



Here's why Apple, big pharma are paying close attention to a Supreme Court case over a fracking patent

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When Tribal Chief Eric Thompson first heard about a new venture to get the Saint Regis Mohawks into the business of intellectual property, he was hesitant.

"I had never heard of an IPR," Thompson recalled, referring to a system of challenging patents called inter partes review.

Most people haven't — IPR resides among the intricacies of patent law that generally don't surface outside legal circles — but the system has been steadily increasing in popularity since it was introduced in 2011, championed by giants of the technology industry, like Apple, Google and Facebook. They see it as a more efficient way of dismantling bad patents, often held by so-called patent trolls. It's come to be despised by many big pharmaceutical companies.

It's also now the subject of a case before the Supreme Court, where oral arguments took place Monday morning. The outcome, experts say, is worth billions — in one estimate, even trillions — of dollars, and holds implications for the scope of power of federal agencies.

For the Saint Regis Mohawks, a tribe of about 16,000 people along the St. Lawrence River in northern New York, it represents a potential new source of much-needed revenue. But only if the Court rules IPR doesn't violate the Constitution.

Oil States v. Greene's Energy

The case, called *Oil States Energy Services v. Greene's Energy Group*, stems from a dispute over a method using hydraulic fracturing, or fracking. But the key issue is IPR, which, since it was introduced in the 2011 America Invents Act, has faced a number of legal challenges.

"This is like lawyer nirvana," said Arti Rai, a professor of law and co-director of the Duke Law Center for Innovation Policy. Rai worked in the Obama Administration when the America Invents Act was being drafted, and wrote a brief with 71 other law professors in support of IPR in the Oil States case.

"The idea was, essentially, that there should be a way to do a fairly low-cost challenge to a patent grant that seems suspect," Rai said in an interview. "Challenging in the courts can be really expensive."

The America Invents Act enables patent challengers to petition the U.S. Patent and Trademark Office to essentially take a second look at patents it's already granted. And it's been embraced by tech giants; Apple, in a Supreme Court brief said it's filed more IPR petitions than any other company, at 267 through 2016. That's almost 5 percent of all the petitions filed since 2012. "It's been a really useful tool for companies to defend against patents that shouldn't have been issued in the first place," said Joshua Landau, patent counsel for the Computer and Communications Industry Association. He estimates the system has saved \$2.3 billion in legal fees alone in the last five years.

Big pharmaceutical companies that sell branded medicines, for the most part, hate it. Competitors that want to bring generic copies of drugs to market have increasingly used the IPR system to try to invalidate patents. Mylan, for example, says it's filed 88 IPR challenges against 37 branded medicines, seeking to bring cheaper versions to market earlier. Often, drug companies face IPR challenges in addition to simultaneous suits in the federal courts. They argue the two systems have different standards, and that IPR is less favorable to patent holders.

What's more, it's not only generic competitors that have sought to use the IPR system to dismantle patents. In 2015, hedge fund investor Kyle Bass used the IPR system to file challenges against multiple drug companies while being suspected of shorting their stocks.

"The America Invents Act was an effort to destroy the U.S. patent system," said patent attorney Michael Shore, who cites an estimate that the system has cost the U.S. economy \$1 trillion in lost patent value (a figure others dispute). "They've done a pretty good job of doing it."

Enter the Saint Regis Mohawks

It was Shore who brought the Saint Regis Mohawks into the IPR story, through a realization that state universities held special protections against patent challenges through inter partes review because of their sovereign status.

Those protections, he said, conferred a much higher value to patents held by sovereign entities. "Your chances of winning, statistically, are about three times better than if you had to go through the IPR process," Shore said from the Dallas offices of his law firm, Shore Chan DePumpo.

Saint Regis Mohawk Tribe Chief Eric Thompson next to the Saint Lawrence River in upstate New York. The tribe aims to diversify its economy through patent partnerships.

Others, like law professor Gregory Dolin at the University of Baltimore, who wrote a brief in favor of overturning IPR along with the Cato Institute, put the rate of patent invalidation at twice as high through IPR versus the federal courts.

"When we realized there was such a huge disparity in value, we started trying to figure out ways to help our non-sovereign clients get the protection of sovereign immunity," Shore said. There are a few entities that possess sovereign status: foreign governments, states (and therefore state universities), and Native American tribes.

Enter the Saint Regis Mohawks. Shore first proposed his idea to a few tribes who turned him down, he said. Then he was introduced to Dale White, general counsel for the Saint Regis Mohawks, who brought the idea to the tribal leaders.

"We vetted this idea for better than six months before we decided to do it," Tribal Chief Thompson said in an interview recently at Akwesasne, the tribe's territory in northern New York. "We decided to pursue it because of the unmet needs in our community and for the benefit of our people."

The tribe's first moves in the space, though, have thrust it into a national debate about drug prices, the patent system and the very sovereign status of Native American tribes.

In September, drugmaker Allergan announced it had transferred the patents for its blockbuster eye drug, Restasis, to the tribe, which then licensed the rights back exclusively to Allergan. The tribe then moved to dismiss the IPR challenges filed by generic-drug makers, including Mylan, which was also challenging the patents in federal court. In return, Allergan paid the tribe \$13.75 million, with the potential for \$15 million more in annual royalties.

For the Saint Regis Mohawks, the deal represented a new way to diversify its revenue. The tribe's economy depends heavily on its casino, the Akwesasne Mohawk Casino, and in recent years, the tribe's leaders said, gaming revenue has leveled off.

Gaming revenue at the Akwesasne Mohawk Casino has leveled off in recent years. It's also contending with significant health problems associated with pollution from factories along the borders of the tribe's territory, according to Tsiorasa Barreiro, the Saint Regis Mohawk Tribe's executive director. They're now Environmental Protection Agency-designated superfund sites.

The factories "have leaked PCBs and other heavy metals into our environment, into the river, and into our soil," Barreiro said. "We are experiencing high rates of cancer, autoimmune diseases, thyroid issues, and other chronic health conditions due to the toxic legacy of the industry along the St. Lawrence River."

The funds from IPR deals like the one with Allergan, Thompson said, could potentially be used to address the pollution and health problems from those sites, as well as for infrastructure and

support to address opioid addiction, which has touched the tribe much as it has the rest of the country.

Deal criticism

But the response to the Allergan partnership was electric.

"We were shocked," said Michael Shore. "I don't know if it's the fact that it was Native Americans, I don't know if it was the fact that it was pharmaceutical, or both, but it sure seemed to create a much bigger hubbub than we ever thought it should or deserved."

"I'm getting an education on the lightning-rod status of the pharmaceutical industry," Shore said, "and the interest in tribal affairs."

Thompson bristles at accusations the partnership contributes to higher drug prices, pointing out the tribe is concerned about health costs itself.

"It's not our intention at all to deal with or to negatively advance a position that would be counter to our own interests with regards to drugs that would be utilized in Indian country as a whole, and in our community," he said. He pointed to Allergan's "social contract," pledging, among other things, to limit price increases on medicines to less than 10 percent a year.

But Congress criticized the deal, with one senator, Claire McCaskill of Missouri, introducing legislation that would strip tribes of their sovereign immunity to IPR challenges.

"Any thinking person would look at what this company did and say, 'that should be illegal,'" McCaskill said in a statement at the time. "Well, I agree."

Thompson called her bill a double-standard, state university systems also benefit from sovereign status.

"It's colonialistic thought," he said. "It's almost like an economic apartheid, where we're not allowed to do certain things unless otherwise given permission."

Allergan's stock suffered as its partnership with the tribe was criticized. And then, in October, a federal judge invalidated the patents in question. Allergan's protection against IPR challenges hadn't mattered.

Allergan has responded to the criticisms by pointing out flaws with the IPR system, calling it a "double jeopardy" for patent holders.

"While Allergan was well aware that its agreement with the Saint Regis Mohawk Tribe would draw scrutiny, much of this scrutiny as focused on emotional arguments and has failed to acknowledge the fundamental issues with IPR," the company said in a statement.

Constitutional questions

Those issues are now before the Supreme Court. The key question being evaluated is whether inter partes review violates the Constitution by "extinguishing private property rights" through a forum other than federal courts. A decision is expected by June of 2018.

Meanwhile, the Saint Regis Mohawks have another IPR deal playing out, which the tribe struck before the agreement with Allergan. That partnership, with a tech company called SRC Labs, concerns patents the tribe and SRC allege are being infringed by Microsoft and Amazon. So the Saint Regis Mohawks are closely watching the outcome of the Oil States case.

"We entered into this knowing it could be short-lived," Thompson said. "If it goes on, I think we have a viable, reasonable, lawful blueprint to go forward to provide a revenue stream for our people."