Inside the US's perfect patent storm

Supreme Court decisions, reform initiatives in Congress and changes at the USPTO mean that the patent landscape is shifting dramatically in the US. Whether this is for better or for worse is a different issue. Four experts give their opinions

By **Joff Wild**

There is no doubt about it: patent owners and their advisers in the US are living in interesting times. Once it may have been the case that patents were the poor relation, interesting only to scientists and specialist attorneys. Nowadays, however, that is very far from the truth. If 80% of corporate value is composed of intangibles, as some claim, in certain industries a big proportion of that percentage can be attributed to patent rights. Put simply, patents equal money. As a result, they are now major business assets and the courts, Congress and a string of regulatory authorities recognise this, as do a growing number of company boards and savvy investors.

With that recognition has come change. The Supreme Court now hears patent cases on a regular basis and some of its recent decisions could have potentially far-reaching consequences. Congress, too, has been listening to the lobbying of powerful players in industry and is now proposing major changes to the litigation system, as well as measures to help improve patent quality. The USPTO, meanwhile, is struggling to make inroads into a growing backlog of applications, while all the time facing funding uncertainties.

In order to make sense of what is currently happening, *IAM* brought together four individuals representing different parts of the patent community: Christopher Ainsley, of patent analytics company the Patent Board; Douglas Cawley, a shareholder of McKool Smith in Dallas; Todd Dickinson VP and head of IP at GE; and Gary Hoffman, the head of the IP practice at Dickstein Shapiro in Washington DC.

In a lively, wide-ranging and thought-provoking sweep through recent developments, the four of them expressed a range of opinions – ranging from the pessimistic to the hopeful. But one thing they were agreed on is that there is more change to come. Hold on to your hats, it's going to be some journey.

Joff Wild: *Looking from the outside in, it seems to have been a busy 18 months or so for patent owners and their advisers in the US. Do you agree?*

Todd Dickinson: *I absolutely agree. This is one of the busiest times I have seen during my 30-year career. We have had a combination of Supreme Court decisions, attempts at patent reform in two separate Congresses, as well as significant rule changes at the USPTO. All three branches of the US government are currently active in the patent world. I don't want to read too much into it, though, except to say this all marks a continued recognition of the important role intellectual property plays in the US economy.*

Gary Hoffman: *The significance of IP has grown, with more companies now seeking ways to tap into these assets and to find ways to monetise the value. With this, the number of patent applications has substantially grown and the size and complexity of litigations have increased.*

In addition, as Todd says, over the last few years the Supreme Court has become actively involved in taking up a number of

patent cases. For many years, the Federal Circuit was considered to be the ultimate authority since the Supreme Court took virtually no cases; this has changed. As a result, there have been major decisions in the areas of patent injunctions, declaratory judgment jurisdiction, patent antitrust interface and others. And in the very recently decided KSR v Teleflex *case, the court has just handed down a judgment which is likely to at least partially change the test for determining obviousness.*

It also appears that the Federal Circuit has become more aggressive in reviewing many of its long-held positions and taking on several new changes. The Federal Circuit has abandoned its requirement for reasonable apprehension as a requirement for filing a declaratory judgment action and is currently considering critical issues relating to wilful infringement and the need for an opinion and the scope of waiver when a party relies on an opinion of counsel.

We are likely to see this trend in the courts continue over the next few years. In addition, as Todd mentions, both Congress and the USPTO have been active in changing the ground rules.

***Christopher Ainsley:** I agree with Todd and Gary about the growing importance of IP. From our perspective as experts on patent and patent portfolio quality metrics and valuation, the most exciting events have been the development of patents as a legitimate asset class. The financial community is beginning to take serious notice of the importance of patents and patent-based metrics and their links to enterprise value, and there has also been increased coverage by the mainstream press about patents as business assets. These factors have raised the awareness of IP and, specifically, patent quality value directly to the Fortune 500 boardroom. The recognition of the link between patent metrics and enterprise value is critical to legitimising this asset class and enabling additional monetisation.*

***Douglas Cawley:** Statistically, patent litigation filings have declined a bit, but most people believe that's because the size of the cases has increased. Even though there may be slightly fewer filings, many of the cases we see have more at stake than in years past. In the marketplace, the past 18 months have seen continued activity by patent aggregators, which has triggered counter-activity by at least some potential targets buying up intellectual property to avoid its assertion against them. The last 18 months have also seen growth in transnational patent litigation, in which IP is asserted simultaneously in multiple jurisdictions.*

***JW:** A number of critics are looking at the USPTO – with its sometimes long delays and an alleged propensity to issue "bad" patents – as a source of many of the alleged problems that now exist in the US patent system. Is this fair?*

***GH:** I entered the IP arena 40 years ago as an examiner in the USPTO and went into private practice in the 1970s. As far back as I can remember, there have been criticisms about the USPTO issuing bad patents. I remember the patent that issued about 30 years ago on a carved bar of soap. There will always be issues and limitations on the ability of the USPTO to examine any application. In litigation, defendants will search all over the world and spend thousands of hours looking for prior art. The USPTO does not have this luxury and never will.*

However, the quantity of prior art has exponentially increased at the same time so that computer searching capabilities must become more sophisticated.

This does not mean that there are not problems; there are, and ways should be found to improve the system. But as an old cliché goes, we need to make sure not to throw out the baby with the bath water. At the same time, we need to find ways to speed up the process. Years of delay can and often do rob patents of their value. Technology changes rapidly and the patents need to issue (or become abandoned) before the technology becomes obsolete.

***DC:** Gary is right that the PTO has always been criticised for delay and every defendant thinks it's being accused of infringing a bad patent. Although issuance of the occasional silly patent gets a lot of publicity, I think the marketplace of patent value is self-correcting and finds a way to separate the valuable from the marginal. Remember, too, that the last two decades have seen an historic explosion in the importance of technology, which in turn has placed unprecedented demands on the PTO. I think it's inevitable that any government agency would struggle to keep up.*

***CA:** The general consensus from our analysts is that the USPTO does an above-average job considering the constraints it operates under. The USPTO is extremely under-funded*

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considering the amount of revenues it draws, and it therefore has a hard time securing patent examiners focused on the forefront of newer technologies or areas of patenting like business methods or nanotechnology. This fuels the quality and pendency issues – in some industries now upward of five years. Proposed reforms and changes at the USPTO will be helpful, but we question whether it's too little. We applaud the USPTO and its recommitment to, and emphasis on, quality. Our stance is that quality patent metrics for calculating business value need to be based on strong objectively reviewed patents.

TD: *As a former Commissioner of the USPTO I tend to appreciate and defend its work. Like Christopher, I believe that it is generally doing a good job, especially when you consider that because of fee diversion it has been resourced deprived for many years. So, while there is always a need to improve quality, the situation is not as dire or apocalyptic as some might have us believe.*

With regard to pendency times, there have been efforts to bring these down but the changes suggested to help do it have met with resistance. However, in the long run I am pretty confident we will get there. New examiners are now being recruited and while some say you cannot buy your way out of a problem, I think that you can hire your way out of a lot of them. That said, hiring depends on resources and until diversion is ended permanently, not just on a year-on-year basis, there will always be some uncertainty. To make plans you need to know that you will have a constant stream of revenue; the USPTO does not have this certainty at the moment.

JW: *Of the recent cases heard by the Supreme Court, which since* eBay v MercExchange *has been the most significant?*

CA: eBay v MercExchange *is important because of the uncertainty it leaves as to whether an injunction will continue to be automatically issued to a prevailing patent holder. While the court did not categorically denounce patent holders who do not make products, it also did not categorically endorse the issuance of injunctions. This could be a strike against the so-called trolls, but not enough time has passed to see how this will really play out. The recent decision in* Medimmune v Genentech *should also be followed closely. The Supreme Court's ruling could lead to an increase in litigation in the near term. If licensees do not have to worry about the liability of a breach of contract, they could be more inclined to challenge the enforceability of their in-licensed patents.*

GH: *The recent decision in* eBay v MercExchange *is having a significant impact on the ability to obtain an injunction. Some would say that stopping the "patent trolls" from obtaining or being able to threaten a potential injunction is excellent; but then ask 10 people what a troll is and you may get 10 different answers. Our Constitution states: "To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." This does not limit who is entitled to have such right to exclude if the patent is valid and infringed. While there are practical benefits of what the Supreme Court decided, there are also potential problems such as for major research institutions which derive their value from licensing of the technology.*

TD: *Data from the district courts does seem to suggest that, broadly speaking. If a patent case does not involve competitors, it is unlikely that a permanent injunction will now be granted. That's a pretty big impact and it will be interesting to see what the Federal Circuit does when it starts getting cases on this.*

DC: *For me, it's* KSR v Teleflex. *As a result of this decision, every case will now include substantial litigation over obviousness, whereas Section 103 allegations have largely been overlooked in the past. Expect that motions for summary judgment asking for findings of obviousness will be standard practice in patent litigation. Plaintiffs and defendants will be quoting language from* KSR *back and forth for the next decade.*

GH: *Yes, the Supreme Court's unanimous* KSR *opinion reshapes decades of Federal Circuit law on determining whether a patent's claims are obvious under 35 USC Section 103. Justice Kennedy's decision stated that while the Federal Circuit's teaching, suggestion, motivation (TSM) test is a "helpful insight", the Federal Circuit erred in transforming it into a rigid rule limiting the obviousness inquiry. The Federal Circuit's TSM test requires that, in order to prove that a patent claim is obvious in light of two or more prior art references, a teaching, suggestion or motivation to combine the two must be shown.*

As stated by the Supreme Court: "The TSM test [when rigidly applied] is incompatible with our precedents. The obviousness analysis cannot be confined by a formalistic conception of the words teaching, suggestion, and motivation, or by overemphasis on the importance of published articles and the explicit content of issued patent....Granting patent protection to advances that would occur in the ordinary course without real innovation retards progress and may, in the case of patents combining previously known elements, deprive prior inventions of their value or utility."

The court's reasoning reaffirmed and amplified its decision in Graham v John Deere Co, *stating that* Graham's *multi-pronged analysis provided "an expansive and flexible approach" to the obviousness question. The court stated that neither* Graham *nor 103's enactment disturbed the Supreme Court's earlier instructions to exercise caution before granting a patent based on the combination of elements found in the prior art. Moreover, it stated: "And as progress beginning from higher levels of achievement is expected in the normal course, the results of ordinary innovation are not the subject of exclusive rights under the patent laws. Were it otherwise patents might stifle, rather than promote, the progress of useful arts."*

CA: *The recent decision in* KSR v Teleflex *is interesting because it raises the bar for patentability. It is unclear how dramatically this will affect the industry, but we consider any change that more rigorously tests the patentability of an invention a step in the right direction.*

TD: *Although I have not yet fully digested the* KSR *decision, it looks to be quite nuanced, just like the others that the Supreme Court has been handing down. In fact all of them since* eBay v MercExchange *have been narrower than people were predicting. If you look at how the USPTO has responded to* KSR, *for example, it has pretty much said it is business as usual and even in its judgment the Supreme Court seemed to indicate that it was happy with the Federal Circuit's most recent obviousness decisions. For me, that subtle, calibrated approach is a good thing.*

GH: *Todd is correct about the recent guidelines on* KSR *provided by the PTO; but let's remember that the PTO called them the initial guidelines. If they are also the final, then fine. However, I believe there is likely to be a lot more to come from the PTO.*

JW: *Some people have labelled the Supreme Court anti-patent or, at least, patent-sceptical. Is that fair?*

DC: *I think that the Supreme Court is sceptical of the direction patent protection has been moving in for the past 10 to 15 years. In my view,* State Street *was the high-water mark of patent protection in the United States. That case prompted the first pushback in the form of heightened review procedures by the USPTO for business method patents and was the beginning of speculation in the press that patent protection had gone too far. In* eBay, *and the dissent from the refusal to hear* Lab Corp, *some members of the Court expressed scepticism about business method patents in particular and the range of patent protection in general. At oral arguments in the last two years, members of the Court have expressed the view that: "If I can understand the invention, it can't be worthy of a patent." I wouldn't say that the Supreme Court is anti-patent, but I certainly think the Court has indicated that it feels that the pendulum has swung too far in favour of patent protection.*

TD: *I am worried about the cumulative impact of the Supreme Court decisions, the current publicity around the patent system and reform moves in Congress; the fact that it is now harder to get permanent injunctions and that we may see lower damages awards raises questions about the value of portfolios and for companies like GE that is a major issue.*

As for the Supreme Court, some of the justices – or their clerks – seem to have been reading a lot of what is being written in the media. But the subtle nature of the opinions being handed down shows that the Court is seeking some kind of recalibration of the system rather than a wholesale change.

GH: *From my perspective, the Supreme Court is at a minimum patent sceptical, if not actually anti-patent. It has been driven by a desire to clamp down on what they perceive as the evils created by patent trolls. There is no question in my mind that there are patent trolls who are abusing the system to extort money from many legitimate companies; this problem must be addressed. But we need to take greater care not to destroy the system when killing the mosquitoes. The justices are patent-sceptical and are not looking for a better balance between the benefits of having a strong patent system that upholds patents and a system that is solely focused on terminating the trolls.*

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***JW:** What does the Supreme Court's recent string of decisions tell us about its views of the CAFC?*

***TD:** It is quite trendy, I suppose, to say that the Supreme Court is currently beating up on the Federal Circuit, but I am not so sure. These people know each other, probably socially as well as professionally; they work in the same town. It seems to me that all the Supreme Court is saying is that we want the final say on some of the issues the Federal Circuit deals with.*

Essentially, the Supreme Court is taking its review function seriously and is providing oversight. When it takes a case on, people say that it would not have happened unless there were going to be wholesale changes as a result, but this has not happened. Maybe when they actually get into the issues involved, the justices realise it is not quite so clear-cut and straightforward as the media suggests.

In the KSR *case, for example, they were looking at an issue that the Supreme Court had not looked at for 30 years. The Federal Circuit deals with 10 or 20 similar cases each year.*

***DC:** I don't think the Supreme Court's recent patent jurisprudence is driven by the view that the Federal Circuit needs to be reined in. Instead, I think the Supreme Court in the last few years has awakened to the realisation that intellectual property is the most important asset in our economy and that it has been largely dormant in addressing the law that governs that property. As Todd says, I think the Court intends to be the final arbiter of the most important legal issues facing the country and its business. Once upon a time, those issues were securities laws, antitrust, and regulatory matters – today they are intellectual property issues.*

***GH:** I am not sure I completely agree. It seems to me that the Supreme Court has a sceptical view of the Federal Circuit and believes the Federal Circuit has tipped way too far in support of patent owners. I believe that this view is driven more by the press and by reports talking about abuses in the system by patent trolls, and not by an analysis of the statistics of the Federal Circuit itself.*

Recently, the Federal Circuit had a very poor track record with the Supreme Court and has been regularly reversed. Some people also believe that at least some of the justices have been upset with the Federal Circuit allegedly acting as if it were the ultimate authority on patent law and wanting to ignore the existence of the Supreme Court. Even if this might have been true at one time, the Supreme Court has now told the Federal Circuit loud and clear that only the Supreme Court is the ultimate authority and that it will get actively involved in handling major patent legal issues.

***CA:** From our perspective, taking a look at both this question and the one before, it is important to remember the Supreme Court's role. It is not really to be anti-patent or pro-patent, but to balance the social and economic consequences of administering a patent system. This is illustrated in some of the most recent decisions in* eBay v MercExchange *and* Medimmune v Genentech*. In both decisions, the Supreme Court overturned the CAFC by taking the legal issues out of the patent lens and placing them into the context of broader legal doctrines. This may hint at some concerns that the Supreme Court has about the CAFC, but unless the Supreme Court grants* certiorari *to more than two or three patent cases a year, we are unlikely to see any major change to the* status quo*.*

***JW:** Amicus briefs filed for several of the Supreme Court cases, as well as differing reactions to proposed reforms now in front of Congress, indicate the development of major divergences between patent owners in sectors such as high-tech and pharma. Can their differing needs be reconciled?*

***GH:** There are different needs and problems confronted by various industries such as brand-name pharma, polymer chemistry, electronics, semiconductors, computer software and medical products. The so-called patent trolls are primarily active in attacks in electronics, semiconductors and computer software, as well as a few other areas; while sectors such as brand-name pharma are highly dependent on having a strong patent system. These differences drive conflicts in positions on issues such as entitlements to injunctions, tests for obviousness and many other areas. This has been seen both in the diversity of amicus briefs submitted and the support of opposition to portions of patent reform bills in Congress. Some of these differences can be reconciled with compromise or middle of the road positions taken, such as in the IPO brief in the* KSR *case, and others cannot, such as when IPO was unable to reach an agreement in the* eBay *case.*

CA: *From a business and specifically patent metrics perspective, divergences between the industry sectors are natural. There are individual dynamics in each industry that need to be considered. We see fundamental differences between pharmaceuticals and high-tech, especially on the issue of infringement awards. There is no doubt that the pharmaceuticals companies rely heavily on strong patent protection and large awards to offset competition from generic drug manufacturers and to keep their research economically viable. In stark contrast is the high-tech industry, where the cost of innovation is typically less and the chance of inadvertently infringing a patent is high. However, both industry players would agree that greater emphasis should be placed on patent examination and the issuance of quality patents.*

DC: *As both Gary and Christopher say, patent protection means very different things for pharma and for IT. Pharma lives and dies on patents; IT considers them an irritant and would rather succeed by becoming dominant first-mover in the marketplace. This fundamental difference has thus far made it impossible to reconcile competing interests for patent reform. I think that eventually many of the contentious issues for Congressional patent reform will be taken off the table by the Supreme Court (for example,* eBay*), so it may be easier for competing interests to reach agreement on what's left.*

TD: *There is no denying that there are differences between patent owners on different issues. Like the others, I believe this is down to the fundamental differences that exist between industry business models and also, to an extent, to the way in which industries have developed.*

It's quite instructive to look at the biotechnology and IT/software industries, which both emerged at the same time in the late 70s and early 80s. Since they began, the biotech companies have always seen patents as a matter of life and death – companies in the sector stand or fall on the strength of their patent rights. In IT and software it is very different. Companies in those sectors didn't need patents when they started, resisted them for quite a while and so got into patenting late. They find themselves part of a system they are not used to and they are being affected by it; and they are big enough and powerful enough to lobby for changes.

But it is simplistic to say it is just about high-tech and life sciences companies. The licensing industry has a lot to say about reform, as do companies such as GE and Procter & Gamble. We may fall somewhere between the two extremes in terms of our views, but we still have a big stake in what is being discussed. So rather than seeing this as a bi-polar debate, it is far more accurate to see it as a multi-polar one.

Having said all that, it's also right to point out that there is actually a broad consensus among us all – the fights are over sub-sets, no-one is arguing about things such as wilful infringement. Will we find complete agreement? Well, my hunch is that the IT sector wanted to wait until the last Congressional elections had passed before it began to think about compromise over reform. Politically, with the Democrats now in charge in both houses, pharma may feel it has less opportunity to shape the debate, but no one wants to damage the life sciences industries – they are too important, both to the US and to the world at large, to run down. I think all sides will talk and we will find that the current Patent Reform Act proposals are not set in stone.

JW: *There have been recent moves in Congress to introduce more specialist judges to hear patent cases at the federal district level. Do you welcome these moves?*

CA: *Yes, because specialised judges will encourage greater uniformity of claims interpretation and a more comprehensive assessment of the overall business and technological issues at stake. The important aspect is periodically to educate the specialised judges about the prevailing economic consequences of their decisions. This will keep them from losing track of the overall purpose of the patent system.*

DC: *No one could argue with the desirability of judges conversant with patent law and technical issues. Nevertheless, I'm sceptical of specialist judges as a panacea to the management of patent litigation. First, what will the specialist judges be specialists in? Will a judge with a degree in electrical engineering be a specialist at handling patent litigation in the life sciences? Second, I worry that elevating considerations of technical expertise will come at the expense of other qualities (like judgement, maturity, fairness, etc) that we've traditionally used to select judges. I think better solutions to the challenges of patent litigation are to provide more education in patent law to judges who*

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want it and more technical support in the form of clerks and advisers for the cases that need it.

TD: *Like Doug, I think this is actually a more complex question than it first seems. We are dealing here with a long tradition in the US of broad-based judges and that is a difficult thing just to discard. I was recently on a panel with federal district judge Sue Robinson of Delaware, who has heard a lot of patent cases, and she was totally opposed to specialisation. So, the pilot programmes that are currently being discussed in Congress are a good idea, though we will see if anything actually happens as the proposals are still before the Senate.*

GH: *Having specialised judges will be a benefit in the long term. Generally, judges who have handled a number of patent cases have an easier time learning about the technology and the body of patent law involved in many of the issues that they need to decide, such as in doing a claim construction. However, then the issue will be whether the Federal Circuit pays any deference to the decisions of these judges on matters such as claim construction or insists on continuing to consider claim construction* de novo *with no deference to the district court decision.*

JW: *Do you think the last 18 months have made it easier or harder for patent owners to monetise their rights in the US and to maximise the value of what they have?*

GH: *The recent Supreme Court decisions have made it more difficult to monetise patents, particularly where they really have, at most, marginal value. It is imperative that the patent owner truly understands the value of the patent and the underlying technology and develops a programme that seeks to capitalise on that value. Strike suits against entire industries that are predicated on trying to extort relatively small amounts of money from a large number of companies have become more difficult to bring and maintain. However, there are still a number of these suits being filed. Over the next several years, litigation will be a necessary component to achieve value from a patent portfolio.*

At the same time, many companies have become far more sophisticated in developing ways to obtain value not just from litigation and royalty licensing of the patent. The expansion of creativity has made it easier to maximise the value of the portfolio.

TD: *The bottom line here is that the train has left the station. The idea of companies capturing the value of their IP and the knowledge that so much of overall company value is made up of IP assets are not going to go away now. If recent developments have caused any problems, these are no more than bumps in the road and, in any case, nothing that has happened at the Supreme Court and elsewhere has turned back the clock, while the reforms being discussed in Congress are about improving quality and fixing the litigation system – there will be no wholesale changes. The overall value proposition is unaffected.*

DC: *I think it's a draw. On the one hand, the enforcement of patents has become harder. Injunctions are questionable after* eBay*; obviousness was making a resurgence even before* KSR*; re-examinations are more frequent. On the other hand, I think that potential defendants now are more educated about the costs and risks of patent litigation, and are more inclined than previously to reach a fair licence agreement if it can be done.*

CA: *I am on Todd's side here. IP is now in the business mainstream and will not go away. The increasing frequency of patent auctions in the US as well as in Europe has certainly helped some patent holders to monetise their IP. In addition, the broader acceptance of published patent metrics and the new role of patent index funds all provide needed clarity on the financial value of patents. These elements are helping to improve overall understanding of both patent valuation and how to leverage it, and will further interest the financial community. We expect that there will be demand for a standard rating system to further validate patents as an asset class, making ideas like an IP exchange more of a reality and providing additional options to maximise IP value.*

JW: *What do you think needs changing in the US system?*

DC: *The patent system in the US needs more predictability. Although we may eventually look back on Supreme Court decisions and major Federal Circuit decisions as the beginning of clarity, it usually takes years for the dust to settle. Even Congressional reform (like, say, the current proposal on apportionment of damages) will only create a new set of words for litigators to argue about.*

CA: *We feel that proposed patent reform is an*

excellent starting point. Post-grant opposition proceedings and more funding for the USPTO will happen and we support them. We question whether the funding will actually be enough to help with current quality and pendency challenges. We remain concerned about accelerated patent review because it may limit the objective valuation of the patent.

***TD:** I am certainly with Christopher on the need for more resources at the USPTO. I have been a long-term proponent of this. The office should get funding money and we have to ensure that this is permanent, so I would like to see an end to diversion for all time. Of course, this sounds like Mom and apple pie, but it is crucial.*

Something else that I believe is critical is the introduction of first-to-file in the US. Although the universities and small inventors are worried about it, there is enough research out there now to show it will not damage them. By bringing it in, the US would also call Europe's bluff on wider patent harmonisation issues – we would be able to say, we have done our bit, now it is up to you to step up to the plate.

***GH:** There are several changes that I believe should be made in the US patent system and these changes are contained in the legislation introduced in April in Congress. They include: going to a first-to-file system; changing the jurisdiction where patent litigation can be brought to the residence of the defendant or where the defendant has a regular established place of business; limiting the scope of wilful infringement and the need for obtaining an opinion of counsel; and having some form of expedited post-grant opposition (but not for the life of the patent, as proposed in the recently introduced legislation). While many say that the bill will pass this year, these same provisions have been in prior bills that never passed in Congress.*

We also need to improve the quality of the examination process and reduce the time that it takes to obtain a patent. As Todd indicates, the PTO has to be given the resources to keep up with the growth in the number of applications and the growth in the sophistication and complexity of the technology.

***JW:** Looking in to your crystal ball, where do you see the US patent system in, say, five years' time?*

***TD:** The US patent system will continue to move forward, and if they are passed by Congress, the reform proposals will be in their implementation stage. On that basis, the next presidential election will be important as it will lead to the appointment of a new director of the USPTO who will have to put in place the rules packages that will surround the Act.*

My overriding hope, however is that the current moves on reform do not descend into general criticisms that undermine what we currently have. The IP system is too important for that and it is important that any changes do not ruin it. We have to act smart.

***DC:** I think there will continue to be two to three cases yearly from the Supreme Court, so that's 10 to 15 revolutionary decisions in the next five years. This churning will create a lot of uncertainty, which will discourage casual patent trolls. Serious aggregators, on the other hand, will be able to winnow their portfolios to minimise the effect of particular changes in the law and will continue to pursue returns on their investments. Meanwhile, as traditional industry continues to migrate abroad, the business of America will be innovation. The US patent system will continue to experience growing pains to deal with it. Management of patent litigation will still challenge the courts; the USPTO will still struggle to keep up with its workload; and other federal agencies will continue to seek ways to make themselves relevant in the IP field.*

***GH:** Unfortunately, I see a pendulum that is swinging in an anti-patent direction. The problems created by the patent trolls have caused a fury of noise and concerns, and have resulted in that backlash against the system which Todd is worried about. I fear that in trying to solve the troll problem we may cause severe harm to the benefits the system brings overall. The issue of trolls has to be dealt with, but we need to be careful how we do it.*

***CA:** Besides improvements and reforms to the USPTO processes, industry leaders and practitioners need to step up and lead. That is happening and will continue over the next five years. The IPO's taskforce on defining patent quality metrics is especially interesting to us. We would like to see the patent community work together to develop industry-accepted metrics for patent and portfolio quality metrics. We think the next five years will be very exciting as patent metrics continue to influence investment rating methods for routine securitisation and monetisation of patent-based assets. It's truly a time of groundbreaking work.*

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