

Lessons from the US Court of Appeals for the Federal Circuit's Recent Jurisprudence on *Inter Partes* and Post-Grant Review

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Today's Presenters



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Topics to be Discussed

- PTAB Trial Proceedings & Appeals: *The New Normal*
- Appellate Review and Jurisdiction
- Claim Construction
- Lessons Learned

PTAB Trial Proceedings & Appeals: *The New Normal*

Precedential Federal Circuit Opinions from AIA Trial Proceedings



Appeals & Mandamus from Non-Final Decisions

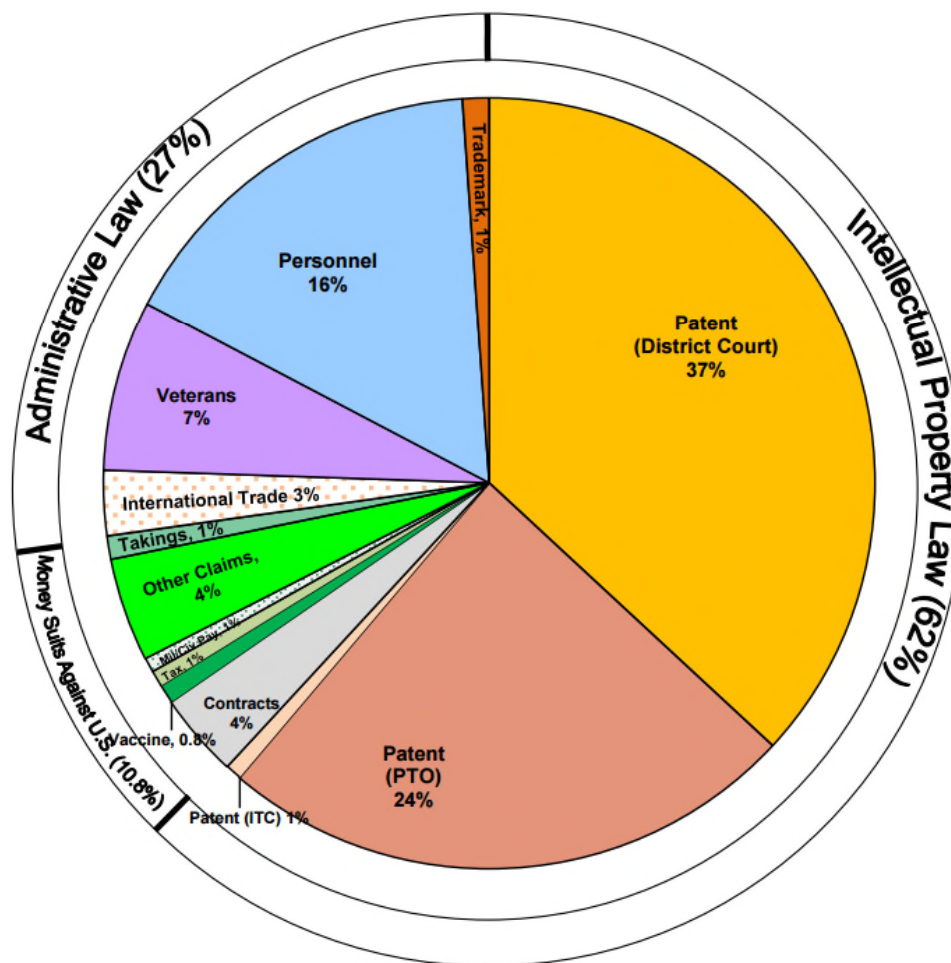
Case Name	Date	Appealed by	Outcome
<u><i>In re Dominion Dealer Solutions, LLC</i></u>	4/24/2014	Petitioner	Mandamus Denied
<u><i>In re Proctor & Gamble Co.</i></u>	4/24/2014	Patent Owner	Mandamus Denied
<u><i>St. Jude Medical, Cardiology Division, Inc. v. Volcano Corp.</i></u>	4/24/2014	Petitioner	Appeal Dismissed
<u><i>GTNX, Inc. v. Inttra, Inc.</i></u>	6/16/2015	Petitioner	Appeal Dismissed

Precedential Federal Circuit Opinions from AIA Trial Proceedings

Case Name	Date	Issues	Appealed by	Outcome
<u><i>In re Cuozzo Speed Technologies, LLC</i></u>	7/8/2015 (replacing 2/4/2015)	BRI, defects in Petition, institution after final	Patent Owner	Affirmed-in-part, Dismissed-in-part
<u><i>Microsoft Corp. v. Proxyconn, Inc.</i></u>	6/16/2015	Claim construction, amendments	Both	Affirmed-in-part(Petitioner's appeal), Remand (Patent Owner's appeal)
<u><i>Versata Dev. Grp. v. SAP Am., Inc.</i></u>	7/9/2015	Institution after final, CBM, claim construction, § 101	Patent Owner	Affirmed
<u><i>Dynamic Drinkware, LLC v. National Graphics, Inc.</i></u>	9/4/2015	Priority to provisional	Petitioner	Affirmed
<u><i>Achates Reference Publishing, Inc. v. Apple Inc.</i></u>	9/30/2015	Institution after final	Patent Owner	Affirmed
<u><i>Belden Inc. v. Berk-tek LLC</i></u>	11/5/2015	Obviousness, reply evidence	Both	Affirmed-in-part (Patent Owner's appeal), Reversed-in-part (Petitioner's appeal)
<u><i>Ariosa Diagnostics v. Verinata Health, Inc.</i></u>	11/16/2015	APA review, reply evidence, obviousness	Petitioner	Remand
<u><i>Straight Path IP Group, Inc. v. Sipnet EU S.R.O.</i></u>	11/25/2015	Claim construction	Patent Owner	Remand
<u><i>MCM Portfolio LLC v. Hewlett-Packard Co.</i></u>	12/2/2015	Constitutionality, obviousness	Patent Owner	Affirmed
<u><i>Prolitec, Inc. v. Scentair Technologies, Inc.</i></u>	12/4/2015	Claim construction, amendment	Patent Owner	Affirmed
<u><i>SightSound Technologies, LLC v. Apple Inc.</i></u>	12/15/2015	Institution after final, CBM, claim construction, obviousness	Patent Owner	Affirmed-in-part, Dismissed-in-part
<u><i>Merck & CIE v. Gnosis S.P.A.</i></u>	12/17/2015	Claim construction, obviousness, anticipation	Patent Owner	Affirmed
<u><i>South Alabama Medical Science Foundation v. Gnosis S.P.A.</i></u>	12/17/2015	Obviousness (companion to <i>Merck</i> decision)	Patent Owner	Affirmed
<u><i>Redline Detection, LLC v. Star Envirotech, Inc.</i></u>	12/31/2015	Supplemental information, obviousness	Petitioner	Affirmed
<u><i>Ethicon Endo-Surgery, Inc. v. Convidien LP</i></u>	1/13/2016	Single panel, obviousness	Patent Owner	Affirmed

Share of the Federal Circuit's Docket

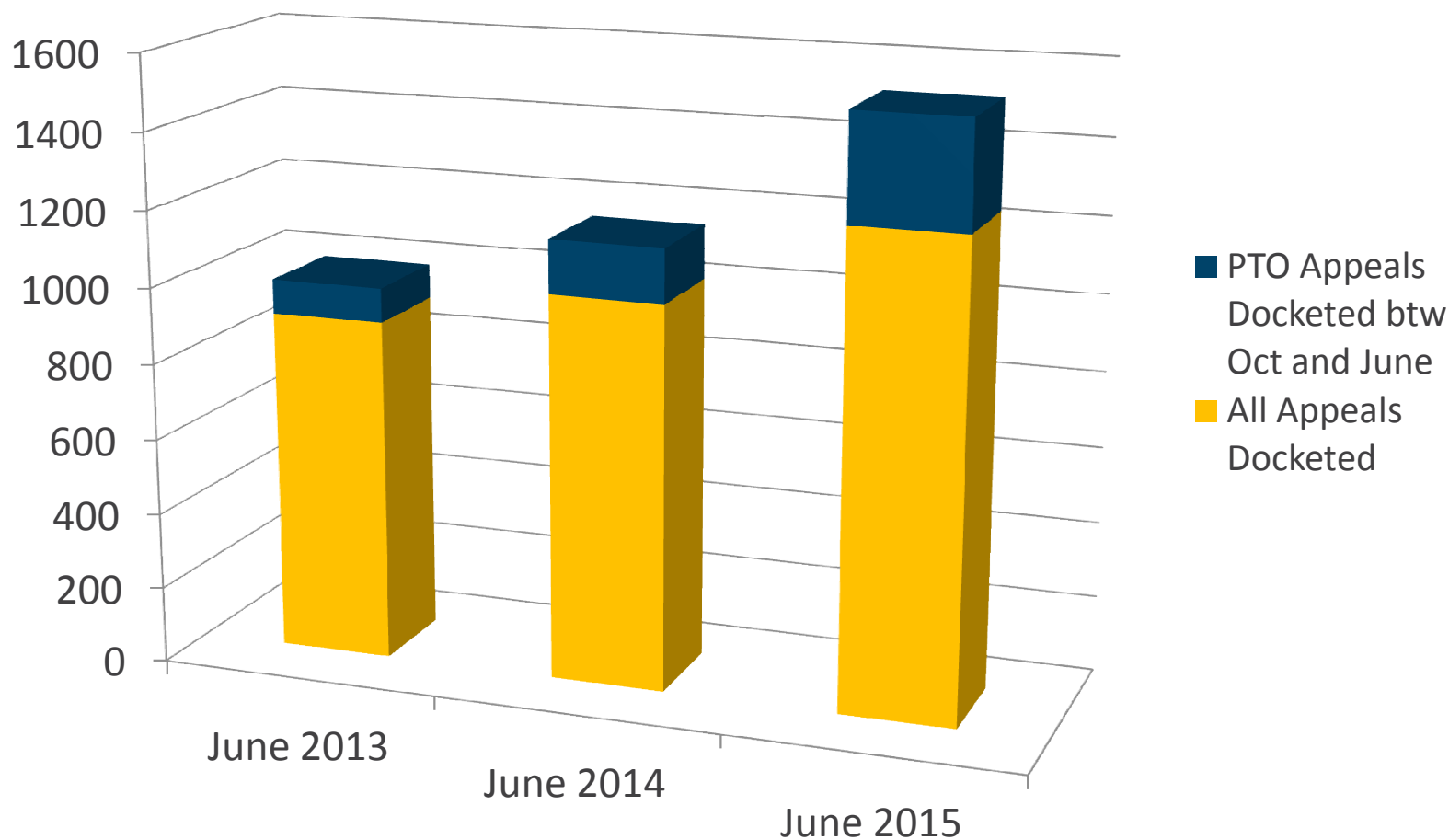
United States Court of Appeals for the Federal Circuit
Appeals Filed, by Category
FY 2015



Source:

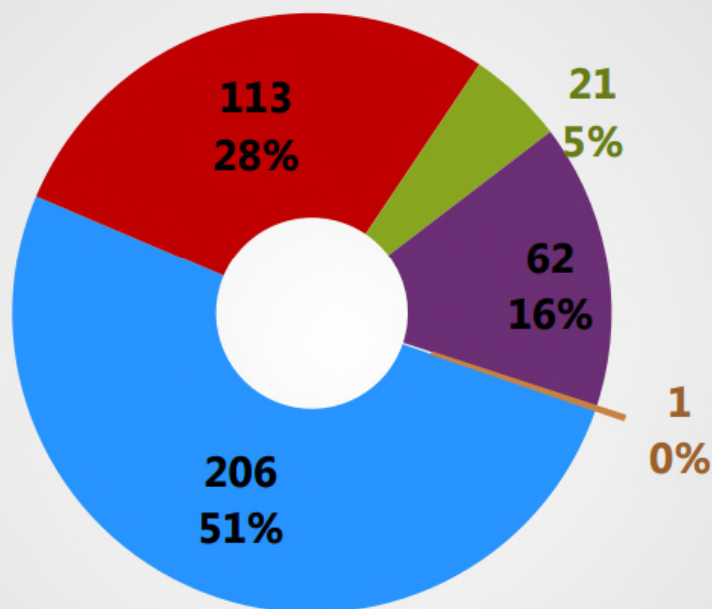
<http://www.ca9c.uscourts.gov/sites/default/files/Caseload%20by%20Category%20%282015%29.pdf>

Share of the Federal Circuit's Docket



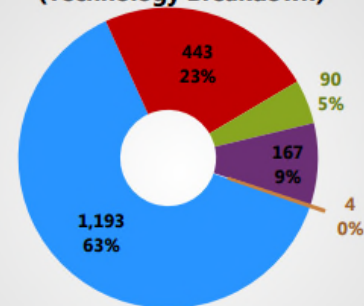
PTAB Filings

**403 Total AIA Petitions in FY 16*
(Technology Breakdown)**

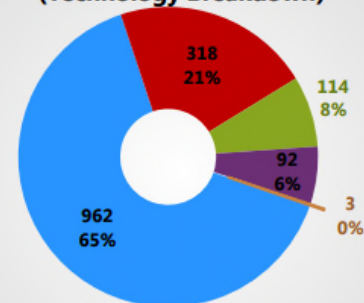


- Electrical/Computer - TCs 2100, 2400, 2600, 2800
- Mechanical/Business Method - TCs 3600, 3700
- Chemical - TC 1700
- Bio/Pharma - TC 1600
- Design - TC 2900

**1897 Total AIA Petitions in FY 15*
(Technology Breakdown)**



**1489 Total AIA Petitions in FY 14*
(Technology Breakdown)**



**Data current as of: 12/31/2015*

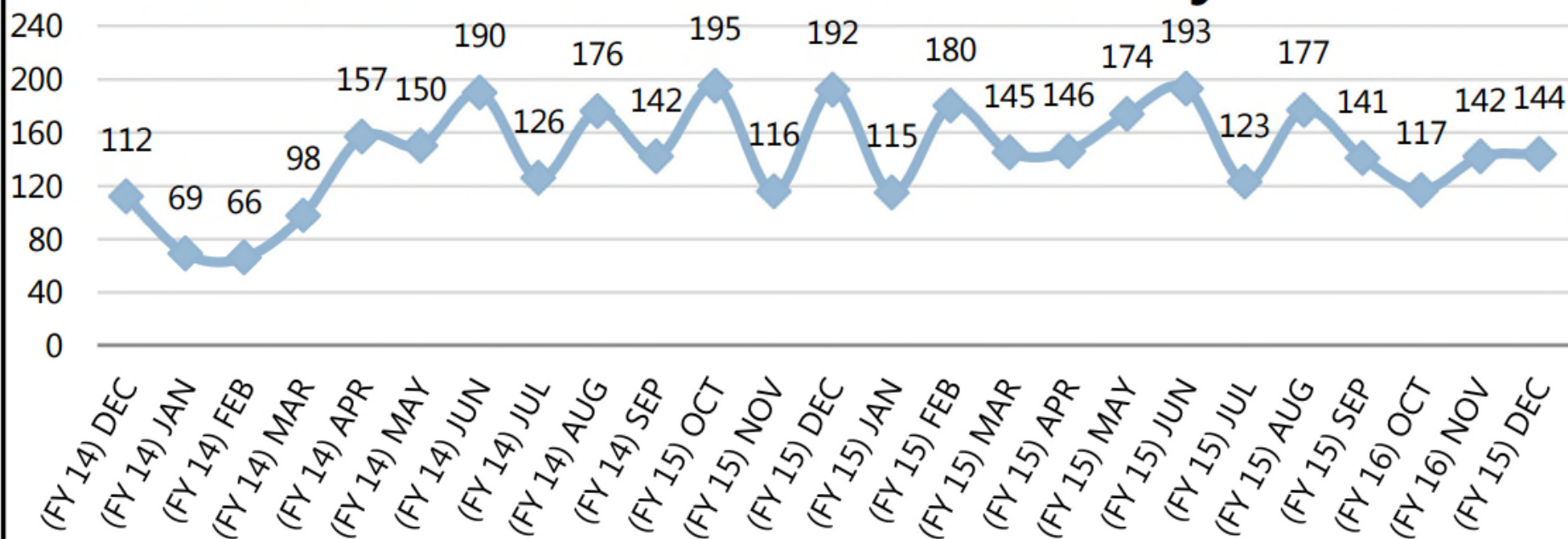
Source:

<http://www.uspto.gov/sites/default/files/document/s/2015-12-31%20PTAB.pdf>

Current PTAB Filings



Number of TOTAL Petitions Filed by Month*



Average \approx 150 petitions monthly

Source:

<http://www.uspto.gov/sites/default/files/document/s/2015-12-31%20PTAB.pdf>

Appellate Review and Jurisdiction

What About an Appeal?

- Review of administrative decisions by Fed. Cir. is governed by the Administrative Procedure Act.
- Board's factual findings are reviewed for substantial evidence and questions of law are reviewed *de novo*. *In re Gartside*, 203 F. 3d 1305, 1311 (Fed. Cir. 2000) (citing *Dickinson v. Zurko*, 527 U.S. 150 (1999)).
- More deferential in a number of respects than review of judgments from district courts

What About an Appeal?

- Fed. Cir. may affirm PTAB ruling if the court may reasonably discern that the PTAB followed a proper path, even if path is less than perfectly clear
- Fed. Cir. may affirm PTAB if an erroneous portion of PTAB's ruling is not prejudicial
- Fed. Cir. may **not** make factual and discretionary determinations that are in purview of the agency

Basis for Jurisdiction

- 35 U.S.C. § 141(c) provides basis for appeal (emphasis added):

POST-GRANT AND INTER PARTES REVIEWS.—A party to an *inter partes* review or a post-grant review who is dissatisfied with the **final written decision** of the Patent Trial and Appeal Board under section 318(a) or 328(a) (as the case may be) may appeal the Board’s decision only to the United States Court of Appeals for the Federal Circuit.

- 35 U.S.C. §§ 319 and 329 have similar language

Limit on Jurisdiction

- 35 U.S.C. §§ 314(d) and 324(e) provide (emphasis added):

NO APPEAL.—The determination by the Director whether to institute a post-grant review [or an *inter partes* review] under this section shall be final and nonappealable.

No Direct Relief from Decision to Institute



- *St. Jude Med., Cardiology Div. v. Volcano Corp.*, 749 F.3d 1373 (Fed. Cir. 2014)
 - Dismissed appeal from a decision not to institute IPR
- *In re Proctor & Gamble Co.*, 749 F.3d 1376 (Fed. Cir. 2014)
 - Denied mandamus from a decision instituting IPR
 - Left open possibility of review after final written decision
- *In re Dominion Dealer Solutions, LLC*, 749 F.3d 1379 (Fed. Cir. 2014), the court
 - Denied mandamus from a decision not instituting IPR

Review of Statutory Bars?

- *In re Procter & Gamble Co.* involved a statutory bar and seemed to leave open some avenue of review
- 35 U.S.C. §§ 315(a)(1) and 325(a)(1) bar institution (emphasis added):

POST-GRANT REVIEW [AND INTER PARTES REVIEW] BARRED BY CIVIL ACTION.—A post-grant review [or an *inter partes* review] **may not be instituted** under this chapter if, before the date on which the petition for such a review is filed, the petitioner or real party in interest filed a civil action challenging the validity of a claim of the patent.

Review of Statutory Bars?

- 35 U.S.C. § 315(b) similarly provides, in part (emphasis added):

PATENT OWNER'S ACTION.— An inter partes review **may not be instituted** if the petition requesting the proceeding is filed more than 1 year after the date on which the petitioner, real party in interest, or privy of the petitioner is served with a complaint alleging infringement of the patent.

- Does “may not be instituted” limit USPTO authority?

No Relief from Decision to Institute After Final Written Decision

- *Achates Reference Publishing, Inc. v. Apple Inc.*, 803 F.3d 652 (Fed. Cir. 2015)
 - Interpreting § 314(d) prohibition on appeal as precluding appellate jurisdiction regarding whether § 315(b) time bar applies
- *In re Cuozzo Speed Techs. LLC*
 - Board instituted IPR against claims 10 and 14 using art cited against claim 17, but not against claims 10 and 14
 - “We conclude that § 314(d) prohibits review of the decision to institute IPR even after a final decision.”
 - Certiorari granted on this issue

No Relief from any Termination that Is not a Final Written Decision



- *GTNX, Inc. v. INTTRA, Inc.*, 789 F.3d 1309 (Fed. Cir. 2015)
 - After institution, Patent Owner moved for termination because the Petitioner had previously filed a DJ claim asserting invalidity
 - Board terminated CBM proceeding based on § 325(a)(1) bar
 - 35 U.S.C. §§ 141(c), 328(a), 329 construed
 - Termination decision was not appealable because it was not a “final written decision”
 - “The Board decision GTNX is seeking to appeal was not reached after conduct of the review and did not make a determination with respect to patentability.”
 - Also denied mandamus, in the alternative; no clear right to relief

Exception to Rule of No Jurisdiction: CBM Standing

- *Versata Dev. Grp., Inc. v. SAP Am. Inc.*, 793 F.3d 1306 (Fed. Cir. 2015)
 - Construed America Invents Act § 18(a)(1)(E):

The Director may institute a transitional proceeding [under Section 18] only for a patent that is a business method patent.
 - Section 18(a)(1)(E) places a limit on the PTAB’s “invalidation authority”
 - “Here, nothing in § 324(e) meets the high standard for precluding review of whether the PTAB has violated a limit on its invalidation authority under § 18.”

“Invalidation Authority”

- Compare Section 18 of the AIA (“invalidation authority”):

The Director **may institute** a transitional proceeding [under Section 18] **only** for a patent that is a business method patent.

- With 35 U.S.C. § 315(b) (not “invalidation authority”):

PATENT OWNER’S ACTION.— An inter partes review **may not be instituted** if the petition requesting the proceeding is filed more than 1 year after the date on which the petitioner, real party in interest, or privy of the petitioner is served with a complaint alleging infringement of the patent.

Claim Construction

Claim Construction ... “Standard”?

- Interestingly, IPR and district court litigation have different claim construction “standards”
- In district court litigation, claims are construed to give them their plain and ordinary meaning
 - *Claims given their plain and ordinary meaning to one skilled in the art*
 - *Specification is key in determining a claim’s construction*
 - *Prosecution history provides insights into the metes and bounds of the claimed invention*
 - *Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005)
- In an IPR, the Board applies the Broadest Reasonable Interpretation (“BRI”) standard to the claims

Why the Different Standards?

- AIA created the IPR proceeding, but was silent on the claim construction standard that should be applied
- But, AIA did grant the PTO the right to promulgate rules that govern IPR proceedings
- PTO promulgated 37 C.F.R. § 42.11(b) that provides:
 - “A claim in an unexpired patent shall be given its broadest reasonable construction in light of the specification of the patent in which it appears.”

Origins of the BRI Standard

- BRI not found in the patent statute, but “has been applied by the PTO and its predecessor for more than 100 years in various types of PTO proceedings.”
 - *In re Cuozzo*, at 11-12
- A 1906 PTO decision explained, “[n]o better method of construing claims is perceived than to give them in each case the broadest interpretation which they will support without straining the language in which they are couched.”
 - *In re Cuozzo* at 12 (citing *Podlesak v. McInnerney*, 1906 Dec. Comm’r Pat. 265, 258).
- BRI “reduce[s] the possibility that, after the patent is granted, the claims may be interpreted as giving broader coverage than is justified.”
 - *Reuter*, 670 F.2d at 1015 (quoting *Prater*, 415 F.2d at 1404–05).

Origins of the BRI Standard

- In fact, every PTO proceeding of an *unexpired* patent utilizes the BRI standard
 - *E.g.*, patent examination, *ex parte* reexamination, *inter partes* reexamination and interferences
- The one exception: claims of an expired patent are viewed under the *Phillips* standard
 - The reasoning behind the exception is in a proceeding involving an expired patent, the patentee cannot amend the claims
 - More akin to a district court litigation
 - Consequently, a patent owner's right to amend the claims is critical to the application of the BRI standard to claim construction

Different Claim Construction Standards Depending on Venue Challenged as Improper in *In re Cuozzo*

- The application of the BRI standard in an IPR proceeding was challenged in *In re Cuozzo Speed Tech., LLC*, 793 F.3d 1268 (Fed. Cir. 2015)
- Two Issues on appeal in *In re Cuozzo*
 - Should the Board apply the BRI standard in claim construction during an IPR?
 - Can the Federal Circuit review a decision to institute after the Final Written Decision has been issued?

Different Claim Construction Standards Depending on Venue Challenged as Improper in *In re Cuozzo*

- Cuozzo Speed Technologies owns a patent on an invention that alerts a driver that he is speeding
 - Invention integrates a GPS unit and an in-vehicle display to provide the driver with a visual display that he is speeding
- Cuozzo’s patent claims a “speedometer *integrally attached* to [a] colored display.”
- The Board explained that “*integrally attached*” was critical to the patentability analysis
- Applying the BRI standard, and not the ordinary meaning of the phrase as Cuozzo advocated, the Board found the claims at issue obvious based on the prior art

Different Claim Construction Standards Depending on Venue Challenged as Improper in *In re Cuozzo*

- The Federal Circuit held in a 2-1 decision that the BRI standard was proper
 - Patent Owner has the ability to amend the claims
 - Thus, no different than other PTO proceedings that utilize BRI
 - PTO has the right to establish rules governing IPR proceeding
 - Application of BRI reasonable in light of precedent
 - Allows PTO to have a uniform standard if it wants to consolidate multiple patent office proceeding
- The Federal Circuit also found that “*integrally attached*” was properly construed

Different Claim Construction Standards Depending on Venue Challenged as Improper in *In re Cuozzo*

- Cuozzo sought rehearing from the Federal Circuit *en banc*
- In a 6-5 decision, the Federal Circuit denied the petition for rehearing *en banc*
- Judges Dyk, Lourie, Chen and Hughes concurred in the denial of the rehearing, finding that the PTO has used BRI in a variety of proceeding for over a century, and “nothing in the [AIA] indicates congressional intent to change” that standard. See concurring opinion on Petition for Rehearing En Banc

Different Claim Construction Standards Depending on Venue Challenged as Improper in *In re Cuozzo*

- Chief Judge Prost and Judges Newman, Moore, O'Malley and Reyna jointly dissented from the denial of the rehearing finding:
 - Congress did not approve the BRI standard in an IPR as “Congress’ silence is just that – silence.”
 - Congress wanted a “court-like proceeding” as “a far reaching surrogate for district court validity determinations.” As a result, IPRs should apply the district court claim construction standard
 - “There is no back-and-forth between the patentee and examiner seeking to resolve claim scope ambiguity; there is no robust right to amend”
 - PTO only had the right to promulgate procedural regulations, and in any event, the BRI regulation was unreasonable

Different Claim Construction Standards Depending on Venue Challenged as Improper in *In re Cuozzo*

- Judges Newman separately dissented from the rehearing denial
 - Judge Newman summarized all the *amicus* briefs that had been received on the issue
 - She went through several reasons why the application of the BRI standard is illogical in an IPR proceeding
 - She concluded that the question of what claim construction standard should apply is “of powerful consequence” and “should be answered correctly”
- Cuozzo filed a cert. petition with the U.S. Supreme Court requesting review of the Federal Circuit decision, and that petition was granted on January 15, 2016

Claim Construction in an IPR – *Don't Forget to Develop Your Extrinsic Evidence*

- The Federal Circuit reviews the Board's claim construction according to the Supreme Court's decision last year in *Teva Pharm. U.S.A., Inc. v. Sandoz, Inc.*, 135 S. Ct. 831 (2015)
 - Factual determinations concerning extrinsic evidence are reviewed for substantial evidence
 - Ultimate claim construction is reviewed *de novo*
- The application of *Teva* to appeals from PTAB proceedings further highlights the importance of developing factual evidence in an IPR

BRI Held to be the Appropriate Claim Construction Standard, but the Construction Must be “Reasonable”

- Before the *Cuozzo* decision had been rendered, another patent owner, Proxyconn, sought Federal Circuit review of whether the BRI standard should apply to IPRs.
 - See *Microsoft Corp. v. Proxyconn*, 789 F.3d 1292 (2015).
- The Federal Circuit confirmed that the BRI applies, but explained “[t]hat is not to say, however, that the **Board may construe claims during IPR so broadly that its constructions are *unreasonable under general claim construction principles***. As we have explained in other contexts, ‘[t]he protocol of giving claims their broadest reasonable interpretation. . . does not include giving claims a legally incorrect interpretation.’”
 - *Proxyconn* (citing *In re Skvorecz*, 580 F.3d 1262 (Fed. Cir. 2009)).

BRI Held to be the Appropriate Claim Construction Standard, but the Construction Must be “Reasonable”

- The Federal Circuit went on to explain that
 - “***claims should always be read in light of the specification*** and teachings in the underlying patent.”
 - “***The PTO should also consult the patent’s prosecution history*** in proceedings in which the patent has been brought back to the agency for a second review.”
 - “***Even under the broadest reasonable interpretation, the Board’s construction ‘cannot be divorced from the specification and the record evidence’ . . . and ‘must be consistent with the one that those skilled in the art would reach’***” (internal citations omitted)
 - See *Proxyconn*, at 1298.

Would the *Phillips* Standard Apply to an Expired Patent in an IPR?



- In *Straight Path IP Group, Inc. v. Sipnet EU S.R.O.* (Case No. 2015-1212 decided on Nov. 25, 2015), the patent had expired. Thus, the Patent Owner, Straight Path, asked that the claims be construed under the *Phillips* standard as amendments weren't possible.
- The Federal Circuit did not address the issue and it concluded that the Board's claim construction was wrong even under the BRI standard
- The Federal Circuit explained that the "claim language... can only be called plain."

Would the *Phillips* Standard Apply to an Expired Patent in an IPR?

- The Federal Circuit found
 - “*When claim language has as plain a meaning on an issue as the language does here, leaving no genuine uncertainties on interpretive questions relevant to the case, it is particularly difficult to conclude that the specification reasonably supports a different meaning.* The specification plays a more limited role than in the common situation where claim terms are uncertain in meaning in relevant respects. The reason is that, unless there is a disclaimer or redefinition, whether explicit or implicit, ***the proper construction of any claim language must, among other things, “stay[] true to the claim language,”*** and, in order to avoid giving invention-defining effect to specification language included for other descriptive and enablement purposes, ‘the court’s focus remains on understanding how a person of ordinary skill in the art would understand the claim terms.’”
 - *Straight Path* at pgs. 9-10 citing (*Phillips*, 415 F.3d at 1316, 1323, 1324).

Would the *Phillips* Standard Apply to an Expired Patent in an IPR?



- The Federal Circuit found that the Board’s reliance on one passage from the specification to support its construction was improper
 - Passage contradicts plain meaning of the claim language
 - Passage does not expressly or implicitly redefine the claim term
- The Federal Circuit also explained that the “plain meaning [of the claim] is positively confirmed by the prosecution history, which we have indicated is to be consulted even in determining a claim’s broadest reasonable interpretation.” *Straight Path* at pg. 12 (citing *Proxyconn*, 789 F.3d at 1298).

What to do in Light of the Pending US Supreme Court Review in *In re Cuozzo*

- Claim construction may be the best basis for Appellant review
- The specification is key to a claim construction analysis under either standard
 - Review of the patent specification specifically provided for in 37 C.F.R. § 42.11(b) and applied by the Federal Circuit in *In re Cuozzo*, *Proxyconn* and *Straight Path*
 - The specification is “the single best guide to the meaning of a disputed term” and is “always highly relevant to the claim construction analysis” - *Phillips*

What to do in Light of the Pending US Supreme Court Review in *In re Cuozzo*

- Consider whether extrinsic evidence can assist you in your claim construction
 - Well developed extrinsic evidence may help preserve the Board's claim construction findings
- If you are a Petitioner, make sure your prior art reads on the claims under either the BRI or plain and ordinary meaning standard
- If you are a Patent Owner, use everything you can to support your proposed claim construction (*e.g.*, plain and ordinary meaning, specification, prosecution history, and extrinsic evidence)

Lessons Learned

Lessons Learned and Future Considerations



- Prepare petition and patent owner response with the assumption that you get one bite at the apple
 - Don't rely on ability to file supplemental or reply evidence
 - Anticipate what opponent may argue
- Develop record with an eye toward appeal
- On appeal, consider requests for intervention by Director
- Keep an eye on cert petitions to Supreme Court
- Watch for PTAB rules changes

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Thank you!



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Additional Resources

Share of the Federal Circuit's Docket

United States Court of Appeals for the Federal Circuit

Year-to-Date Activity
as of June 30, 2015

Court or Agency of Origin	Pending as of 10/01/14	Docketed 10/01/14 to date	Terminated 10/01/14 to date	Currently Pending
Boards of Contract Appeals	16	13	15	14
Court of Federal Claims	121	115	132	104
Court of International Trade	41	26	35	34
Court of Appeals for Veterans Claims	90	90	108	72
Department of Agriculture	0	0	0	0
District Courts	498	462	456	504
Department of Justice	4	2	4	2
Department of Veterans Affairs	4	7	1	10
Government Accountability Office, Personnel Appeals Board	0	1	0	1
International Trade Commission	15	9	10	14
Merit Systems Protection Board	135	194	188	141
Office of Personnel Management	0	0	0	0
Office of Compliance	1	0	1	0
Patent & Trademark Office	162	280	165	277
Writs & Other Original Proceedings	11	41	46	6
TOTAL	1098	1242	1161	1179

Guidance from the Federal Circuit?

United States Court of Appeals for the Federal Circuit

Year-to-Date Activity
as of June 27, 2014

Court or Agency of Origin	Pending as of 10/01/13	Docketed 10/01/13 to date	Terminated 10/01/13 to date	Currently Pending
Boards of Contract Appeals	8	17	9	16
Court of Federal Claims	119	111	120	110
Court of International Trade	55	29	41	43
Court of Appeals for Veterans Claims	104	99	121	82
District Courts	438	395	358	475
Department of Justice	2	6	3	5
Department of Veterans Affairs	1	2	0	3
International Trade Commission	19	13	15	17
Merit Systems Protection Board	104	155	166	93
Office of Personnel Management	0	0	0	0
Office of Compliance	0	2	0	2
Patent & Trademark Office	118	142	135	125
Writs & Other Original Proceedings	15	41	49	7
TOTAL	983	1012	1017	978

Guidance from the Federal Circuit?

United States Court of Appeals for the Federal Circuit

Year-to-Date Activity and Status of Pending Appeals

as of June 28, 2013

Year-to-Date Activity

Court or Agency of Origin	Pending as of 10/01/12	Docketed 10/01/12 to date	Terminated 10/01/12 to date	Currently Pending
Boards of Contract Appeals	16	5	15	6
Court of Federal Claims	116	117	102	131
Court of International Trade	43	50	32	61
Court of Appeals for Veterans Claims	124	118	136	106
District Courts	466	340	385	421
Department of Justice	1	0	1	0
Department of Veterans Affairs	1	0	0	1
International Trade Commission	24	10	15	19
Merit Systems Protection Board	121	156	167	110
Office of Personnel Management	0	0	0	0
Office of Compliance	1	0	0	1
Patent & Trademark Office	100	90	86	104
Writs	11	16	18	9
TOTAL	1024	902	957	969