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Supreme Court Justice Nomination
What Originalist Viewpoints May Mean for Patent Law

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Special to the Legal

The landscape for patent law has changed more quickly over the last five years than it had in preceding decades. The America Invents Act, which was enacted in September 2011, may be the most comprehensive and significant change to patent law in decades, and recent case law appears to be accelerating changes. For example, *Mayo Collaborative Services. v. Prometheus Labs*, 566 U.S. 66 (2012), changed how patent-eligible subject matter is determined and what currently is patentable eligible. *Alice v. CLS Bank International*, 134 S. Ct. 2347 (2014), dramatically changed the landscape for software and internet based technology patents and the law on what is patent eligible subject matter.


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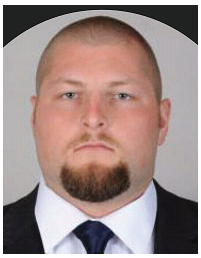
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Samsung v. Apple, 137 S. Ct. 429 (2016), is likely to dramatically change the landscape for damages in design patent infringement. Finally, *Life Technologies v. Promega*, 197 L.Ed.2d 33 (U.S. 2017), tests the limits of liability and the extra territorial reach of U.S. law for infringement abroad. These cases profoundly changed to the way courts and the U.S. Patent and Trademark Office treat patents and patent applications, in Article III courts and administrative agencies.

The U.S. Supreme Court will have ample opportunity, if it chooses, to revisit the issues that have been raised by these cases over the next few terms. The untimely loss of Justice Antonin Scalia makes predicting the direction of the Supreme Court, ever a challenge, even more difficult. With the recent nomination of Judge Neil Gorsuch, President Donald Trump made clear his intentions to fill Scalia's vacancy with a similarly minded jurist.

While it is difficult to determine how any potential Supreme Court nominee will rule in the Supreme

Court, such a prediction is compounded by the fact neither Gorsuch nor Scalia have written many decisions on intellectual property. The vastly different writing styles of the two men makes the analysis difficult. Gorsuch's style is very direct and methodical. He compares current facts to facts from previous cases and then methodically applies the applicable precedents. In contrast, Scalia's writings take the reader on a journey through his complete thought process, along with an explanation of how he applied various materials to the case at hand in order to reach his decision. In part, these differences can be attributed to the different review aspects of the Supreme Court verses a circuit court.

One common thread between them is that both of them are known as, or are considered to be "originalists." Scalia defined originalism by stating, "the constitution that I interpret and apply is not living but dead, or as I prefer to call it, enduring. It means today not what current society, much less the court, thinks it ought to mean, but what it meant when it was adopted." While the idea of originalism is not prevalent in Gorsuch's written opinions, he has made his views clear in two recent speeches. In his nomination acceptance speech, Gorsuch paraphrased a Scalia quote, stating, "it is the role of judges to apply, not alter, the work of the people's representatives. A judge who likes every outcome he reaches is very likely a bad judge stretching for results he prefers rather than thought the law

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demands." Further, at a speech given at Case Western Reserve University in 2016 and in a related law review article, Gorsuch praised Scalia for his philosophy and spoke on how he tries to emulate Scalia's approach. "Respectfully, it seems to me an assiduous focus on text, structure and history is essential to the proper exercise of the judicial function. That, yes, judges should be in the business of declaring what the law is using the traditional tools of interpretation, rather than pronouncing the law as they might wish it to be in light of their own political views, always with an eye on the outcome ... ."

Even though their styles are different, there are some similarities in their writings. In Scalia's well-known opinion in *Printz v. United States*, 521 U.S. 898 (1997), he provides the reader with a glimpse into his mental process for approaching extremely difficult cases and arriving at a ruling he believes the "law demands." Throughout the opinion, he cites to numerous historical documents, including several of the Federalist Papers, in an attempt to determine whether the Constitution allows for the federal government to commandeer state officials for its purposes. In a similar manner, Gorsuch writes in his *Elwall* opinion, "In this case, those traditional tools of statutory construction—including a close examination of the text together with a careful review of the larger statutory structure, persuade us that Congress has spoken and spoken clearly," *Elwell v. Oklahoma ex rel. Board of Regents of the University of Oklahoma*, 693 F.3d 1303 (10th Cir. 2012). It is clear from this language that Gorsuch uses a similar decisional approach to Scalia.

Several cases regarding matters of federal pre-emption also evidence similarities between the two. In both *AT&T Mobility*, (by Scalia) and *Russo*, (by Gorsuch and

his only discoverable written case relating to patent law) the two jurists carefully analyze Congress' intent in creating a piece of legislation in an effort to determine whether it should pre-empt a state law (*AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011); *Russo v. Ballard Medical Products*, 550 F.3d 1004 (10th Cir. 2008). Both judges use substantially the same methodical approach of looking to both the text of the legislation and the intent of Congress' legislative history surrounding the particular legal area; the FAA and patent law, respectively.

The final element in this analysis relates to criminal law, particularly the Bill of Rights. In *Crawford v. Washington*, 541 U.S. 36 (2004), Scalia analyzes the Sixth Amendment's right to confront your accuser. In his extremely detailed, almost professorial style, Scalia analyzes the Sixth Amendment as well as the intended meaning of the text in order to make his determination. Similarly, in *Kerns v. Bader*, 663 F.3d 1173 (10th Cir. 2011), Gorsuch goes through an analysis as it relates to three different police officers and explains the Fourth Amendment issues under consideration. Gorsuch chose to first analyze the Fourth Amendment issues when he wrote, "we begin with Mr. Kerns's Fourth Amendment claim, because it provides the more 'explicit textual source of constitutional protection' against law enforcement searches." From both his public speeches and his opinions, it is clear that Gorsuch's originalist philosophy and his approach to case analysis and decision are very similar to Scalia's in many ways.

Scalia penned relatively few patent opinions during his Supreme Court tenure. However, two cases stand out as best displaying Scalia's mindset in determining a patent-related issue. First, in *Merck KGaA v. Integra Lifesciences I*, 545 U.S. 193 (2005), Scalia writes, " ... we think it apparent from the statutory text that Section 271(e)(1)'s exemption from infringement extends to all uses of patented inventions that are reasonably related to the development and submission of any information under the FDCA." In his dissent in *Commil USA v. Cisco Systems*, 135 S. Ct. 1920 (2015), Scalia writes, "ours is not a common-law court. We do not, or at least should not, create defenses to statutory liability ... . Our task is to interpret the Patent Act ... ." These two rulings reflect Scalia's belief that when it comes to patent law, he should only interpret the text as it was meant when written.

Of course, it is difficult, if not impossible, to predict how Gorsuch will rule on matters that will be put before him if his nomination is approved. From the evidence, however, it is clear from Gorsuch's written cases, but more so from his outside the court, unrestricted, speeches and writings, that Gorsuch and Scalia align in several key ways that make it plausible he will rule in a similarly manner as Scalia as proposed here.

Although there appear to be many similarities between Scalia and Gorsuch, the history of the Supreme Court is replete with nominates that did not respond to matters in the same way the nominating president expected. The Supreme Court hears only those cases it wants to hear and often narrows the issues to be briefed from what the litigants propose. Under a more limited review of more limited facts, a Gorsuch may decide an issue very differently that may have been predicted by the mere fact that he is filling Scalia's spot on the bench. The one thing that does seem to be clear from his writings and speeches is that he will approach his analysis from an "originalist" perspective, just like Scalia. •