

IP Owners Group Urges High Court To Scrap PTAB Claim Rule

By **Matthew Bultman**

Law360, New York (March 8, 2016, 5:31 PM ET) -- The Intellectual Property Owners Association is the latest group to urge the U.S. Supreme Court to change the patent claim construction standard for America Invents Act reviews, saying Monday the current approach is harmful to the patent system.

The association, which represents a number of Fortune 500 companies, joined a growing list of companies and interest groups to file an amicus brief in the case, which *Cuozzo Speed Technologies LLC* brought to the Supreme Court last year. *Cuozzo* was the first company to have a patent invalidated in an AIA inter partes review.

Like other recent briefs, the IPOA asked the justices to require the Patent Trial and Appeal Board use the claim construction that is used in district court to interpret patents, rather than a broader standard that some complain results in too many patents being found invalid.

"A patent claim, ... like any other piece of property, cannot logically have more than one 'proper' boundary," the IPOA wrote.

In America Invents Act reviews, the PTAB construes the claims of challenged patents by giving them their "broadest reasonable interpretation," while in district courts, judges construe claims by giving them their "plain and ordinary meaning."

Cuozzo argues the standard used by the PTAB is "surprisingly lethal" and results in too many patent claims being invalidated. The justices agreed in January to hear the case, and arguments will occur later this spring.

On Monday, the IPOA argued the PTAB's standard flouts the intent of Congress. And it contends the harm to the patent system as a result was "real, serious, and increasing" as the number of inter partes review cases grow.

"This court has the opportunity to restore its jurisprudence to patent validity determinations issuing from the USPTO, and it should do so before the problem grows even further," the group wrote.

A slew of major companies and drug industry groups have weighed in on the dispute in recent weeks, many arguing that the claim construction standard in AIA reviews should be the same as the one in district court.

One brief, which included Exxon Mobil, Procter & Gamble and Johnson & Johnson, said that the current PTAB standard makes patents particularly vulnerable to invalidation and deprives patent owners of their property rights.

The IPOA noted a recent study found that roughly 70 percent of inter partes review petitions are brought by someone who is also a defendant in a patent lawsuit in district court.

“This very high percentage of dual PTAB-district court patent validity proceedings provides further support for using the same claim construction in both forums,” it said.

Microsoft Corp. and two professors also filed an amicus brief in the case Monday. They agreed that patent claims should be interpreted in the same way at the PTAB and in district court.

But they argued two conflicting branches of the “plain and ordinary meaning” had developed at the Federal Circuit and urged the Supreme Court to retire that label.

“The court should require that issued patent claims be interpreted in the same manner in court and in the PTAB, guided by the claim-construction principles the court has approved, not ‘plain and ordinary meaning,’” the group wrote.

Cuozzo's petition had presented a second question to the Supreme Court, which challenges the Federal Circuit's ruling that decisions to institute AIA reviews are not appealable, even if the PTAB exceeds its authority.

The IPOA addressed this question Monday as well, saying that giving the patent office “unchecked authority” in AIA reviews might encourage even more special rules for patent cases.

“Such an outcome is contrary to other recent patent decisions of this court, and it is contrary to other legal precedent holding that judicial review of administrative action is unquestionably the norm,” it wrote.

IPOA is represented by Kevin H. Rhodes, Steven W. Miller of the IPOA and D. Bartley Eppenauer, William J. Harmon, Lynn H. Murray and Rachael Smith of Shook Hardy & Bacon LLP.

The Microsoft group is represented by in-house counsel Isabella Fu and John D. Vandenberg of Klarquist Sparkman LLP.

Cuozzo is represented by Garrard Beeney, Jeffrey Wall, Stephen Elliott and James Williams of Sullivan & Cromwell LLP.

The government is represented by Solicitor General Donald B. Verrilli as well as Benjamin C. Mizer Mark R. Freeman and Melissa N. Patterson of the U.S. Department of Justice.

The case is Cuozzo Speed Technologies LLC v. Lee, case number 15-446, in the U.S. Supreme Court.

--Additional reporting by Ryan Davis. Editing by Emily Kokoll.
