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The *Loper v. Raimondo* Decision

A Survey Of Perspectives

Appeals From the PTAB Committee
July 30, 2024

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Loper and *Chevron* At-A-Glance

Chevron Deference

- Step 1: Did Congress clearly express intent on the precise issue?
- Step 2: Was agency's interpretation a "permissible construction"?
- Step 0: Did Congress delegate authority to make rules carrying the force of law? (*U.S. v. Mead*)

Loper v. Raimondo

- Expressly overruled *Chevron*
- Prior *Chevron* holdings subject to *stare decisis*
- Cites *Cuozzo v. Lee* as Court's last application of *Chevron*

After Chevron: Expect Limited Changes In USPTO Rulemaking

Andrei Iancu and Cooper Godfrey - Sullivan & Cromwell

"limited consequences for the U.S. Patent and Trademark Office, given the USPTO's unique statutory features."

- Patent code (§2(b)(2)(A)) did not give USPTO substantive rulemaking authority
- AIA granted additional authority for IPR
- Limited prior application of *Chevron* to USPTO

"Rulemakings that purport to alter or interfere with the patent code … will not be entitled to deference."

- No *Chevron* for terminal disclaimer proposal

Andrei Iancu & Cooper Godfrey, After Chevron: Expect Limited Changes In USPTO Rulemaking, Law360 (July 8, 2024)
https://www.law360.com/articles/1855529/after-chevron-expect-limited-changes-in-uspto-rulemaking

Chevron's End May Put Target On ITC And Patent Office Policy

Ryan Davis - Law360

"USPTO's legal interpretations have usually not been expressly given Chevron deference," but *Loper* could "embolden[]" challenges.

Precedential Opinions

- Unclear what amount of deference was due under *Chevron*
- "'now a PTAB precedential decision is worth no more than any other brief,' said David Boundy of Potomac Law Group PLLC"

Claim Construction Standard

- *Loper*'s citation of *Cuozzo* indicates that a return to BRI is unlikely - Nicholas Matich, Former Acting USPTO General Counsel

Ryan Davis, Chevron's End May Put Target On ITC And Patent Office Policy, Law360 (June 28, 2024)
https://www.law360.com/articles/1852785/chevron-s-end-may-put-target-on-itc-and-patent-office-policy

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U.S. Supreme Court Administrative Law Decisions Raise Questions for U.S. Patent and Trademark Office Proceedings

Richard Torczon, Michael T. Rosato, Matthew A. Argenti, and Jad Mills - WSGR

USPTO has not heavily relied on *Chevron*

USPTO has limited substantive rulemaking authority

"the Federal Circuit has always had its own expertise and mandate regarding patent law interpretation, and consequently little need to defer to USPTO on substantive patent (or trademark) law"

Richard Torczon, Michael T. Rosato, Matthew A. Argenti & Jad Mills, *U.S. Supreme Court Administrative Law Decisions Raise Questions for U.S. Patent and Trademark Office Proceedings*, wsgr.com (Jul. 1, 2024)
https://www.wsgr.com/en/insights/us-supreme-court-administrative-law-decisions-raise-questions-for-us-patent-and-trademark-office-proceedings.html

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With Elimination of Chevron Deference, Challenges to Post Grant Procedures Likely to Follow

Andrew J. Koopman and Christopher H. Blaszkowski - Buchanan

"The coming months will undoubtedly see a number of challenges to USPTO rulemaking authority, with post-grant practice, as usual, in the crosshairs."

Potential Petitioner Challenges

- Claim Construction standard – *Cuozzo* redo
- 325(d) discretionary limits

Potential Patent Owner Challenges

- Motions to amend - "one substitute claim" presumption v. 316(d)

Andrew J. Koopman & Christopher H. Blaszkowski, *With Elimination of Chevron Deference, Challenges to Post Grant Procedures Likely to Follow*, bipc.com (July 1, 2024)
https://www.bipc.com/with-elimination-of-chevron-deference-challenges-to-post-grant-procedures-likely-to-follow

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A few initial thoughts on Loper and the end of Chevron Deference

Dennis Crouch - University of Missouri

Loper's impact "will be relatively minor in the patent area"

Case to watch: *United Therapeutics v. Liquidia*

- Pending petition for certiorari
- What is the appropriate deference for determination on new arguments?

Dennis Crouch, *A few initial thoughts on Loper and the end of Chevron Deference*, Patently-O (July 2, 2024)
https://patentlyo.com/patent/2024/07/initial-thoughts-deference.html

ITC Challenge *Suprema*-ly Likely

Suprema v. ITC (Fed. Cir. 2015) – ITC & induced infringement

Loper said prior *Chevron* holdings subject to *stare decisis*

Issue already raised in *Sonos/Google* case

Ryan Davis, *Chevron's End May Put Target On ITC And Patent Office Policy*, Law360 (June 28, 2024)
Dennis Crouch, *A few initial thoughts on Loper and the end of Chevron Deference*, Patently-O (July 2, 2024)
Christopher A Suarez, *Patent law and litigation without Chevron deference*, The Patent Lawyer (July 16, 2024)

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Questions on *Loper*'s Broader Impact

What replaces *Chevron*? Maybe *Skidmore*?
-Patrick J. Sobkowski, Marquette University

Did *Loper* open the "litigation floodgates"?
-Christopher J. Walker, University of Michigan

Will there be a "negative deference" for changing interpretations?
-Daniel Deacon, University of Michigan

Patrick J. Sobkowski, *Chaos and Chevron in the Backyard, by Patrick J. Sobkowski*, Yale Journal on Regulation (June 28, 2024)
Christopher J. Walker, *What Loper Bright Enterprises v. Raimondo Means for the Future of Chevron Deference*, Yale Journal on Regulation (June 28, 2024)
Daniel Deacon, *Loper Bright, Skidmore, and the Gravitational Pull of Past Agency Interpretations*, Yale Journal on Regulation (June 30, 2024)

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