERA”, 1/23, <https://www.judiciary.senate.gov/imo/media/doc/2024-01-23_-_testimony_-_kappos.pdf> //DH

The vagueness and randomness of the Alice/Mayo framework have also enabled patent infringers to exploit Section 101 as a litigation weapon exacting unnecessary burdens and costs on good-faith patent holders and the courts, further disincentivizing investment and innovation. Patent infringers now routinely raise Section 101 as a defense, often merely as a strategy to complicate and prolong litigation, rather than as a good-faith defense. One analysis found that from 2012 to 2014 (when Alice was decided), Section 101 was raised in just two Rule 12(b)(6) motions across the country each year. In the year after Alice, that number rose to 36 motions, and by 2019, accused infringers were filing nearly 100 such motions each year.8

#### 3. Link turn—PERA will reduce patent litigation

Courtenay C. Brinckerhoff, 24 – registered patent attorney and have been representing chemical, biotech, and pharmaceutical clients before the USPTO for over 30 years. Answers To Questions For The Record from Senator Padilla, before the U.S. Senate Committee on the Judiciary Subcommittee on Intellectual Property, “The Patent Eligibility Restoration Act”, 1/23, www.judiciary.senate.gov/imo/media/doc/2024-01-23\_-\_qfr\_responses\_-\_brinckerhoff.pdf //DH

My practice does not focus on patent litigation, but I understand that Alice and Mayo have impacted patent litigation by permitting patent challengers to invalidate patents at an early stage of litigation, such as at the motion to dismiss stage, on a record with very little or no evidence other than the patent document itself. Moreover, the uncertainty surrounding the scope of the “judicial exceptions” and the willingness of courts to invalidate seemingly concrete inventions as “abstract ideas,” has incentivized challenges based on patent eligibility. PERA would reign in the use of Section 101 as a blunt instrument against patents, and would require patent eligibility determinations to be made on a more precise basis.

#### 4. Courts don’t solve climate change

Goho et al. 24 (Shaun Goho, Frank Sturges, Veronica Saltzman, and Mary Sasso, writers for the Clean Air Task Force. “Advocating for climate and clean air rules after a Supreme Court power grab” 7/15/2024. Accessed 7/15/2024. <https://www.catf.us/2024/07/advocating-climate-clean-air-rules-after-supreme-court-power-grab/>) wtk

In the final week of its term, the Supreme Court issued a string of decisions expressing remarkable hostility to federal regulatory agencies and public health protections. Of most immediate importance to public health, the Supreme Court blocked EPA’s Good Neighbor Rule — a regulation that protects downwind states from air pollution. In the longer term, though, this group of decisions builds on and accelerates recent trends in the Court’s decisions and, cumulatively, amounts to a sea change in entire fields of the law. The jarring ripple effects will be felt for years to come. In particular, these decisions:

* Carry out a massive judicial power grab that takes decisions out of the hands of subject matter experts and gives them to unelected and unaccountable judges;
* Destabilize environmental regulation by making it more likely that different courts will reach conflicting decisions, that previously settled questions of law will be reopened, and that judges will overturn agency actions based on their own policy preferences; and
* Demonstrate a striking distrust of environmental regulation and agency expertise more generally.

#### 5. No impact—climate change won’t cause extinction—we can adapt and the negative impacts are overplayed

Mark **Bucknam 23**, professor and the Director of Research and Writing at the National War College, Ph.D. from King’s College London, 3/10/2023, “Climate Change and National Security,” *Comparative Strategy*, Vol. 42, Issue 2, pp. 187-226, https://doi.org/10.1080/01495933.2023.2182108

Evidence of a Non-crisis

**One** of the main **reason**s the **science remains unsettled** and that more and more scientists appear comfortable bucking the prevailing narrative **is the failure of** the **observed climate to conform to so many** dire **projections**. For more than three decades, **a chorus of** environmentalists, geologists, and climate **scientists have warned** that **mounting levels of greenhouse gases** in Earth’s atmosphere **were leading to extreme weather** events, including more numerous and more severe hurricanes, more numerous and extreme tornadoes, more frequent and intense heatwaves, more continuous and ferocious wildfires, more widespread droughts and floods, and more rapidly melting glaciers and rising sea levels. Fortunately, **the reality of all** these **weather-related events is far from alarming**, notwithstanding what one might hear on the nightly news or read in newspapers. As Dr. Koonin explains in Unsettled, “**record high temperatures** in the US— **they’re no more common today than** they were **in 1900**,” nearly **a century’s worth of observations shows “human influences haven’t caused** any observable **changes in hurricanes**,” “the global **area burned by fires** each year **has declined** by 25 percent **since** observations began in **1998**,” and while “**sea levels**…have been rising over the past many millennia…the current **rate** of rise (about **one foot per century**)…**explain[s] why it’s very hard to believe** that surging **seas will drown the coast any time soon**.”26 When discussing these claims, Koonin is careful to note: “**Those statements are** not my science. They’re not my spin on the science. They’re **what’s** there **in the [IPCC and US government] reports**, although sometimes buried and you’ve got to read them carefully.”27 And, citing the work of Yale’s Nobel Prize winning climate economist William Nordhaus, **even if** global **temperatures were to go up 6 degrees** Centigrade by the year 2100—four times the target limit sought under the Paris Climate Accord and an added fivefold increase above the 1 degree Centigrade increase since the mid-1800s—the **impact on US** and global GDP **would be** on the order of a few percent—**hardly a catastrophe**.28

While Koonin may be the latest, most prestigious, and impeccably credentialed scientist to point to the gaping discrepancies between terrifying claims and the unalarming physical record, he is far from being the only respected scientist or expert to call out these inaccuracies.29 **Other researchers and commentators** such as Bjorn Lomborg, and Alex Epstein **point to the stunning worldwide drop in deaths caused by severe weather**—99 percent over the past century.30 The more detached from reality the claims of climate crisis have become, the more that contrarian experts are speaking up, even though their well-founded skepticism risks their being branded as “deniers.”31 Predictions of climate catastrophe due to human greenhouse gas emissions have been made for nearly 35 years, and yet **Earth’s climate stubbornly refuses to lend evidence of a “climate crisis” or the “existential risk”** claimed in the Biden administration’s Interim National Security Strategic Guidance and 2022 National Security Strategy. 32 The **scary projections are always based on models, not observed trends** in the climate, **and those models have proven unreliable**.33

**Contrary to the** prevailing **narrative of climate doom, Earth’s warming is mild and** largely **beneficial—mostly moderating cold temperatures** in northernmost latitudes and at night; **there are no climate-caused dangerous trends in global weather** such as hurricanes, droughts, floods, or wildfires; **human deaths attributed to extreme weather events have declined over 99 percent** over the past century; increasing levels of CO2 are a net positive—enabling photosynthesis using less water and greening the planet; **coral reefs are not threatened by warming** or increased CO2; **polar bear populations are increasing; the** Antarctic **ice sheet is growing**; the IPCC says the Greenland ice sheet under all scenarios would take centuries if not millennia to melt; the Arctic will remain decidedly frozen in winter even if it becomes ice-free in summer—a phenomenon that would have almost no impact on sea levels as Arctic ice is already floating on the ocean; with some natural variation, **sea levels continue to rise at the same slow rate as they have for 5,000 years**—less than **a foot per century**; the **oceans** are and **will remain markedly alkaline**— burning all of the coal, oil, and natural gas on Earth would not change that—and studies show **marine life adapts well** to changes in pH; and, finally, **there is no evidence of mass species die-offs or a** coming great **extinction**. These claims are so starkly counter to what everyone “knows” that it would take a book or several books to explain and document their veracity. Fortunately, such books have been written by scientists and researchers who understand that Earth’s climate is constantly changing and who acknowledge the planet has warmed just over 1 degree Centigrade over the past 170 years and that CO2 and other human produced greenhouse gases contributed something to that warming. These are serious, intelligent people who have studied the evidence and cannot be dismissed as "deniers.” **The enormous gap between the unscary reality of climate change and** the **dire statements and radical**, multi-trillion-dollar **policies** of those pushing **to “fix” the climate has led critics of** the **climate hype to brand it as dishonest, unscientific, and immoral**.34

### 2ac vs court clog da—copyright

#### 1. Non-unique—the courts will hear a tsunami of lawsuits about regulations now

Katz 24 (Eric Katz, Senior Correspondent for Government Executive. “Will recent Supreme Court rulings 'devastate the functioning of the federal government?'” 7/1/2024. Accessed 7/11/2024. <https://www.govexec.com/management/2024/07/will-recent-supreme-court-rulings-devastate-functioning-federal-government/397795/>) wtk

Last week, the court overturned the precedent known as Chevron deference, which said broadly that courts must defer to agencies when interpreting ambiguous statutory language. In Relentless and Loper Bright v. Commerce Department, the court ruled in a 6-3 decision—the same tally in all three of the recent rulings—that the judiciary, not federal agencies, should resolve questions of law according to their own judgment. In Jarkesy v. Securities and Exchange Commission, it ruled that agencies issuing civil penalties should defend those decisions in federal court rather than solely in in-house tribunals.

The court dealt yet another blow to federal agencies on Monday, deciding in Corner Post v. Federal Reserve that it must strike down the existing six-year statute of limitations to sue the government over a rule. Instead, the court said, the clock starts whenever a party can claim to suffer an injury as a result of an agency-issued rule. In this case, a truck stop in North Dakota challenged a cap on debit-card processing fee issues by the Federal Reserve.

Like the other cases, the fallout from Corner Post is likely to be widespread: agencies will see no time limit on the challenges they face from their rules and regulations. Any regulated party can sue at virtually any time, leaving agencies to constantly defend themselves in court even decades after issuing a rule.

In her dissent, Associate Justice Ketanji Brown Jackson warned of the consequences, particularly when taken in conjunction with the court’s other recent decisions.

“At the end of a momentous term, this much is clear: the tsunami of lawsuits against agencies that the court’s holdings in this case and Loper Bright have authorized has the potential to devastate the functioning of the federal government,” Jackson wrote. “That result simply cannot be what Congress intended when it enacted legislation that stood up and funded federal agencies and vested them with authority to set the ground rules for the individuals and entities that participate in…our economy and our society.”

Bridget Dooling, a law professor at Ohio State University who served for 10 years in the White House's Office of Information and Regulatory Affairs, including as its deputy chief, said the cumulative impact of the decisions could open the floodgates of new litigation against federal agencies.

“Now it is open season on the regulatory state,” Dooling said.

#### 2. Non-unique and turn—copyright suits will flood the courts now, but the plan provides legal clarity which prevents court clog

Coffey and Smith 23 (Danielle Coffey, President and CEO of News/Media Alliance. Regan Smith, Senior Vice President and General Counsel for News/Media Alliance. “Artificial Intelligence and Copyright” Comments of the News/Media Alliance before the U.S. Copyright Office. Docket No. 2023–6. 10/30/2023. Accessed 5/21/2024. <http://www.newsmediaalliance.org/wp-content/uploads/2023/10/Final-NMA-USCO-AI-NOI-Response-Submitted-10.30.23.pdf>) wtk

*Use*: The Office should clarify publicly that use of publishers' expressive content for commercial generative AI training and development is likely to compete with and harm publisher businesses, which is disfavored as a fair use. This conclusion follows naturally from existing case law, as discussed below. But such clarification would nonetheless be helpful now, to reduce uncertainty that may arise as multiple lawsuits progress through different district courts and circuits, and help the affected industries and policymakers move towards a clearer consensus on the existing law. It would also help avoid the need for litigation by incentivizing GAI companies to reach fair and negotiated agreements that compensate publishers for the past and ongoing use of their content. While the Office may prefer to weigh in on specific litigation directly in a judicial setting, the constellation of litigation matters that has and will continue to emerge may benefit from the Office’s broad guidance on common issues and themes. The Office has historically played such a useful role in providing guidance to the public, Congress, and affected industries in similar contexts.34 It should do so here, to reduce an extended period of uncertainty that may create a cloud on generative AI products, as well as the economic viability of publishers, journalists and authors, while various litigations proceed, potentially through protracted appeals.

#### 3. Courts don’t solve climate change

Goho et al. 24 (Shaun Goho, Frank Sturges, Veronica Saltzman, and Mary Sasso, writers for the Clean Air Task Force. “Advocating for climate and clean air rules after a Supreme Court power grab” 7/15/2024. Accessed 7/15/2024. <https://www.catf.us/2024/07/advocating-climate-clean-air-rules-after-supreme-court-power-grab/>) wtk

In the final week of its term, the Supreme Court issued a string of decisions expressing remarkable hostility to federal regulatory agencies and public health protections. Of most immediate importance to public health, the Supreme Court blocked EPA’s Good Neighbor Rule — a regulation that protects downwind states from air pollution. In the longer term, though, this group of decisions builds on and accelerates recent trends in the Court’s decisions and, cumulatively, amounts to a sea change in entire fields of the law. The jarring ripple effects will be felt for years to come. In particular, these decisions:

* Carry out a massive judicial power grab that takes decisions out of the hands of subject matter experts and gives them to unelected and unaccountable judges;
* Destabilize environmental regulation by making it more likely that different courts will reach conflicting decisions, that previously settled questions of law will be reopened, and that judges will overturn agency actions based on their own policy preferences; and
* Demonstrate a striking distrust of environmental regulation and agency expertise more generally.

#### 4. No impact—climate change won’t cause extinction—we can adapt and the negative impacts are overplayed

Mark **Bucknam 23**, professor and the Director of Research and Writing at the National War College, Ph.D. from King’s College London, 3/10/2023, “Climate Change and National Security,” *Comparative Strategy*, Vol. 42, Issue 2, pp. 187-226, https://doi.org/10.1080/01495933.2023.2182108

Evidence of a Non-crisis

**One** of the main **reason**s the **science remains unsettled** and that more and more scientists appear comfortable bucking the prevailing narrative **is the failure of** the **observed climate to conform to so many** dire **projections**. For more than three decades, **a chorus of** environmentalists, geologists, and climate **scientists have warned** that **mounting levels of greenhouse gases** in Earth’s atmosphere **were leading to extreme weather** events, including more numerous and more severe hurricanes, more numerous and extreme tornadoes, more frequent and intense heatwaves, more continuous and ferocious wildfires, more widespread droughts and floods, and more rapidly melting glaciers and rising sea levels. Fortunately, **the reality of all** these **weather-related events is far from alarming**, notwithstanding what one might hear on the nightly news or read in newspapers. As Dr. Koonin explains in Unsettled, “**record high temperatures** in the US— **they’re no more common today than** they were **in 1900**,” nearly **a century’s worth of observations shows “human influences haven’t caused** any observable **changes in hurricanes**,” “the global **area burned by fires** each year **has declined** by 25 percent **since** observations began in **1998**,” and while “**sea levels**…have been rising over the past many millennia…the current **rate** of rise (about **one foot per century**)…**explain[s] why it’s very hard to believe** that surging **seas will drown the coast any time soon**.”26 When discussing these claims, Koonin is careful to note: “**Those statements are** not my science. They’re not my spin on the science. They’re **what’s** there **in the [IPCC and US government] reports**, although sometimes buried and you’ve got to read them carefully.”27 And, citing the work of Yale’s Nobel Prize winning climate economist William Nordhaus, **even if** global **temperatures were to go up 6 degrees** Centigrade by the year 2100—four times the target limit sought under the Paris Climate Accord and an added fivefold increase above the 1 degree Centigrade increase since the mid-1800s—the **impact on US** and global GDP **would be** on the order of a few percent—**hardly a catastrophe**.28

While Koonin may be the latest, most prestigious, and impeccably credentialed scientist to point to the gaping discrepancies between terrifying claims and the unalarming physical record, he is far from being the only respected scientist or expert to call out these inaccuracies.29 **Other researchers and commentators** such as Bjorn Lomborg, and Alex Epstein **point to the stunning worldwide drop in deaths caused by severe weather**—99 percent over the past century.30 The more detached from reality the claims of climate crisis have become, the more that contrarian experts are speaking up, even though their well-founded skepticism risks their being branded as “deniers.”31 Predictions of climate catastrophe due to human greenhouse gas emissions have been made for nearly 35 years, and yet **Earth’s climate stubbornly refuses to lend evidence of a “climate crisis” or the “existential risk”** claimed in the Biden administration’s Interim National Security Strategic Guidance and 2022 National Security Strategy. 32 The **scary projections are always based on models, not observed trends** in the climate, **and those models have proven unreliable**.33

**Contrary to the** prevailing **narrative of climate doom, Earth’s warming is mild and** largely **beneficial—mostly moderating cold temperatures** in northernmost latitudes and at night; **there are no climate-caused dangerous trends in global weather** such as hurricanes, droughts, floods, or wildfires; **human deaths attributed to extreme weather events have declined over 99 percent** over the past century; increasing levels of CO2 are a net positive—enabling photosynthesis using less water and greening the planet; **coral reefs are not threatened by warming** or increased CO2; **polar bear populations are increasing; the** Antarctic **ice sheet is growing**; the IPCC says the Greenland ice sheet under all scenarios would take centuries if not millennia to melt; the Arctic will remain decidedly frozen in winter even if it becomes ice-free in summer—a phenomenon that would have almost no impact on sea levels as Arctic ice is already floating on the ocean; with some natural variation, **sea levels continue to rise at the same slow rate as they have for 5,000 years**—less than **a foot per century**; the **oceans** are and **will remain markedly alkaline**— burning all of the coal, oil, and natural gas on Earth would not change that—and studies show **marine life adapts well** to changes in pH; and, finally, **there is no evidence of mass species die-offs or a** coming great **extinction**. These claims are so starkly counter to what everyone “knows” that it would take a book or several books to explain and document their veracity. Fortunately, such books have been written by scientists and researchers who understand that Earth’s climate is constantly changing and who acknowledge the planet has warmed just over 1 degree Centigrade over the past 170 years and that CO2 and other human produced greenhouse gases contributed something to that warming. These are serious, intelligent people who have studied the evidence and cannot be dismissed as "deniers.” **The enormous gap between the unscary reality of climate change and** the **dire statements and radical**, multi-trillion-dollar **policies** of those pushing **to “fix” the climate has led critics of** the **climate hype to brand it as dishonest, unscientific, and immoral**.34

### 2ac vs court clog da—trademark

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#### 2. Non-unique—SAD lawsuits are flooding the courts with trademark enforcement now and targeting small sellers

Ina Steiner, 2023 – co-founder and Editor of EcommerceBytes “Small Sellers Are Getting Swept Up as Brands ‘Weaponize’ the Legal System” ECommerceBytes, 7/16, <https://www.ecommercebytes.com/2023/07/16/small-sellers-are-getting-swept-up-as-brands-weaponize-the-legal-system/> //DH

Law firms are increasingly using a tactic called “Schedule A Defendant” lawsuits to target online merchants on behalf of their clients in the name of trademark enforcement, and it’s having a devastating effect. A single lawsuit targeting hundreds of sellers at a time for selling a branded product can leave each seller owing many tens of thousands of dollars through default judgments that obliterate their businesses.

Law professor Eric Goldman wrote about what he dubbed SAD Schemes (“Schedule A Defendants” schemes) after being retained to opine in one such case in 2021. It led him to look at such cases holistically, and he told us he was shocked by what he saw.

“I saw so many places where the procedures and outcomes just didn’t comport with the law as I understood it,” he told EcommerceBytes in a telephone interview on July 14. “And I couldn’t understand how that kept replicating. It wasn’t like a one-off mistake. It was a systematic sequence of errors that the courts were producing. And when I give the presentation on my paper, the audiences are shocked.”

Most sellers are familiar with programs like eBay’s VeRO, set up to efficiently handle takedown notices by brands who report specific listings as being in violation of their intellectual property. The SAD Schemes bypass such marketplace programs – instead, the brands (“rightsowners”) sue scores of sellers in a single complaint in federal court, accusing them of trademark infringement and counterfeiting.

In an article in April, Bloomberg Law reported that the US District Court for the Northern District of Illinois had received 817 Schedule A filings in 2022, an increase of over 900% from 2013, when the first Schedule A cases were filed.

The SAD lawsuits seek fast injunctions against defendants who don’t immediately know they’re being sued because judges are granting the plaintiffs’ requests that defendant lists be sealed.

#### 3. The plan reduces court clog—l**ack of platform liability means brands seek injunctive relief**

Brian J. Winterfeldt, 2021 - Counsel to the Global Brand Owner and Consumer Protection Coalition. Comment submitted to the US Patent and Trademark Office, “RE: Secondary Trademark Infringement Liability in the E-Commerce Setting” 1/25, <https://www.regulations.gov/comment/PTO-T-2020-0035-0022> //DH

2. Have you pursued or defended secondary trademark infringement claims against an e-commerce platform, online third-party marketplace, or other online third-party intermediary where the claim was that the intermediary facilitated the sale of counterfeit goods, including counterfeit goods offered by a third-party seller? If so, what challenges did you face in pursuing or defending these claims under a secondary infringement theory, and what was the result?

We have not directly pursued such claims against e-commerce platforms, in light of the high bar for prevailing under the Tiffany standard. Because of this, we generally advise members and clients to consider pursuing no-fault injunctive relief through which the platform or other third parties (such as payment processors) will shut down seller accounts and any assets they control in relation to counterfeit or other infringing goods.

3. If you have chosen not to pursue a potential claim or defend against a claim for secondary trademark infringement against an e-commerce platform, online third-party marketplace, or other online third-party intermediary for reasons related to the current interpretation of the doctrine of secondary infringement, please explain how your decision-making was affected by the state of the law and how a different interpretation might have led to a different decision.

See our response above. Because the bar under Tiffany for prevailing in secondary infringement claims against platforms is so high, many brand owners, including our members, have been deterred from bringing liability claims against online platforms for the sale of counterfeit goods by third parties. Instead, most suits are brought against individual sellers seeking injunctive relief and damages, if the seller is subject to US jurisdiction. If the seller is not subject to US jurisdiction, adequate relief is generally beyond reach for most brand owners. Even if some limited relief is achieved, most bad actors will simply resume their activities through alternative pseudonyms leading to an endless game of whack-a-mole.

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## 1ar materials

### \*\*\*uniqueness\*\*\*

### 1ar court clog now

#### The courts are clogged now—there is still a backlog from Covid

Fellner and Nolan 24 (Gary M. Fellner is a principal in the New York office of Porzio, Bromberg & Newman, where he concentrates his practice on commercial litigation and business-related controversies. Caitlin M. Nolan is counsel in the firm’s New York office, where she focuses her practice on commercial litigation and directors and officers liability. “A Rearview Look at the Pandemic” 2/9/2024. Accessed 7/11/2024. <https://www.law.com/newyorklawjournal/2024/02/09/a-rearview-look-at-the-pandemic/?slreturn=20240611190147>) wtk

Many courts are now more strained than before COVID-19 struck. Courts struggled, especially during the height of the pandemic, to manage growing caseloads and bring cases to conclusion. A backlog resulted, and much of that persists. Many cases take longer to get to trial and, justice delayed is justice denied.

#### And more cases will come in the future because the court overturned Chevron

Steyer 24 (Robert Steyer, Robert Steyer is reporter for Pensions & Investments, a sibling publication of Crain Currency. “How the Supreme Court's Chevron deference ruling expands judges' roles” 7/2/2024. <https://www.craincurrency.com/compliance-legal-and-regulation/litigation-floodgates-expected-open-how-supreme-courts-chevron>) wtk

As a result of the Supreme Court ruling, "I think it could lead to more litigation and also change the nature of existing litigation," Santos said. "These decisions could very much encourage companies to challenge more agency interpretations."

The overturning of Chevron deference "might also embolden plaintiffs to sue using more aggressive interpretations of a statute than interpretations that have been adopted by the Department of

### \*\*\*patent specific answers\*\*\*

### 1ar patent litigation high

#### Uncertainty generates a flood of bad-faith litigation

Paul Michel et al, 2022 – former Chief Judge for the Federal Circuit Court of Appeals. “Presenting the Evidence for Patent Eligibility Reform: Part IV – Uncertainty is Burdening Litigants and Courts, Threatening U.S. Competitiveness and National Security” IP Watchdog, 10/26, <https://ipwatchdog.com/2022/10/26/presenting-evidence-patent-eligibility-reform-part-iv-uncertainty-burdening-litigants-courts-threatening-u-s-competitiveness-national-security/id=152341/> //DH

The current unreliability of patent-eligibility law, documented thus far here, here and here, has also created undue burdens on litigants and the courts. In this final installment, we detail how the current unreliability burdens litigants and the courts and how it is a fundamental threat to U.S. competitiveness and national security.

Patent infringers now routinely raise Section 101 as a defense, often merely as a strategy to complicate and prolong the litigation, rather than as a good-faith defense with a likelihood of success. For example, one analysis found that, from 2012 to 2014 (when Alice was decided), Section 101 was raised in just two Rule 12(b)(6) motions across the country each year. In the year after Alice, that number rose to 36 motions, and by 2019, accused infringers were filing over 100 such motions each year.

Moreover, while the success rate of these motions skyrocketed in the first years after Alice—illustrating Alice’s impact on granted patent rights—by 2019, the percentage of such motions granted was only 38%. Thus, almost two-thirds of all such 12(b)(6) motions accomplished little more than imposing time and expense on patent owners trying to vindicate their patent rights.

Another analysis similarly found that, in the 30 months prior to Alice, district courts had entertained 20 Section 101 motions to dismiss. Between June 19, 2014, and July 31, 2018, that number totaled 365 decisions on these types of motions—representing a 1,725% increase.

As another indication of the burdens that post-Mayo/Alice Section 101 is imposing on litigants and courts, the District of Delaware—one of the busiest patent dockets in the country—has established dedicated “Section 101 days” to deal with a docket that has “become flooded with legal briefs arguing that a patent covers ineligible material.”

#### Uncertainty incentivizes litigation floods and forum shopping

Matthew DelGiorno, 2021 – IP attorney, President of Dominion Harbor Group, “COMMENTS OF DOMINION HARBOR GROUP, LLC

IN SUPPORT OF PATENT ELIGIBILITY JURISPRUDENCE STUDY” 10/8, <https://downloads.regulations.gov/PTO-P-2021-0032-0081/attachment_1.pdf> //DH

B. Eligibility Uncertainty Incentivizes Litigation

The uncertainty of Section 101 law has led to an explosion of companies accused of infringement “taking their shot” at having patents declared ineligible. Over 1,100 eligibility motions have been filed since Alice, compared with a mere handful in the years prior.7

The Federal Circuit has incentivized companies to litigate the issue by allowing district court judges to decide eligibility at the outset of a case under Fed. R. Civ. P. 12. At this early stage, no discovery has been taken (despite eligibility purportedly turning on underlying factual issues8), allowing judges to invalidate patents based on implicit, untested “findings of fact.”9 The cost of preparing a motion to dismiss at this stage is insignificant given the 40% chance to successfully render the patent ineligible.

The same uncertainty that fuels eligibility-related litigation also fuels inefficient ancillary tactics, like forum shopping. If the test for eligibility was well-defined, it would matter little where the dispute was heard. Because it is not, a particular court’s interpretation of the test is important. At the time of a 2019 study, the Southern District of New York and the Eastern District of Virginia granted more than 80% of eligibility challenges, while the Eastern and Western Districts of Texas granted less than half.10 Parties jockey over declaratory judgment jurisdiction, personal jurisdiction, and forum non conveniens transfers to secure an interpretation of Alice to their liking.

### \*\*\*copyright specific answers\*\*\*

### 1ar copyright litigation high

#### There’s only a risk of the turn—unlicensed use creates serial lawsuits

Chertkof 23 (Susan B. Chertkof is the Senior Vice President, Business and Legal Affairs for the Recording Industry Association of America (RIAA). “Artificial Intelligence and Copyright: Comments of the American Association of Independent Music and Recording Industry Association of America, Inc.” Before the United States Copyright Office. 10/30/2023. Accessed 5/25/2024 from [https://www.regulations.gov/comment/COLC-2023-0006-8833) wtk](https://www.regulations.gov/comment/COLC-2023-0006-8833)wtk)

When considering economic impacts, a better question to ask is what would be the economic impacts of a market built on piracy and infringement?93 Without licenses in place, AI developers would face serial lawsuits from content owners large and small, requiring large outlays of money for outside lawyers and large outlays of time for in-house staff. This is not conjecture – consider the number of lawsuits that already have been filed since ChatGPT burst into popular view in early 2023. 94 Moreover, in an unlicensed world, product development will be driven by defensive legal strategies, rather than by creative and entrepreneurial ideas.

#### It's already happening

Kupferschmid 23 (Keith Kupferscmid, CEO of the Copyright Alliance, “Artificial Intelligence and Copyright: Comments of the Copyright Alliance” comment before the U.S. Copyright Office. 10/30/2023. Accessed 5/25/2024 from https://www.regulations.gov/comment/COLC-2023-0006-8935) wtk

First of all, this question should ask the inverse: What would be the economic impacts of not requiring licensing on the creative community? The way the question is phrased implies that a “licensing requirement” is something that is being considered, when it is already the law (again, absent a clear exception or fair use defense). The answer to the inverse is that it would completely undermine existing and potential markets and cause immeasurable harm to copyright owners. Further, in the absence of licensing, there will be (and already is) considerable litigation, which is expensive, time-consuming and diverts attention away from AI development and the creation of copyrighted works.

### 1ar plan reduces court clog

#### Licensing creates partnership between authors and ai developers—that prevents litigation

Nunwick 24 (Alice Nunwick, Technology Reporter for GlobalData Media. “Analysis: Can licensing deals save OpenAI from future copyright lawsuits?” 5/3/2024. Accessed 5/14/2024. <https://www.verdict.co.uk/analysis-can-licensing-deals-save-openai-from-future-copyright-lawsuits/>) wtk

OpenAI’s copyright lawsuits required the start-up to take data transparency seriously, and it has since signed numerous licensing deals with major news publishers such as the Associated Press, Le Monde and Prisa Media.

While these deals give OpenAI access to a large variety of long-form text to train ChatGPT, graduate analyst at GlobalData Emma Christy explained the symbiotic nature of licensing journalists’ work.

“Licensing partnerships between AI developers and news publishers, such as that between the Financial Times and OpenAI, can only be positive for the future of AI chatbots and AI ethics,” said Christy.

“It is important that news publishers are renumerated fairly by AI developers for the use of their materials,” she added.

“Access to real-time, high-quality news articles for training will in turn ensure chatbots are trained on reliable sources. Such partnerships, both now and in the future, will help to reduce both lawsuits and friction in integrating AI across industries,” Christy said.

#### The aff removes the threat of litigation

Wolff 23 (Nancy E. Wolff, Counsel to the Digital Media Licensing Association, “Artificial Intelligence and Copyright” comments by Digital Media Licensing Association before the United States Copyright Office. 10/30/2023. Accessed 5/25/2024 from https://www.regulations.gov/comment/COLC-2023-0006-8742) wtk

Moreover, requiring and abiding by licensing practices in this context will actually better facilitate the development of AI systems, considering the removal of the threat of litigation, which—as we are seeing across the many current active AI infringement cases—does more to halt this technology and drain its developers’ resources than licensing requirements could.

#### And insulates companies from legal risk

Kupferschmid 23 (Keith Kupferscmid, CEO of the Copyright Alliance, “Artificial Intelligence and Copyright: Comments of the Copyright Alliance” comment before the U.S. Copyright Office. 10/30/2023. Accessed 5/25/2024 from https://www.regulations.gov/comment/COLC-2023-0006-8935) wtk

* As noted above in our discussion of the benefits of voluntary licensing, while there are examples of AI companies that are directly entering into licensing agreements with (and thereby compensating) copyright owners for the ingestion of their works, unfortunately, so far, many AI companies have been slow or unwilling to license works from creators and the vast majority of works ingested from copyright owners of all types have not yet been licensed. The voluntary licensing of works for AI use can bring creators much needed additional compensation, and it can insulate AI companies from the risk of expensive and time-consuming litigation.

### \*\*\*trademark specific answers\*\*\*

### 1ar trademark litigation high

#### SAD lawsuits will end small sellers

Ina Steiner, 2023 – co-founder and Editor of EcommerceBytes “Small Sellers Are Getting Swept Up as Brands ‘Weaponize’ the Legal System” ECommerceBytes, 7/16, <https://www.ecommercebytes.com/2023/07/16/small-sellers-are-getting-swept-up-as-brands-weaponize-the-legal-system/> //DH

But lawsuits are very different from marketplace takedowns through programs such as VeRO – and SAD Scheme lawsuits are in a league of their own.

Professor Goldman called them in his draft paper, “an underreported system of abusive intellectual property (“IP”) litigation” and outlined an eight-step protocol plaintiffs use in the schemes. “The complaint will contain sparse factual assertions, none particularized to any defendant,” he wrote, and, “The complaint’s generic prose makes it easy to clone-and-revise for subsequent cases.”

In 2022, Goldman conducted research and identified 3,217 cases that met his criteria for a SAD lawsuit. Over 88% were filed in the Northern District of Illinois, with the Southern District of Florida next at (7.5%). We also found numerous SAD Schemes lawsuits filed in the Southern District of New York.

Goldman has been blogging about IP issues and Internet law on the Technology & Marketing Law blog for the past 18 years and is Associate Dean for Research and co-director of the High Tech Law Institute at Santa Clara University School of Law, to mention a few of his many credentials.

But he’s no ivory-tower dweller and appears genuinely distraught over the plight of online sellers at the hands of rightsowners who, in his words, weaponize the legal system.

When we mentioned the stress casual sellers were experiencing compared to larger sellers – one of the sellers who contacted us said he was having panic attacks – Goldman said small businesses have an extraordinary amount of stress too, because they’re literally out of business. “The casual seller you mention has got a very unfortunate sword hanging over their head. But for the people who are trying to run a business, who have payroll, who have mortgages, who have vendors to pay – when they get their accounts freeze and the cash freeze, all of that becomes at risk.”

That said, rightsowners are not going after the big players who are likely to fight back, they’re going after the small players who have no real means of defending themselves, according to Professor Goldman.

#### SAD suits cause court clog

Bea Swedlow and David Roulo, 2023 - Bea Swedlow is a partner and David Roulo is an associate at Honigman LLP“Concerns Emerging On TM Cases Against Undisclosed Parties” Law360 Expert Analysis - Corporate, 6/21, Nexis Uni, accessed via University of Michigan //DH

Given the debatable success of these cases in curbing counterfeiting, courts and Congress could view Schedule A suits as a drain on judicial resources. Prior to 2012, the Northern District of Illinois saw an average of 150 trademark cases a year. Now the average is well over 700, with almost 90% being Schedule A cases.

As this phenomenon spreads to other jurisdictions, the current pace and volume could become unsustainable. As such, Congress may need to consider a legislative solution that has the dual effect of combating counterfeits and preserving judicial resources. It could look to patent law for guidance.

### \*\*\*climate change answers\*\*\*

### 1ar courts don’t solve climate change

#### The courts are part of an attack against climate change regulation

Davenport 24 (Coral, reporter covering energy and environmental policy, with a focus on climate change, for The New York Times. “Republican Drive to Tilt Courts Against Climate Action Reaches a Crucial Moment” last updated 2/2/2024. Accessed 7/15/2024. <https://www.nytimes.com/2022/06/19/climate/supreme-court-climate-epa.html>) wtk

The case, West Virginia v. Environmental Protection Agency, is the product of a coordinated, multiyear strategy by Republican attorneys general, conservative legal activists and their funders, several with ties to the oil and coal industries, to use the judicial system to rewrite environmental law, weakening the executive branch’s ability to tackle global warming.

Coming up through the federal courts are more climate cases, some featuring novel legal arguments, each carefully selected for its potential to block the government’s ability to regulate industries and businesses that produce greenhouse gases.

“The West Virginia vs. E.P.A. case is unusual, but it’s emblematic of the bigger picture. A.G.s are willing to use these unusual strategies more,” said Paul Nolette, a professor of political science at Marquette University who has studied state attorneys general. “And the strategies are becoming more and more sophisticated.”

The plaintiffs want to hem in what they call the administrative state, the E.P.A. and other federal agencies that set rules and regulations that affect the American economy. That should be the role of Congress, which is more accountable to voters, said Jeff Landry, the Louisiana attorney general and one of the leaders of the Republican group bringing the lawsuits.

But Congress has barely addressed the issue of climate change. Instead, for decades it has delegated authority to the agencies because it lacks the expertise possessed by the specialists who write complicated rules and regulations and who can respond quickly to changing science, particularly when Capitol Hill is gridlocked.

West Virginia v. E.P.A., No. 20–1530 on the court docket, is also notable for the tangle of connections between the plaintiffs and the Supreme Court justices who will decide their case. The Republican plaintiffs share many of the same donors behind efforts to nominate and confirm five of the Republicans on the bench — John G. Roberts, Samuel A. Alito Jr., Neil M. Gorsuch, Brett M. Kavanaugh and Amy Coney Barrett.

“It’s a pincer move,” said Lisa Graves, executive director of the progressive watchdog group True North Research and a former senior Justice Department official. “They are teeing up the attorneys to bring the litigation before the same judges that they handpicked.”

The pattern is repeated in other climate cases filed by the Republican attorneys general and now advancing through the lower courts: The plaintiffs are supported by the same network of conservative donors who helped former President Donald J. Trump place more than 200 federal judges, many now in position to rule on the climate cases in the coming year.

#### Court-created solutions increase warming—triggers carbon leakage and old technology lock-in which stifles renewables

Tribe 10 – Laurence H. Tribe, the Carl M. Loeb University Professor, Harvard Law School; Joshua D. Branson, J.D., Harvard Law School and NDT Champion, Northwestern University; and Tristan L. Duncan, Partner, Shook, Hardy & Bacon L.L.P., January 2010. (“TOOHOTFORCOURTSTO HANDLE: FUEL TEMPERATURES, GLOBAL WARMING, AND THE POLITICAL QUESTION DOCTRINE,” <http://www.wlf.org/Upload/legalstudies/workingpaper/012910Tribe_WP.pdf>)

The Second Circuit, in allowing the plaintiffs’ claim for an injunction to proceed, presumed that any reduction in carbon emissions, no matter how bluntly calibrated or poorly targeted, contributes in some measure, however small, to the overall project of reducing the long-term injurious consequences of climate change. That simply is not so. Wielding the sledgehammer of injunctive relief against arbitrarily selected groups of carbon emitters and producers is as likely to exacerbate as to ameliorate those injurious effects. For one thing, many climate change scholars have identified the phenomenon of “carbon leakage,” whereby poorly thought out carbon reductions in one section of the global economy result in increased emissions elsewhere, as fossil fuel price reductions, coupled with the tendency for global corporations to shift their bases of operations to avoid stringent regulation, spark rising energy consumption in other jurisdictions.38 Such leakage would exacerbate the injuries about which the plaintiffs complain since carbon emissions from non-defendants—even those halfway around the world—“cause” coastal erosion in exactly the same undifferentiated and attenuated manner as do carbon emissions from the defendants they have randomly targeted. Moreover, there are serious complexities involved in any process of carbon reduction, particularly with respect to the questions of how fast and how much. Slash emissions too fast or too far, and courts risk forcing industry to prematurely retire capital stock, “locking in” inferior technology as companies rush to innovate quickly enough to comply with short-term reduction requirements.39 Such a result would not only entail severe and irretrievable economic costs, but it would exacerbate the longrun harms of climate change by distorting the renewable energy market. On the other hand, slash emissions too little or too slowly, and courts do nothing to ameliorate climate change, while still shaping entitlements in a way that can only inhibit the emergence of any ultimate legislative solution.40 To ask a court to strike the right balance, given that even a stringent injunction will have no statistically significant impact on global temperatures, is to ask it to do the impossible.

### 1ar no climate change won’t cause extinction

#### We will be able to adapt to climate change

**Stewart 20**, Professor of Civil Engineering and Director of the Centre for Infrastructure Performance and Reliability at The University of Newcastle in Australia. (Mark G., 6-10-2020, "Climate Change and National Security: Balancing the Costs and Benefits", *Cato Institute*, https://www.cato.org/publications/climate-change-national-security-balancing-costs-benefits)

If **climate projections** are correct, a changing climate has the potential to cause sea levels to rise, floods, more intense storms and hurricanes, droughts, and other climate extremes. Such climate change would affect every nation, and populations in developing countries would be hit hardest. In the worst case, it would lead to energy and food scarcity, increase the spread of disease, cause mass migration of “climate refugees,” and weaken fragile governments. That is all alarming stuff. However, those effects **are often predicated on worst‐​case** (**and unlikely**) carbon dioxide (**CO2**) **emission scenarios and climate projections to 2100 and beyond**, **and they ignore technological innovations and adaptive behaviors**. This chapter focuses on climate change as a potential national security threat to the United States.1 Taking the projections as reality, Admiral Samuel J. Locklear III, commander of U.S. Pacific Command, contends that a significant upheaval related to the warming planet would “cripple the security environment” and is “probably more likely than the other scenarios we all often talk about.”2 Others claim that “climate change is becoming one of America’s most critical national security issues of the 21st century”3 or that “climate change represents a serious threat to the security and prosperity of the United States.”4 An open letter signed by 38 U.S. national security experts in 2013 states that climate change “presents a serious threat to American national security interests,”5 and a 2007 report by a military advisory board concludes that “climate change is a threat multiplier for instability in some of the most volatile regions of the world, and it presents significant national security challenges for the United States.”6 Not surprisingly, the 2010 Quadrennial Defense Review by the U.S. Department of Defense concludes that “climate change and energy will play significant roles in the future security environment” and highlights several specific climate threats to national security: Opening of new territorial waters in the Arctic; Regional instability caused by food and energy insecurity, and associated increases in refugees; Vulnerability of military installations to hurricanes, storms, floods, sea‐​level rise, and other climate change–induced hazards; and Increased use of military resources for humanitarian and largescale natural disaster missions.7 This chapter assesses such concerns. It estimates that those threats, should they materialize, could conceivably cost the U.S. government up to $20 billion per year. However, that cost would increase federal government outlays by no more than 0.5 percent, requiring an adjustment that is not very significant.8 For example, **climate and extreme weather threats to military installations** **within the U**nited **S**tates **can be readily handled by adaptation strategies, such as seawalls, improved infrastructure resilience, and—as a worst case**—**relocation of bases** **to less vulnerable locations**. The opening of the Arctic to shipping would require new icebreakers to patrol sea‐​lanes and investment in new infrastructure to support Arctic operations. And **future humanitarian missions might be better handled by civilian agencies, such as the United Nations, if properly resourced.** In addition, global warming has benefits that should be considered. For example, the anticipated opening of the Northwest Passage and other “trans‐​Arctic” waterways by 2030 would reduce shipping times between Europe and Asia by 50 percent while opening up the area to the exploitation of more than $1 trillion of hydrocarbon and mineral resources.9 **The U**nited **S**tates **has met many threats to its security in the past century**, **including two world wars** **and engagements in many parts of the globe**. If the direst predictions are proved correct, climate change will adversely affect many facets of life in the United States—“business as usual” may not be an option, and climate change will require a whole‐​of‐​government response that will surely present challenges to the United States and its allies. However, **to call it a “security threat” is excessive**. And to keep matters in perspective, **few** **if any analysts believe that climate change constitutes an existential threat** to the United States. The very existence of some small island nations could be threatened by rising sea levels, but **the U**nited **S**tates **is a large country with significant resources and adaptive capacity. It has proved to be a highly resilient nation, and it is reasonable to expect that** admirable **national trait to continue**.