

Appellate

Irell & Manella LLP's litigators are experienced in arguing appeals before the U.S. Supreme Court, U.S. Court of Appeals for the Federal Circuit, U.S. Court of Appeals for the Ninth Circuit and California appellate courts. For the last 50 years, we have established important precedent in appeals ranging from intellectual property, professional liability, ballot initiatives and redistricting, and securities law, to defamation and right of publicity, copyright and taxation, and constitutional law.

Our team includes trial lawyers who defend verdicts on appeal, as well as appellate specialists brought in to challenge trial judgments in high-stakes civil litigation. Our background includes successfully defending one of the largest jury verdicts in California, and reversing one of the largest patent infringement judgments in U.S. history.

Highly regarded for our work in the intellectual property sector, Irell lawyers have deep appellate expertise in patent law—before the Federal Circuit, the Patent Trial and Appeal Board (PTAB) and the U.S. Supreme Court. In addition, our colleague David Nimmer, the author of *Nimmer on Copyright*, has been cited in over 3,500 state and federal court decisions, including numerous U.S. Supreme Court opinions.

From the inception of every case, we focus on the endgame—weighing appellate issues and strategy from the moment a complaint is filed in trial court.

Recent highlights include:

- Convincing the U.S. Supreme Court to unanimously side with NantKwest, Inc. and strike down the U.S. Patent and Trademark Office's policy that applicants who appeal to a district court must foot the agency's legal bills – no matter who wins or loses.
- Obtaining the dismissal of a high-stakes securities fraud class action against Uber Technologies, Inc., and then convincing the Ninth Circuit to affirm the victory.
- Persuading the Delaware Supreme Court to affirm our complete defense verdict for Gilead Sciences, Inc. in contract litigation, helping Gilead avoid exposure to over \$55 million in damages.
- Assisting T-Mobile US, Inc. in convincing the U.S. Court of Appeals for the Fourth Circuit to affirm dismissal of trademark claims against the company.
- Securing an appellate victory in the Federal Circuit in favor of Ariosa Diagnostics, Inc., a San Jose-based molecular diagnostics company, regarding the eligibility of patent subject matter. We successfully defended the appeal in the U.S. Supreme Court against more than 20 amicus briefs urging reversal.

Federal Circuit Appeals

- *Sirius XM Radio Inc. v. Fraunhofer-Gesellschaft* 858 F. App'x 343 (Fed. Cir. 2021). In September 2021, secured a victory for Fraunhofer-Gesellschaft in persuading the U.S. Court of Appeals for the Federal Circuit to affirm a PTAB ruling upholding the validity of a fundamental patent on satellite radio technology that Fraunhofer has asserted against SiriusXM. This was the second Federal Circuit win Irell obtained for Fraunhofer within a two-year period in litigation against SiriusXM. In October 2019, Irell also convinced the Federal Circuit to revive Fraunhofer's

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infringement litigation against SiriusXM in the U.S. District Court for the District of Delaware after a judge dismissed the suit.

- *Finjan Inc. v. Juniper Networks, Inc.*, 825 F. App'x 922 (Fed. Cir. 2020). Successfully defended Juniper against a patent infringement lawsuit, convincing a jury in the U.S. District Court for the Northern District of California that Juniper did not infringe a malware detection patent held by Finjan Inc. In October 2020, the U.S. Court of Appeals for the Federal Circuit issued a summary affirmance on appeal. In July 2021, the trial judge ordered Finjan to pay Juniper \$5.9 million in legal fees. The Federal Circuit affirmed the fees ruling in December 2022. Juniper's victory was recognized as a top defense verdict by the *Daily Journal*.
- *AIDS Healthcare Foundation, Inc. v. Gilead Sciences, Inc.*, 890 F.3d 986 (Fed. Cir. 2018). Secured the dismissal of a lawsuit challenging Gilead's new HIV and hepatitis B medication tenofovir alafenamide (TAF). AIDS Healthcare Foundation brought the lawsuit alleging that five patents owned or licensed by Gilead are invalid and that Gilead violated antitrust and unfair competition laws by first releasing TAF as part of multidrug products. Judge William Alsup of the U.S. District Court for the Northern District of California granted Gilead's motion to dismiss. The U.S. Court of Appeals for the Federal Circuit affirmed the dismissal.
- *Brixham Solutions, LTD v. Juniper Networks, Inc.*, 669 F. App'x 559, 669 F. App'x 560 (Fed. Cir. 2016). On October 6, 2016, the U.S. Court of Appeals for the Federal Circuit issued rulings affirming two PTAB decisions obtained by Irell in July 2015. In those decisions, the PTAB had invalidated each of the asserted claims from two router patents that Brixham had accused Juniper of infringing. The PTAB found that all of the challenged claims were obvious in view of the prior art identified by Juniper.
- *MAG Aerospace Industries v. B/E Aerospace Inc.*, 816 F.3d 1374 (Fed. Cir. 2016). The U.S. Court of Appeals for the Federal Circuit affirmed a district court summary judgment ruling that B/E's patented lightweight Ecosystems aircraft vacuum toilet does not infringe any of the three patents asserted by MAG, which pertain to certain vacuum toilet assemblies and methods for repairing such toilets.
- *Board of Trustees of the Leland Stanford Junior University v. Ariosa Diagnostics Inc.*, 636 F. App'x 801 (Fed. Cir. 2016). The U.S. Court of Appeals for the Federal Circuit affirmed a PTAB decision that all asserted claims of U.S. Patent No. 8,296,076, a patent directed to a non-invasive prenatal test for chromosomal abnormalities, are invalid because they are anticipated, handing a victory to Ariosa Diagnostics Inc. Ariosa has been sued for infringement of this patent in district court by patent owner Stanford University and its exclusive licensee Verinata Health. The Federal Circuit's decision gave Ariosa a complete victory on this patent.
- *Ariosa Diagnostics, Inc. v. Sequenom, Inc.*, 788 F.3d 1371 (Fed. Cir. 2015). Secured an appellate victory in favor of Ariosa Diagnostics Inc., a San Jose-based molecular diagnostics company. In a major precedential opinion, the U.S. Court of Appeals for the Federal Circuit affirmed the district court's summary judgment ruling invalidating, for failure to recite patent-eligible subject matter, the patent that Sequenom Inc. had asserted against Ariosa in early 2012. The Federal Circuit's ruling affirms Ariosa's complete victory in the case. The Federal Circuit denied Sequenom's petition for a rehearing en banc. Thereafter, the U.S. Supreme Court denied Sequenom's petition for certiorari.
- *Realtime Data LLC v. Interactive Data Corp. et al.*, 600 F. App'x 771 (Fed. Cir. 2015). Represented Interactive Data, a developer and supplier of electronic trading applications, analytical tools for investment managers and customized web-based financial information systems, as a defendant in this patent infringement suit filed in 2009. In 2011, Irell succeeded in obtaining a writ of mandamus from the U.S. Court of Appeals for the Federal Circuit ordering the transfer of the litigation to the U.S. District Court for the Southern District of New York. In 2012,

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Irell succeeded in obtaining summary judgment rulings disposing of the case on five independent bases. Realtime appealed those rulings to the Federal Circuit, which affirmed the trial court's rulings.

- *Santarus Inc. v. Par Pharmaceutical Inc.* 694 F.3d 1344 (Fed. Cir. 2012). Represented Santarus Inc. in this case involving Santarus' drug Zegerid. The district court found all of the asserted claims in the patents covering Zegerid to be obvious over the prior art. On appeal, the U.S. Court of Appeals for the Federal Circuit held that 11 asserted claims in two patents were not obvious and reversed the district court on those claims. Because Par's generic was found to infringe the claims that were held to be valid, the decision cleared the way for a trial on damages. As a result of the victory, two days following the decision, Par announced that it had voluntarily ceased further distribution of the infringing product. In September 2014, Par agreed to pay \$100 million to settle the dispute.
- *Crea v. City of Hope* 466 F. App'x 903 (Fed. Cir. 2012). Represented City of Hope in this action—originally filed in the Los Angeles County Superior Court and subsequently removed to the U.S. District Court for the Central District of California—in which Roberto Crea alleged that he should have received millions of dollars in royalties from City of Hope based on contributions he made to patents and other intellectual property while working as a post-doctoral research associate at City of Hope in 1977-78. Crea's work was related to a research collaboration between City of Hope and Genentech that resulted in substantial royalty payments to City of Hope. After being removed to federal court, the case was dismissed by summary judgment on statute of limitations and contractual grounds. Crea appealed, arguing, among other things, that the federal courts lacked jurisdiction over his claims because they raised state law, rather than patent, issues. In March 2012, the U.S. Court of Appeals for the Federal Circuit, concluding that federal jurisdiction existed, affirmed the judgment in favor of City of Hope in full.
- *TiVo Inc. v. EchoStar Communications, et al.* 646 F.3d 869 (Fed. Cir. 2011). Served as co-counsel in an en banc proceeding involving the standard for injunction enforcement proceedings. In 2008, the U.S. Court of Appeals for the Federal Circuit affirmed our trial victory for TiVo, including injunctive relief and an award of damages exceeding \$90 million, in a patent infringement case regarding digital video recorders. The Federal Circuit also instructed the district court to consider awarding additional damages incurred during appeal. In June 2009, the district court once again found for TiVo and held EchoStar in contempt of the 2006 injunction and entered an order requiring EchoStar to pay additional damages and sanctions totaling approximately \$200 million, bringing the total amount of money awarded to TiVo to more than \$400 million. In March 2010, the Federal Circuit affirmed the district court's contempt findings against EchoStar. The Federal Circuit then granted en banc review and, in April 2011, ruled that DISH Network and EchoStar must disable certain DVRs that were found to infringe TiVo's "time warp" patent. Shortly after, a settlement was reached. DISH Network and EchoStar paid TiVo over \$600 million, including more than \$100 million that had already been paid.
- *Spansion, Inc. v. ITC.* 629 F.3d 1331 (Fed. Cir. 2010). Served as co-counsel for Tessera in an appeal from a patent enforcement investigation before the U.S. International Trade Commission (ITC) in which the commission found Tessera's patents valid and infringed by several major players in the semiconductor industry. Irell successfully defeated motions for an emergency stay of the ITC's exclusion orders, a normal stay pending appeal and for reconsideration and en banc review of the same. The U.S. Court of Appeals for the Federal Circuit affirmed the ITC's decision.
- *Peer Communications Corp. v. Skype, Inc., et al.* 333 F. App'x 570 (Fed. Cir. 2009). Successfully defended Skype against a patent infringement lawsuit brought by Peer Communications Corp., a subsidiary of Acacia Research

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- Corp. The U.S. Court of Appeals for the Federal Circuit affirmed summary judgment in favor of Skype.
- *Netcraft v. eBay* 549 F.3d 1394. (Fed. Cir. 2008). The U.S. Court of Appeals for the Federal Circuit affirmed a summary judgment of noninfringement in a patent lawsuit filed against eBay and PayPal relating to online payment systems. We also represented eBay and PayPal in the district court.
 - *Microprocessor Enhancement Corporation v. Texas Instruments, Inc.* 520 F.3d 1367. (Fed. Cir. 2008). The U.S. Court of Appeals for the Federal Circuit affirmed summary judgment in favor of Texas Instruments. MEC had sought over \$94 million in damages and a permanent injunction against TI's line of C6000 processors. The Federal Circuit ruled that Texas Instrument's processors did not infringe any claim of the asserted patent.
 - *IpVenture v. ProStar Computer* 503 F.3d 1324. (Fed. Cir. 2007). Represented the appellant IpVenture. The district court dismissed IpVenture's patent infringement suit without prejudice ruling that IpVenture was not the sole owner of the patent-in-suit and hence lacked standing. The U.S. Court of Appeals for the Federal Circuit vacated the dismissal and reinstated the case. The court ruled that the former employer of one of the inventors had no assignment of the invention and that IpVenture owned the entire interest in the patent.
 - *Ultratech Stepper, Inc. v. ASM Lithography, Inc.* 224 F. App'x 974 (Fed. Cir. 2007). Represented ASML in a patent suit relating to optical photolithography. Following a jury verdict invalidating the patent asserted against ASML on numerous bases, the U.S. Court of Appeals for the Federal Circuit affirmed the judgment on all grounds.
 - *In re Echostar Communications* 448 F.3d 1294. (Fed. Cir. 2006). Represented TiVo in connection with a writ of mandamus regarding discovery of information claimed to be work product or attorney-client privileged when the defendant asserts an advice-of-counsel defense to a charge of willful patent infringement. The U.S. Court of Appeals for the Federal Circuit ruled in client's favor.

State Appellate Matters

- *Alcatel-Lucent USA, Inc. v. Juniper Networks, Inc.*, H040891 (Cal. App. Nov. 8, 2017). Retained by Juniper after it lost a jury trial in a case brought by Alcatel Lucent alleging unfair competition and interference with contractual relations. Irell obtained a judgment notwithstanding the verdict in the trial court and that ruling was affirmed on appeal.
- *Shareholder Representative Services LLC v. Gilead Sciences, Inc.*, 177 A.3d 610 (Del. 2017). Represented Gilead Sciences in a contract litigation related to whether Gilead owed a bonus payment under a merger agreement related to Gilead's cancer-fighting PI3K inhibitor Zydelig. Following a trial, the Delaware Court of Chancery issued a complete defense verdict, rejecting the plaintiff's claim for over \$50 million in damages. On December 12, 2017, in a 3-2 published decision, the Delaware Supreme Court affirmed the trial court's decision that the milestone was not triggered and Gilead had no liability.
- *Amkor Technology Inc. v. Tessera Inc.* A139596 (Cal. Ct. App. Nov 25, 2014). A California appeals court rejected Amkor's attempts to overturn a \$128.3 million arbitration judgment in favor of Tessera Inc. over a patent licensing agreement, ruling the arbitrators were allowed to award Tessera royalties for Amkor's use of the technology after the deal was terminated.
- *Linear Technology Corp. v. Tokyo Electron Ltd. et al.* 200 Cal. App. 4th 1527 (2011). After a decade-long legal battle, the California Court of Appeal upheld a 2010 defense verdict and award of attorneys' fees in favor of semiconductor manufacturer Novellus Systems Inc., represented by Irell, in a breach of warranty suit relating to a

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patent infringement dispute. Irell then defeated Linear's petition to have the California Supreme Court take up the matter for further review.

- *City of Hope National Medical Center v. Genentech, Inc.* 43 Cal. 4th 375 (2008). The California Supreme Court unanimously upheld a \$300 million jury verdict for breach of contract in favor of City of Hope National Medical Center, the largest damage award ever affirmed on appeal by California courts in any area of law. More than \$565 million was paid by the defendant to City of Hope. The case concerned City of Hope's right to receive royalties from Genentech relating to a fundamental invention by City of Hope scientists in the 1970's at the dawn of the biotechnology industry. The Supreme Court's opinion explored the role that a jury may play in interpreting contract language and affirmed the trial court's decision to allow the jury to interpret the contract between City of Hope and Genentech.
- *Jakks Pacific, Inc. v. Superior Court; THQ Inc., Real Party in Interest* 160 Cal. App. 4th 596 (2008). The California Court of Appeal affirmed the trial court's ruling in our favor that arbitrators need not disclose potential conflicts until they are actually selected, as opposed to when they are first nominated by the parties or by the court. This was the first time that the court of appeal had interpreted the arbitrator disclosure rules under the California Code of Civil Procedure.

Federal Appellate Matters

- *Continental Automotive Systems Inc. v. Avanci LLC et al.* 27 F.4th 326 (5th Cir. 2022). Representing PanOptis, persuaded a judge to dismiss with prejudice an antitrust and unfair competition suit filed by Continental Automotive Systems involving licensing practices for patents covering cellular technology. After the dismissal, the firm obtained an affirmance in the U.S. Court of Appeals for the Fifth Circuit.
- *Irving Firemen's Relief Fund v. Uber Technologies, Inc. et al.* 998 F.3d 397 (9th Cir. 2021). In May 2021, secured a victory for Uber Technologies in convincing the U.S. Court of Appeals for the Ninth Circuit to affirm a district judge's dismissal with prejudice at the pleading stage of a securities fraud class action against Uber. The plaintiff contended Uber made false or misleading statements about numerous alleged high-profile scandals, negatively impacting investors. In a precedent-setting opinion, the Ninth Circuit agreed with the firm's argument that the plaintiff had failed to plead loss causation because it did not specifically tie any alleged misstatement to a drop in Uber's stock price. The Ninth Circuit's opinion was the first to address the causation pleading requirement for claims under California's market manipulation statute asserted in federal court. This was a highly positive outcome for Uber because the suit sought billions of dollars in damages under a state statute that is notorious for its low evidentiary hurdles for plaintiffs suing under it.
- *Zahourek Systems, Inc. v. Balanced Body University, LLC*, 965 F.3d 1141 (10th Cir. 2020). Convinced the U.S. Court of Appeals for the Tenth Circuit to reverse a district court's summary judgment ruling against a client in a copyright infringement dispute over a sculpture of a human skeleton with muscles. The Tenth Circuit's July 2020 published opinion revived client Jon Zahourek's infringement suit against Balanced Body University, LLC involving the giant skeleton Zahourek created known as "the Maniken." Before Zahourek hired Irell, the U.S. District Court for the District of Colorado held that the sculpture was a "useful article" and not protectable by copyright. After the ruling, the client hired Irell to represent him on appeal, and the U.S. Court of Appeals for the Tenth Circuit agreed with the firm's argument that the court's "useful article" analysis was flawed. The opinion remanded the case for further consideration.

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- *El Dabe v. Calavo Growers, Inc.*, 719 F. App'x 607 (9th Cir. 2018). In this consolidated securities class action, Irell represented Calavo Growers Inc., a global leader in the avocado industry and a leading provider of diversified fresh packaged foods, and certain of Calavo's officers and directors in the defense of securities fraud allegations relating to Calavo's January 2015 restatement of its audited financial statements. Irell twice won dismissal of the complaint. The U.S. Court of Appeals for the Ninth Circuit affirmed the dismissal.
- *Simply Wireless Inc. v. T-Mobile US, Inc.*, 877 F.3d 522 (4th Cir. 2017). Secured dismissal of Simply Wireless's trademark claims. The matter was appealed to the U.S. Court of Appeals for the Fourth Circuit, which affirmed the dismissal in a 2-1 published decision.
- *SmithKline Beecham Corp. d/b/a GlaxoSmithKline v. Abbott Laboratories* 740 F.3d 471 (9th Cir. 2014). The U.S. Court of Appeals for the Ninth Circuit ruled in favor of GlaxoSmithKline, represented by Irell, that the Constitution prohibits jury strikes based on sexual orientation, extending a protection once reserved for race and gender to sexual orientation and granted a new trial for GSK in a case against Abbott Labs, because a gay potential juror was improperly excluded based on his sexual orientation. In reaching that conclusion, the Ninth Circuit held that discrimination based on sexual orientation was subject to a heightened level of scrutiny under the equal protection clause.
- *SRM Global Fund Ltd. Partnership v. Countrywide Financial Corp.* 448 F. App'x 116 (2d Cir. 2011). The U.S. Court of Appeals for the Second Circuit issued a unanimous opinion affirming in every respect the dismissal of claims brought by SRM Global, a hedge fund, against Irell client Angelo Mozilo, the former chairman and CEO of Countrywide Financial Corporation. SRM claimed losses of more than \$400 million on investments in Countrywide stock and sued Mozilo, Countrywide and others in the U.S. District Court for the Southern District of New York, alleging violations under federal securities laws.
- *Primate Freedom Project, Inc. v. The Regents of the University of California, et al.* 331 Fed. Appx. 716 (11th Cir. 2009). The U.S. Court of Appeals for the Eleventh Circuit affirmed a dismissal in favor of The Regents of the University of California. Represented the University in an action in which the plaintiff sought declaratory and injunctive relief for claims brought under the First Amendment and the free speech provisions of the Georgia Constitution.
- *NRDC v. Winter* 543 F.3d 1152 (9th Cir. 2008). The U.S. Court of Appeals for the Ninth Circuit affirmed plaintiffs' entitlement to attorneys' fees under the Equal Access to Justice Act and declined to reduce the fee award on the basis of purportedly limited success. The Ninth Circuit found that plaintiffs had achieved "excellent results" under EAJA by obtaining a TRO and forcing a settlement that included measures designed to protect the environment that had not previously been implemented in certain naval training exercises.
- *Tucker, et al. v. Interscope Records, et al.* 515 F.3d 1019 (9th Cir. 2008). The U.S. Court of Appeals for the Ninth Circuit affirmed our summary judgment victory in a malicious prosecution action filed against a record company and a law firm. The Ninth Circuit agreed that there was no evidence from which a jury could find malice, a necessary element of the malicious prosecution claim.
- *Huynh v. Chase Manhattan* 465 F.3d 992 (9th Cir. 2006). Successfully represented the appellee in a case before the U.S. Court of Appeals for the Ninth Circuit that involved "heretofore unaddressed choice of law and statutes of limitations issues." The case involved claims against a bank involving deposits lost during the Vietnam War.