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After Chevron: Rethinking Agency Deference In IP Cases

By **William Milliken** (July 10, 2024, 5:43 PM EDT)

On June 28, the U.S. Supreme Court overturned a decades-old precedent, known as Chevron deference, that favored federal agencies' rulemaking interpretations. In this Expert Analysis series, *attorneys discuss the decision's likely impact on rulemaking and litigation across practice areas.*


William Milliken

In Loper Bright Enterprises v. Raimondo — arguably the most closely watched administrative law case in modern U.S. Supreme Court history — a 6-3 majority did away with Chevron deference, the controversial doctrine under which courts generally must defer to reasonable agency interpretations of ambiguous statutes.

Much has already been written about the implications of Chevron's demise, both before and immediately after the Loper decision was issued.

In this article, I will raise — but not attempt to answer definitively — two sets of questions about which I have not yet seen significant discussion: general questions regarding the scope and limits of Loper's holding and the case's potential implications for other administrative law doctrines; and specific questions of agency authority that may arise in the aftermath of Loper.

I focus primarily on the implications for intellectual property law, my own field. But the general questions, at least, will obviously have implications for all practice areas that involve questions of agency authority — which, these days, is most of them.

What Loper Held, What It Means

In one sense, the holding of Loper can be, and was, stated in three words: "Chevron is overruled."[1]

But that shorthand statement misses some important nuances — nuances that are likely to be the subject of substantial litigation in the coming months and years. The majority opinion summarized its holding as follows:

> Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority. … Careful attention to the judgment of the Executive Branch may help inform that inquiry. And when a particular statute delegates authority to an agency

> consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it.[2]

The court also stated that, by overruling Chevron, it did "not call into question prior cases that relied on the Chevron framework."[3]

So, for example, the holding of Chevron itself — namely, that the U.S. Environmental Protection Agency's decision to treat multiple pollution-emitting devices within the same industrial grouping as a single stationary source under the Clean Air Act was a reasonable interpretation of an ambiguous statute and therefore permissible — is still good law. For now.

The majority's summary of its analysis raises several questions.

First, what is the practical difference between paying "careful attention to the judgment of the Executive Branch" and deferring to reasonable agency interpretations under Chevron's Step 2? The former sort of deference is often referred to as Skidmore deference, after the Supreme Court's 1944 ruling in Skidmore v. Swift & Co.[4]

Under Skidmore, an agency interpretation of a given statute can be entitled to more or less weight in a given case, depending on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors that give it power to persuade, if lacking power to control."[5]

It is unclear how much daylight there is, practically speaking, between deferring to a reasonable agency interpretation under Chevron and according weight to a persuasive agency interpretation under Skidmore. That is particularly so given that, as the Loper majority pointed out, many courts have been finding ways to avoid expressly applying Chevron in recent years.[6]

It is possible that Skidmore deference in the post-Loper world looks quite a bit like the "Chevron-lite" deference that we've seen many courts apply in recent years.

To make this question a little more concrete, consider the Supreme Court's opinion in Cuozzo Speed Technologies v. Lee in 2016,[7] which, as it happens, was the last time the Supreme Court actually applied Chevron.[8]

Cuozzo concerned whether the America Invents Act authorized the U.S. Patent and Trademark Office to use the broadest reasonable construction standard when interpreting patent claims in inter partes review proceedings — instead of the plain-and-ordinary meaning standard applicable in district court.

Applying Chevron, the court held that the statute was ambiguous because it was silent as to the applicable standard and that the USPTO's rule was reasonable because the broadest reasonable interpretation standard helps to protect the public, and the USPTO "ha[d] used this standard for more than 100 years."[9]

It is not hard to imagine Cuozzo coming out the same way post-Chevron. The America Invents Act does not specify a claim construction standard one way or another, so it would be difficult for a court to conclude that the plain meaning of the statute clearly requires something other than the broadest reasonable interpretation.

And the court obviously found the USPTO's reasons for adopting the broadest reasonable interpretation persuasive, and its decision to do so consistent with "earlier ... pronouncements." So Skidmore deference would seem to point in favor of the same result as Chevron deference did.

Second, how do we know when a particular statute has "delegate[d] authority to an agency"? After Loper, mere ambiguity is obviously not enough to constitute a delegation of authority. The majority opinion provides certain examples of statutes expressly delegating authority to an agency,[10] and indicates that certain terms or phrases like "appropriate" or "reasonable" may leave agencies with flexibility.[11]

But, just as "the concept of ambiguity has always evaded meaningful definition,"[12] reasonable litigants and judges may disagree on whether a given statute is sufficiently flexible to indicate a delegation of authority. So, the locus of interpretive disputes may simply shift from the question of whether a given statute is ambiguous to whether that statute has expressly or impliedly delegated authority to the agency.

Cuozzo is, again, a good illustration of how such a dispute might play out. Because the America Invents Act does not "direct the agency to use one standard or the other,"[13] one might argue that it leaves the USPTO with flexibility to decide which one to use.

But one might also argue — as Cuozzo in fact did[14] — that, because IPRs are very similar to district court litigation, the statute plainly contemplated that the plain-and-ordinary meaning standard would apply, so the USPTO had no flexibility to conclude otherwise.

The point here is that a dispute about whether a statute is open-ended enough to constitute a delegation of authority may end up looking a lot like a dispute about whether the statute is ambiguous under Chevron Step 1.

Third, what are the constitutional limits on Congress' ability to delegate authority to an agency?

Under current law, "a statutory delegation is constitutional as long as Congress lays down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform."[15]

That doctrine, however, has been called into question in recent years.[16] If, as I suggest above, Loper prompts agencies to frame more statutory interpretation disputes into questions of whether the statute delegates interpretive authority to the agency, regulated parties may respond by challenging the permissibility of that delegation. And so the continuing viability of the intelligible principle test may come to the forefront.

The implications for IP law could be significant. The two federal agencies that deal with the most IP disputes — the USPTO and the U.S. International Trade Commission — have enabling statutes that provide the agencies with significant discretion.

For example, Title 35 of the U.S. Code, Section 316(a)(4), gives the USPTO authority to promulgate regulations "establishing and governing inter partes review … and the relationship of such review to other proceedings under this title."

Title 19 of the U.S. Code, Section 1335, authorizes the ITC "to adopt such reasonable procedures and

rules and regulations as it deems necessary to carry out its functions and duties," and the ITC also has authority to interpret relatively broad statutory terms in Section 1337 that define unfair practices in import trade.[17] Are those unconstitutional delegations of legislative power?

Fourth, just how vulnerable are the holdings of cases that were decided under Chevron?

The majority stated that such holdings "are still subject to statutory stare decisis despite [the] change in interpretive methodology."[18]

"[T]o say a precedent relied on Chevron is, at best, just an argument that the precedent was wrongly decided," the court explained, which "is not enough to justify overruling a statutory precedent."[19]

But one might reasonably argue that the Loper majority's decision to overrule Chevron relied on little else other than that Chevron was wrongly decided. To be sure, the majority also stated that the Chevron doctrine was unworkable and dismissed any reliance interests that have built up around the decision in the past 40 years.

But it would likely not be difficult to devise similar unworkability and no-reliance arguments for any given Chevron-based precedent. At the very least, the majority's attempt to cabin Loper's effect is unlikely to prevent litigants from asking courts to overrule decisions relying on Chevron in the near future.

One doesn't have to look far for an IP-related example of this. The statute permitting the ITC to adjudicate patent disputes, Section 1337, authorizes the commission to enjoin the importation of "articles that ... infringe a valid and enforceable United States patent."[20]

In Suprema Inc. v. International Trade Commission in 2015, the en banc U.S. Court of Appeals for the Federal Circuit held that the commission's interpretation of "articles that infringe" to "cover goods that, after importation, are used by the importer to directly infringe at the inducement of the goods' seller" was permissible under Chevron.[21]

Based on the Loper majority's assurance that prior Chevron-based decisions are still good law, the specific statutory holding of Suprema remains in force. But, even before Loper was decided, Google had already asked the en banc Federal Circuit to overrule Suprema, arguing that its holding could not survive the interment of Chevron deference.[22]

Litigants who disagree with other Chevron-based holdings are likely to make similar arguments in the coming months.

Implications for IP Lawyers: Two Specific Questions

Attorneys in virtually every field that touches on administrative law are busy trying to figure out how Loper is likely to affect their practice.

What will change in terms of the day-to-day functioning of agencies? Asking that question in the abstract is of limited utility, because it typically yields an answer something like the following: "Agency X, which I practice in/litigate against frequently, will encounter more statutory constraints on the actions it can take."

True, but, at that level of generality, not especially helpful. So, to make the implications a little more concrete, here are two specific questions from the IP field whose resolution Loper could affect.

The first is the validity of the USPTO's proposed rule concerning terminal disclaimer practice.

In May, the agency issued a notice of proposed rulemaking outlining a rule that a patentee filing a terminal disclaimer must agree that the patent will be enforceable only if it has never been tied through a terminal disclaimer to a patent in which any claim has been finally held unpatentable or invalid over prior art.[23]

This proposed rule would constitute a significant change to existing law and is highly likely to be challenged if it is promulgated. Post-Loper, the USPTO will not be able to rely on Chevron to defend the validity of this rule.

The second question concerns the ITC's authority to issue limited exclusion orders against products that were not adjudicated to infringe in the underlying investigation.

When the commission makes a finding of infringement and issues a limited exclusion order barring the infringing articles from entry into the U.S., it typically frames the exclusion order as applying to "articles that infringe" the relevant patents.

The commission has taken the position that these orders not only apply to the specific articles adjudicated in the investigation but also presumptively apply to other articles — for example, any redesigned versions of the infringing articles — unless the importer can prove noninfringement.[24] In previous litigation on this question, the commission has relied in part on Chevron to justify this interpretation of its authority.[25]

No court, however, has definitively answered the question of whether the commission's reading of the statute is permissible.

Now that Chevron is no longer good law, it is possible that the commission's interpretation of its powers under Section 1337 — on this question and others upon which the Federal Circuit has not yet definitively ruled — will be subject to renewed challenges.

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[1] 2024 WL 3208360, at *22 (U.S. June 28, 2024).

[2] Id.

[3] Id. at *21.

[4] 323 U.S. 134 (1944).

[5] Id. at 140.

[6] See 2024 WL 3208360, at *18–19 & n.7.

[7] Cuozzo Speed Techs. v. Lee, 579 U.S. 261 (2016).

[8] See Loper Bright, 2024 WL 3208360, at *19.

[9] Cuozzo, 579 U.S. at 276–81.

[10] See Loper Bright, 2024 WL 3208360, at *13 & nn.5–6.

[11] Id. at *13 (quoting Michigan v. EPA, 576 U.S. 743, 752 (2015)).

[12] Id. at *19.

[13] Cuozzo, 579 U.S. at 277.

[14] See id. at 277–78.

[15] Gundy v. United States, 588 U.S. 128, 135 (2019) (cleaned up).

[16] See, e.g., id. at 163 (Gorsuch, J., dissenting).

[17] See generally Suprema, Inc. v. Int'l Trade Comm'n, 796 F.3d 1338 (Fed. Cir. 2015).

[18] 2024 WL 3208360, at *21.

[19] Id. (cleaned up).

[20] 19 U.S.C. § 1337(a)(1)(B)(i).

[21] 796 F.3d at 1340, 1352.

[22] See Petition for Rehearing En Banc by Cross-Appellant Google LLC, Sonos, Inc. v. Int'l Trade Comm'n, No. 22-1421, Dkt. 98 (Fed. Cir. June 24, 2024).

[23] See Notice of Proposed Rulemaking, Terminal Disclaimer Practice to Obviate Nonstatutory Double Patenting, 89 Fed. Reg. 40439 (May 10, 2024).

[24] See, e.g., Reply of the U.S. International Trade Commission in Support of the Motions to Dismiss, Wirtgen Am., Inc. v. Dep't of Homeland Security et al., No. 20-cv-195, Dkt. 33 at 5–6 & n.3 (D.D.C. Feb. 12, 2020); id., Dkt. 26 at 12–13 (D.D.C. Feb. 7, 2020).

[25] Id. at 12 n.5.