Supreme Court of the United States. Photo by Sean Pavone Photo via Adobe Stock.

The End of *Chevron* Deference and Its Impact on Intellectual Property Law

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The U.S. Supreme Court's 2023–2024 term was marked by numerous high-profile decisions that generated significant discussion and commentary. One such decision was *Loper Bright Enterprises v. Raimondo*,[1] in which the Court expressly overruled its notorious 1984 decision, *Chevron, U.S.A., Inc. v. NRDC, Inc.*[2] The Court's decision means that it will no longer give so-called "*Chevron* deference" to federal agency interpretations of federal statutes. Almost every legal observer agrees that *Loper Bright* is likely to have far-reaching effects in agency enforcement and litigation contexts, particularly those involving politically sensitive subject matters.

But how will *Loper Bright* impact attorneys in the intellectual property ("IP") space? IP practitioners often find themselves enmeshed in legal disputes involving federal agencies such as the U.S. Patent and Trademark Office ("PTO"), including the Patent Trial and Appeal Board ("PTAB") and Trademark Trial and Appeal Board ("TTAB"), the U.S. Copyright Office, and the United States International Trade Commission ("ITC"). Practice before such agencies, for example, necessarily involves a labyrinth of agency regulations designed to implement federal statutes originally enacted by Congress. And the question always arises: is the agency's implementation of regulation faithful to the Congressional statute?

In the aftermath of *Loper Bright*, IP practitioners will have enhanced opportunities to challenge an agency's statutory interpretations in whatever form they are manifested. IP practitioners should be alert to these opportunities post-*Loper Bright*.

On the other hand, IP practitioners should recognize that—even years before *Loper Bright*—*Chevron* had been judicially criticized, limited, and avoided. Where courts did not agree with agency interpretations, courts were generally able to circumvent the deference to agencies that *Chevron* purported to require. Thus, it remains to be seen just how significant a role *Loper Bright* will play in the IP arena from a practical standpoint.

The Birth of *Chevron* Deference

As every first-year law student learns, since the beginning of our Republic, it has been, "emphatically the province and duty of the judicial department to say what the law is."[3] In *Chevron*, however, the Supreme Court added an important caveat. When a court was asked to review a federal agency's interpretation of a federal statute that the agency is responsible for administering, the court was required to engage in a more deferential two-step analysis that subsequently became known as "*Chevron* deference."[4]

Under *Chevron* deference, at "*Chevron* step one," the court was first required to determine whether the relevant statutory provision is clear and unambiguous with respect to the specific issue at hand; if it was, then the plain meaning of the statute would be given effect.[5] But if it was ambiguous, then "the court [did] not simply impose its own construction on the statute."[6] Instead, under "*Chevron* step two," "the question for the court [was] whether the agency's answer is based on a permissible construction of the statute."[7] In answering this question, "[t]he court need not [have] conclude[d] that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding."[8]

Exemplary Applications of *Chevron* Deference in IP Contexts

In the IP context, *Chevron* was potentially applicable whenever federal district courts reviewed federal statutory interpretations of agencies authorized to implement aspects of IP law, such as most prominently the PTAB, the TTAB, and the ITC.

For instance, in *Cuozzo Speed Technologies, LLC v. Lee*,[9] the PTO had promulgated a regulation requiring the PTAB to give patent claims their "broadest reasonable interpretation" ("BRI") during inter partes review ("IPR") proceedings,[10] despite the fact that the federal statutory scheme establishing IPRs did not provide for this standard of review.[11] After the PTAB reviewed a patent using the BRI standard and canceled certain claims on obviousness grounds, the patent owner appealed, arguing that the PTO's BRI regulation exceeded the PTO's authority under the relevant federal statutes.[12] Applying *Chevron* deference, the Supreme Court upheld the PTO's regulation, holding that the federal statutes were silent on the issue (and thus ambiguous) and that the PTO's implementing regulation was reasonable.[13]

Similarly, in *Harmonic Inc. v. Avid Technology, Inc.*,[14] the Federal Circuit addressed the propriety of a PTO regulation permitting the PTAB to institute an IPR proceeding based on only some of the grounds of unpatentability that had been originally advanced by the petitioner.[15] The Federal Circuit concluded that, under *Chevron*, the regulation was a reasonable exercise of the PTO's authority to administer IPR proceedings.[16]

In *Suprema, Inc. v. International Trade Commission*,[17] the Federal Circuit was asked to address the ITC's interpretation of 19 U.S.C. § 1337(a)(1)(B)(i), which makes it illegal *inter alia* to import into the

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United States "articles that [...] infringe a valid and enforceable United States patent." The patent claim at issue recited a "method for capturing and processing a fingerprint image," and the respondent Suprema was accused of violating the statute by selling fingerprint scanners.[18] Notably, however, the method claim was not even arguably infringed by U.S. consumers until after the scanners had been imported into the United States, and the question was whether a foreign respondent could violate the statute under an *indirect* infringement theory where the accused products did not and could not *directly* infringe at the time of importation.[19] The ITC held that it could and found a violation based on indirect infringement.[20] On appeal, the Federal Circuit determined that section 1337(a)(1)(B)(i) was ambiguous as to whether a violation could be premised on indirect infringement and, applying *Chevron* deference, held that the ITC's interpretation was reasonable.[21]

And in *Eastman Kodak Co. v. Bell & Howell Document Management Products Co.*,[22] Kodak initiated opposition proceedings before the TTAB challenging a trademark applicant's attempt to register the numbers "6200," "6800," and "8100" as trademarks on the principal register on an "intent-to-use" basis.[23] The TTAB dismissed the opposition without prejudice, in effect holding that numerical designators are presumptively not descriptive under 15 U.S.C. § 1052(e) in an "intent-to-use" context.[24] On appeal, the Federal Circuit applied *Chevron* deference, concluded that the statute was not clear and unambiguous on the point, and held that the TTAB's interpretation of the Lanham Act was reasonable.[25]

Chevron Is Criticized, Limited, and Avoided

At the same time that *Chevron* was being applied in deference to agency decisions in many administrative contexts, however, the doctrine was being consistently criticized, limited, and avoided in other cases.[26]

One important example occurred in *United States v. Mead*,[27] decided in 2001. In *Mead*, the Court expressly limited *Chevron* deference to circumstances in which "Congress delegated authority to the agency generally to make rules carrying the force of law, and [] the agency interpretation claiming deference was promulgated in the exercise of that authority."[28] The Court clarified: "Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent."[29] Significantly, this confirmed that "interpretations contained in policy statements, agency manuals, and enforcement guidelines" as a rule were not entitled to *Chevron* deference.[30]

Consistent with this guidance, in the IP context, many courts have declined to defer to discussions of law or statute contained in PTO manuals and guidelines.[31]

Courts also recognized that *Chevron* deference was limited to agency interpretations of federal *statutes*; agency interpretations of their own *regulations* were outside the scope of *Chevron*.[32] Instead, agency interpretations of regulations since 1997 had been subject to so-called *Auer* deference, which was different.[33] And by 2019, the Court had severely limited the scope of even *Auer* deference.[34]

Even when *Chevron* deference was relevant, courts frequently found reasons to avoid its application. In numerous cases, for example, courts found that the statute at issue was unambiguous, and thus that the analysis stopped at *Chevron* step one.[35] In *Facebook, Inc. v. Windy City Innovations, LLC*,[36] for instance, the statutory provision at issue, 35 U.S.C. § 315(c), governed joinder of parties in IPR proceedings. That provision specifies that the PTO "may join as a party to that inter partes review any person who properly files a petition . . . ."[37]

At Facebook's request, the PTAB had instituted IPRs covering certain claims of four patents.[38] After the one-year time bar for instituting IPRs on those patents had passed, Facebook filed additional IPR petitions seeking to have additional claims from the same patents reviewed, and it moved for joinder of the new requests with its own already-instituted IPRs under section 315(c).[39] After the PTAB instituted the new IPRs and granted the joinder motions,[40] the Federal Circuit vacated the PTAB's ultimate decisions on the new claims, holding in relevant part that section 315(c) was not ambiguous, that it unambiguously did not permit same-party joinder, and thus that *Chevron* did not require deference to the PTAB's contrary understanding.[41]

In other cases, courts declined to defer to agencies under *Chevron* step two. For example, *Aqua Products, Inc. v. Matal*[42] involved the question of what party to an IPR bears the burden of proof when the patent owner seeks to amend a claim at issue during the IPR proceeding: does the burden of proving unpatentability remain on the petitioner even in connection with the proposed substitute claim, or must the patent owner demonstrate that the proposed substitute claim would be patentable over the prior art of record?[43] Congress had authorized the PTO to promulgate regulations "setting forth standards and procedures for allowing the patent owner to move to amend,"[44] and it did so.[45]

Under the PTO's regulations, a patent owner seeking to amend must file a motion to amend that *inter alia* "respond[s] to a ground of unpatentability involved in the [IPR]."[46] A different PTO regulation specifies that a "moving party has the burden of proof to establish that it is entitled to the requested belief."[47] In reliance on these provisions, the PTAB's practice was to place the burden of proof on the patent owner in an amendment scenario.[48] On the other hand, the governing federal statute, 35 U.S.C. § 316(e), provided without qualification: "In an inter partes review instituted under this chapter, the petitioner shall have the burden of proving a proposition of unpatentability by a preponderance of the evidence."[49] The Federal Circuit held that the PTO regulations at issue did not in fact address whether a patent owner bears the burden of proof as to patentability, and since the regulations did not purport to engage in statutory interpretation on this question, there was no basis for *Chevron* deference.[50]

Loper Bright Overrules *Chevron*

In June 2024, the Supreme Court in *Loper Bright* overruled *Chevron*. The Court focused on the separation of powers under the Constitution and the requirements of the Administrative Procedure Act ("APA")—both of which require the judiciary to independently interpret the law in the first instance, without deference to agency interpretations.[51] Under our constitutional system, "the final 'interpretation of the laws' would be 'the proper and peculiar province of the courts,'" and the Constitution was structured "to allow judges to exercise [their] judgment independent of influence from the political branches."[52] And the APA crystallizes the judiciary's role, providing that "the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action" and that the court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . not in accordance with law."[53] *Chevron* deference was fundamentally inconsistent with these principles and misguided.[54]

From a more pragmatic standpoint, the Court decried the fact that, under *Chevron* deference, there was effectively "a license authorizing an agency to change positions as much as it likes," depending on which way the political wind happened to be blowing at any given time.[55] An agency's ability to modify its statutory interpretations without fear of judicial oversight "foster[ed] unwarranted instability in the law, leaving those attempting to plan around agency action in an eternal fog of uncertainty."[56] To the majority, this meant that *Chevron* should not be upheld on the basis of *stare decisis*, since the legal instabilities set in motion by *Chevron* ran directly contrary to the doctrine's underlying purpose.[57]

Having decisively overruled *Chevron*, however, the Court also made a conscious effort to soften the edges of its ruling. Although courts are the final arbiters on questions of law, that did not mean that statutory interpretation need be conducted in a vacuum, divorced from agency participation or input.[58] To the contrary, "although an agency's interpretation of a statute 'cannot bind a court,' it may be especially informative 'to the extent it rests on factual premises within [the agency's] expertise."[59] In other words, an agency's statutory interpretation, if well-founded, may have a "particular 'power to persuade, if lacking power to control.'"[60]

Moreover, somewhat ironically, the Court noted that prior decisions in which *Chevron* deference had been applied to agency actions would be subject to *stare decisis*.[61] In other words, the Court did not see its change in interpretive methodology as providing an automatic basis to revisit prior rulings in which *Chevron* deference had been applied.[62]

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How Will *Chevron*'s Demise Impact IP Disputes Going Forward?

The dissent[63] in *Loper Bright* stridently criticized the majority for attempting to "turn [] itself into the country's administrative czar" in an effort to "roll back agency authority."[64] According to the dissent, *Loper Bright*'s overruling of *Chevron* represents an "overhauling [of] a cornerstone of administrative law" that "is likely to produce large-scale disruption."[65]

External critics of the Court's *Loper Bright* decision have expressed similar alarm. In the environmental context, for example, observers have contended that "the ruling opens the door to challenges to many rules related to environmental guidance documents and policies issued by the Environmental Protection Agency ('EPA') and state agencies involving air and water quality, climate change, and other environmental and public health policies, and EPA will likely have a more difficult time defending enforcement actions and rulemakings."[66] And in the employment context, another observer expressed concern that "the flood gates of legal challenges may very well open with respect to many of the [employment and labor-related federal] agencies' interpretations, causing further question and likelihood that particular rules protecting employees and job applicants will be struck down by the courts."[67]

But in the context of IP law, does *Loper Bright* justify that kind of alarmism? Perhaps not. The federal laws and regulations concerning patent, trademark, and copyright law rarely if ever present the kind of sensitive, hot button political issues that can arise in other contexts, such as environmental or employment law. There, agency policies and accompanying statutory interpretations can vary widely from administration to administration, particularly in this era of political polarization. But IP typically fails to arouse the same kind of political fervor, and the political regime underlying the PTO and the U.S. Copyright Office has never exhibited the kinds of regulatory fluctuations that caused the *Loper Bright* majority concern. In the IP context at least, courts likely will continue to depend heavily on the agencies' "body of experience and informed judgment . . . for guidance."[68]

Certainly, however, the end of *Chevron* deference does mean that IP litigators will have new opportunities to challenge adverse agency action using statutory interpretation arguments. *Loper Bright* has sent a clear message to lower courts that agency interpretations are not sacrosanct and may be second guessed. And although the Court promised that *stare decisis* would leave prior court rulings based on *Chevron* undisturbed, the reality for IP practitioners is that the Court rarely grants certiorari in patent, trademark, and copyright cases.[69] Indeed, the author is only aware of one IP case in which the Court has ever applied *Chevron* deference—and the PTO regulation at issue in that case has since been amended.[70] In the absence of definitive rulings from the Court, every IP decision in which *Chevron* deference was previously applied is theoretically as open to challenge as it has ever been.

The bottom line is that IP attorneys practicing before agencies such as the PTO (including the PTAB and TTAB), the U.S. Copyright Office, and the ITC should be alert to potential challenges to agency statutory interpretations. Under *Loper Bright*, courts now have a clear mandate to reevaluate and, where necessary, to correct agency actions that are inconsistent with the federal statutory frameworks underlying our IP regimes. *Loper Bright* can and should be on every IP attorney's "radar screen." But how much *Loper Bright* ultimately will change the IP landscape going forward is still unclear.

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Endnotes

1. __ U.S. __, 144 S. Ct. 2244 (2024).
2. 467 U.S. 837 (1984).
3. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).
4. *See generally Chevron*, 467 U.S. at 842–45; *see also, e.g.*, Christopher J. Walker, *Chevron Deference and Patent Exceptionalism*, 65 Duke L. J. Online 149 (May 2016).
5. *Id.* at 842–43.
6. *Id.* at 843.
7. *Id.*
8. *Id.* n.11.
9. 579 U.S. 261 (2016).
10. 37 C.F.R. § 42.100(b) (2012). The regulation has since been amended to eliminate BRI review. *See* 37 C.F.R. § 42.100(b) (2024).
11. *See, e.g.*, 35 U.S.C. § 316.
12. 579 U.S. at 276.
13. *See id.* at 276–83.
14. 815 F.3d 1356 (Fed. Cir. 2016).
15. 37 C.F.R. § 42.108(a) (2012). The regulation has since been amended to require IPR institution on all challenged claims and all asserted grounds of unpatentability, if an IPR is instituted at all. *See* 37 C.F.R. § 42.108(a).
16. 815 F.3d at 1367–68.
17. 796 F.3d 1338 (Fed. Cir. 2015) (en banc).
18. *See id.* at 1341–42.
19. *See id.* at 1342–43.
20. *Id.* at 1343.
21. *Id.* at 1345–53.
22. 994 F.2d 1569 (Fed. Cir. 1993).
23. *See id.* at 1570.
24. *See id.* at 1571.
25. *Id.* at 1571–76.
26. *See generally Loper Bright*, 144 S. Ct. at 2268–72.
27. 533 U.S. 218 (2001).
28. *Id.* at 226–27.
29. *Id.* at 227.
30. *Id.* at 234 (quoting *Christensen v. Harris County*, 529 U.S. 576, 587 (2000)).
31. *See, e.g.*, *Applications in Internet Time, LLC v. RPX Corp.*, 897 F.3d 1336, 1344 n.2 (Fed. Cir. 2018) (observing that the PTO Trial Practice Guide is not entitled to *Chevron* deference); *see also Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1370 (Fed. Cir. 2018) (stating that the PTO's Trademark Trial and Appeal Board Manual of Procedure ("TBMP") was entitled to judicial deference only so far as its "power to persuade"); *but see O'Shannessy v. Doll*, 566 F. Supp. 2d 486, 491 n.4 (E.D. Va. 2008) (giving deference to MPEP) (citing *Heinl v. Godici*, 143 F. Supp. 2d 593, 601 n.15 (E.D. Va. 2001)); *Fressola v. Manbeck*, 36 U.S.P.Q.2d (BNA) 1211, 1213 (D.D.C. 1995) (same).
32. *See, e.g.*, *Humanoids Grp. v. Rogan*, 375 F.3d 301, 306 (4th Cir. 2004) (noting that *Chevron* deference was inapplicable to PTO interpretation of 37 C.F.R. § 2.21, a PTO regulation related to trademark applications).
33. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997) ("Because the salary-basis test is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless 'plainly erroneous or inconsistent with the regulation.'") (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)).
34. *See Kisor v. Wilkie*, 588 U.S. 558, 568–80 (2019).
35. *See, e.g.*, *SAS Inst., Inc. v. Iancu*, 584 U.S. 357, 369–70 (2018) (holding that the federal statutes underlying IPR proceedings, particularly 35 U.S.C. § 318(a), unambiguously required the PTAB, to the extent it institutes an IPR proceeding, to adjudicate the patentability of every patent claim originally challenged by the petitioner); *Facebook, Inc. v. Windy City Innovations, LLC*, 973 F.3d 1321, 1338–39 (Fed. Cir. 2020) (holding that the IPR joinder provision set forth in 35 U.S.C. § 315(c) unambiguously does not authorize same-party joinder, and thus the court need not defer to the PTAB's contrary interpretation); *Applications in Internet Time*, 897 F.3d at 1346–51 (holding that the term "real party in interest" as used in the IPR time bar provision contained in 35 U.S.C. § 315(b) is unambiguous, and thus the court need not defer to the PTAB's different interpretation).
36. 973 F.3d 1321.
37. 35 U.S.C. § 315(c).
38. *Facebook*, 973 F.3d at 1325.
39. *Id.*
40. *Id.*
41. *Id.* at 1338–39.
42. 872 F.3d 1290 (Fed. Cir. 2017) (en banc).
43. *Id.* at 1297–98.
44. 35 U.S.C. § 316(a)(9).
45. *See, e.g.*, 37 C.F.R. § 42.121.
46. 37 C.F.R. § 42.121(a).
47. 37 C.F.R. § 42.20.
48. *See, e.g.*, *Idle Free Sys., Inc. v. Bergstrom*, IPR 2012-00027, 2013 Pat. App. LEXIS 6302, 2013 WL 5947697, at *4 (PTAB June 11, 2013).
49. 35 U.S.C. § 316(e).
50. *Aqua Prods.*, 872 F.3d at 1316–25.
51. *E.g.*, *Loper Bright*, 144 S. Ct. at 2273.
52. *Id.* at 2257 (quoting The Federalist No. 78, at 525 (J. Cooke ed. 1961) (A. Hamilton)).
53. *Loper Bright*, 144 S. Ct. at 2261 (quoting 5 U.S.C. § 706).
54. *Loper Bright*, 144 S. Ct. at 2273.
55. *Id.* at 2272.
56. *Id.*
57. *Id.*
58. *See, e.g.*, *id.* at 2267 ("Courts, after all, do not decide [statutory interpretation] questions blindly.").
59. *Id.* (quoting *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 98 n.8 (1983)).
60. *Loper Bright*, 144 S. Ct. at 2267 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)); *see also Loper Bright*, 144 S. Ct. at 2273 ("Careful attention to the judgment of the Executive Branch may help inform [the statutory interpretation] inquiry.").
61. *Id.*
62. *Id.*
63. Justice Kagan authored the dissent, joined by Justices Sotomayor and Jackson.
64. *Id.* at 2295, 2311.
65. *Id.* at 2311.
66. Margaret Anne Hill et al., The Supreme Court Ends Chevron Deference—What Does This Mean for Environmental Regulation and Enforcement?, *Nat'l Law Rev.* (July 2, 2024).
67. Ethan Krasnoo, Anticipated Effects of the U.S. Supreme Court's Eradication of *Chevron* Deference on Employment Agency Rules, *Mondaq Business Briefing* (July 5, 2024).
68. *Skidmore*, 323 U.S. at 140.
69. *See Loper Bright*, 144 S. Ct. at 2272.
70. *See Cuozzo Speed Techs.*, 579 U.S. at 280–83 (adjudicating the interpretation of since-amended 37 C.F.R. § 42.100(b) (2012)).