Divided Federal Circuit Panel Upholds Patent Office's "Broadest Reasonable Interpretation" Standard for Construing Claims in Post-Grant Review

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In a 2-1 decision in *In re Cuozzo Speed Technologies LLC*, No. 14-1301 (Fed. Cir. Feb. 4, 2015), the Federal Circuit recently held that the Patent Office may apply the "broadest reasonable interpretation" standard to construe the claims of issued patents in the new AIA post-grant proceedings, rather than the "ordinary and customary meaning" approach used in the federal district courts. The court also held that the Patent Office's decision to institute review under the AIA is not appealable.

The panel majority reasoned that because Congress was aware of the "broadest reasonable interpretation" standard the Patent Office uses in initial examination of patent applications and other proceedings and did not expressly provide for a different standard, Congress "impliedly adopted" the broadest reasonable interpretation standard already used by the Patent Office.

The majority also concluded that the AIA granted the Patent Office new rule-making authority to govern IPRs, and that *Chevron* deference should apply to the Office's adoption of the broadest reasonable interpretation standard by regulation. The majority also held that parties cannot challenge the Patent Office's decision to institute inter partes review of an issued patent as part of an appeal from the Patent Office's final decision on the merits. The court reasoned that Section 314(d) of the AIA, which provides that "[t]he determination by the Director whether to institute an inter partes review under this section shall be final and nonappealable," precludes such review.

Judge Newman filed a vigorous dissent, arguing that the panel majority's rulings on the "broadest reasonable interpretation" standard and the right to appeal the Patent Office's decision to institute are "contrary to the legislative purpose" of the AIA. Judge Newman recognized that Congress intended to provide a quick, and cost-effective alternative to district court litigation on the issue of patent validity. She distinguished the "broadest reasonable interpretation" standard as a "pragmatic protocol" applied to patent examination from the rule of law set forth in *Phillips v. AWH Corp* that ultimately determines the metes and bounds of the claimed invention to which an inventor is entitled.

Judge Newman cautioned that the majority's decision results in a "built-in discrepancy" that defeats the legislative purpose of providing an administrative surrogate for district court litigation and renders the Patent Office rulings "legally unreliable." She also noted that the majority erred in relying on a patent owner's ability to amend its claims in a post-grant proceeding to justify use of the broadest reasonable interpretation standard, pointing out that the ability to amend claims in IPRs is "almost entirely illusory."

Judge Newman also issued a warning: if the Patent Office does not apply the same law to the construction of a patent claim as the district court would, then IPRs "will merely become another mechanism for delay, harassment, and expenditure," contrary to the expressed intent of Congress.

Judge Newman's dissent signals that this panel majority decision is unlikely to be the last word on the claim construction standard used in the AIA proceedings. In addition to the possibility of panel rehearing or en banc review of this case, Judge Newman is a member of the panel in the pending *SAP v. Versata* case, along with Judges Plager and Hughes, which was argued on December 3 and included significant amicus briefing on the broadest reasonable interpretation standard. (Disclosure: the authors filed an amicus brief on behalf of 13 large companies arguing against the Patent Office's use of the "broadest reasonable interpretation" standard in post-grant proceedings.)

Even if the courts continue to defer to the Patent Office, Congress may step in to address the claim construction standard for post-grant proceedings. On February 5, 2015, House Judiciary Committee Chairman Bob Goodlatte introduced the Innovation Act of 2015, which includes among its technical corrections to the AIA the requirement that the Patent Office apply the same claim construction standard as

the district courts. The bill would also require the Patent Office to consider to any prior district court's construction of the claims at issue.

The 2-1 decision in *Cuozzo* illustrates the continued debate over how the Patent Office should conduct post-grant proceedings and how those proceedings differ from district court litigation, a debate quickly heating up both in the Federal Circuit and the Congress.

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