

SanDisk is undoubtedly the most significant interpretation of *MedImmune* and as the leading case is already the subject of controversy, including prediction of “dire consequences” as quoted below.

Litigation “Floodgates”, the Sky is Falling! The Sky is Falling!: Dire consequences have been speculated: “*SanDisk* is likely to have a very strong adverse impact on small technology companies and universities that may not have the means to defend their patents in declaratory judgment actions... [which] could have a profoundly negative effect on the development of technology in the United States.” David L. Fox, *The Elimination of a Patent Licensing “Safe Haven”*, IP 360 (April 2, 2007). Predicted is “a dire situation for small patentees, and the United States as a whole.” *Id.* “[T]he chilling effect that *SanDisk* will almost certainly have on patent licensing ... is virtually certain to adversely affect the development and implementation of new technology in the United States.” *Id.*

Per Nokia, the London “Floodgates” Remain Closed: Invalidity actions routinely are filed under far lower standards for a justiciable controversy in Germany, Japan and the United Kingdom, yet there is no similar panic reaction. In a recent expansion of the scope of declaratory judgment jurisdiction in the United Kingdom, Lord Justice Jacob scoffed at the “floodgates” argument. Eccleston et al., p. 34 (*attached*) (citing *Nokia v. InterDigital*).

To “dethron[e] Lear”, putting America on a Par with Overseas Systems: *MedImmune* would never have been needed in the first place if the United States had an effective post-grant administrative review process with the same standard of a justiciable controversy as leading foreign systems. More than twenty years ago, Professor Rochelle Cooper Dreyfuss had urged that we should “dethron[e] Lear” in major part because of the expectation at the time that the new reexamination law would provide a solution to the public policy concerns of *Lear*. Only in hindsight can it be seen that the time to dethrone *Lear* is still “tomorrow” – due to the abysmal failure of reexamination to provide a timely alternative to litigation.

A condition precedent to dealing with the very real problems generated by *Lear*, *MedImmune* and *SanDisk* is the creation of an effective *inter partes* post grant review system with a realistically low standard for a justiciable controversy to put the United States on a par with the laws and practices in the United Kingdom, Germany and Japan, as discussed in Eccleston et al., § VI-C, *A Comparative View: A Different Approach Abroad*, p. 33.