
INTELLECTUAL PROPERTY

WHAT'S AT STAKE IN *CUOZZO V. LEE*: THE VIEW OF THE PETITIONER

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Currently pending on the docket of the United States Supreme Court is the case of *Cuozzo Speed Technologies, LLC, v. Michelle K. Lee, Under Secretary of Commerce for Intellectual Property and Director, Patent and Trademark Office*, No 15-446, on petition for writ of certiorari. At issue, first, is whether claims in patent cases arising from the Patent Trial and Appeal Board (PTAB) should be construed in the same manner as claims in cases arising from the district courts. A second issue, a matter of horizontal separation of powers, is whether the Federal Circuit correctly held that PTAB decisions to institute inter partes review (IPR) are judicially unreviewable even if the PTAB exceeds its statutory authority in instituting such proceedings. Because Congress intended IPR as a less expensive surrogate for litigation, this article, like petitioner, argues that the same standard should apply to claim construction regardless of forum. This article takes no position on the second issue, but summarizes the arguments of petitioner.

I. FACTS OF THE CASE

Petitioner Cuozzo Speed Technologies, LLC (Cuozzo) owns a patent on an invention that, by integrating a GPS device with a display system inside the vehicle, alerts drivers when they exceed the posted speed limit at any given location. Garmin, the maker of many in-vehicle GPS systems, filed an IPR, described more fully below, challenging, among others, claims 10, 14, and 17 of the Cuozzo patent.

An IPR Board of the PTAB denied all unpatentability grounds that Garmin had asserted with respect to claims 10 and 14, but then applied to those same claims the prior art that Garmin had cited against claim 17. Based on that claim 17 art, the PTAB instituted an IPR against all three claims. The PTAB ultimately determined that claims 10, 14, and 17 were all obvious in view of the prior art. Cuozzo appealed the decision to the Federal Circuit, at which point Garmin settled with Cuozzo. The U.S. Patent and Trademark Office (USPTO) then intervened to defend the Board's decision.

Nine groups have filed amicus briefs: the American Intellectual Property Law Association; the Biotechnology Industry Organization; the Intellectual Property Owners Association; the New York Intellectual Property Law Association; Pharmaceutical Research and Manufacturers of America; Trading Technologies International, Inc.; Interdigital, Inc.; Tessa Technologies, Inc., and Fallbrook Technologies, Inc.; and the Intellectual Property Law Association of Chicago. This author was the primary author on the brief of The Intellectual Property

Law Association of Chicago, and draws on that brief in part with respect to the first issue in this case.

II. CONSTITUTIONAL AND STATUTORY BACKGROUND OF THE AMERICA INVENTS ACT

The purpose of U. S. patent law is “to promote the Progress of Science and the Useful Arts”¹ Valid patents provide an incentive for inventors to make their inventions and discoveries known to the world by enabling patent owners to exclude marketplace competitors for a term Congress deems sufficient to enable patent owners to earn a reasonable return on their investment. In contrast, by their very nature, patents invalid under Section 102 or Section 103 exclude from the marketplace competitors who merely practice known art (Section 102) or obvious improvements (Section 103). Using invalid patents to exclude qualified competitors from the market impedes the progress of the useful arts by permitting “owners” of invalid patents to monopolize technologies or to charge monopoly prices for practicing them, thus frustrating the purpose of the Constitution's patent clause.

In 1790 Congress enacted the first patent statute, and in 1954 the 83rd Congress enacted the statute's last major overhaul until recent years. In 1995 Congress made other improvements, including bringing the term of U.S. patents into harmony with those of many other Western nations. (Instead of seventeen years from issuance, for example, U.S. patents now expire twenty years from the application date, subject to certain adjustments due to delays within the USPTO.)

Dissatisfaction with the amount and expense of U.S. patent litigation has led to further reforms in the past five years. Part of the dissatisfaction has been with the perceived quality of the patents themselves. In response to early 2000s criticism that the USPTO was granting too many patents likely to be found invalid, for example, the 112th Congress in 2011 passed the Leahy-Smith America Invents Act (AIA).² At the same time, Congress had concluded that the existing patent litigation system itself unnecessarily imposes unneeded litigation and ancillary costs.³ This, too, frustrates the purpose of the Constitution's patent clause and undermines the value of the U.S. patent system.

III. THE PURPOSES OF INTER PARTES REVIEW

In keeping with its Constitutional charter, the AIA seeks to improve the climate for investment and industrial activity by improving the quality of patents and by reducing unnecessary litigation costs.⁴ The AIA attempts to achieve the former by removing invalid patents from enforceability. It attempts to accomplish the latter by shifting patent validity disputes from the courts to the USPTO, the expert agency charged with granting or denying patents in the first place.

To that end, the AIA has established a new post-grant adjudicatory process for challenging patent validity, limited to

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issues that may be raised under Sections 102 and 103 of the Patent Act. Section 102 governs “anticipation”—i.e., whether an existing invention already includes all the salient features of the claimed invention. Section 103 governs obviousness—whether the invention would have been “obvious to one of ordinary skill in the field of art” to which the invention applies.

To administer this adjudicative process, the AIA has created a new body called the Patent Trial and Appeal Board, or PTAB, staffed with administrative law judges. Located within the existing Patent and Trademark Office, the PTAB employs an adjudicative proceeding known as inter partes review, or IPR. IPR has no relationship to a previously-existing practice of patent re-examination within the USPTO—an extension of the prosecution process—and is intended instead as a less expensive surrogate for litigation, complete with limited discovery and briefing opportunities.

IV. THE PROCESS OF INTER PARTES REVIEW

IPR differs substantially from the USPTO patent examination process as well as from pre-AIA re-examinations. Under pre-existing law, a party could challenge an issued patent’s validity through inter partes re-examination. But that process, unlike IPR, was examinational in nature. Patent re-examination necessarily considered patentable subject matter under Section 101, in addition to anticipation under Section 102 and obviousness under Section 103. Re-examination allowed patent examiners to search for potentially invalidating prior art. Re-examination also freely permitted amendments by the patent owner as part of the iterative process between the USPTO and the patentee.

By enacting the AIA, Congress created IPRs as a streamlined adjudicatory process. Central to the AIA’s scheme is having a reliable early indicator of a patent’s quality. Thus, after a patent issues, the AIA provides for the possibility of an IPR by technology-trained patent-savvy adjudicators.⁵ This new type of review is distinct from pre-AIA patent re-examination procedures in several ways. Unlike prior examinations and re-examinations, the IPR process is adversarial, not examinational. Unlike in USPTO patent prosecutions, the IPR Board is not authorized to conduct its own prior art searches. Unlike in examinations and re-examinations, the patentee’s ability to amend claims is extremely limited.⁶ Indeed, in practice, the ability to amend a claim during an IPR is all but illusory.

Thus, IPRs lack the back-and-forth of patent prosecution or re-examination. Rather, IPRs are adversarial and adjudicatory, as is district court litigation—merely streamlined. An IPR’s exclusive central features are (1) “non-notice” (fact-specific) pleading by challengers; (2) fact-specific responsive pleading by patent owners; (3) cross-examination of experts employed by affidavit, limited to seven hours, following the challenge and response; (4) a reply; and (5) a one hour lawyers’ oral argument with exclusion of a “full” record. More fundamentally, unlike patent examinations, IPRs involve only patents already granted. As such, the patent holder already owns a recognized property right with established metes and bounds. Respect for that property right demands a fundamentally different kind of review from patent examination.

Like district court litigation, IPRs are adjudicatory; unlike district court litigation, they are limited to Section 102

novelty and Section 103 obviousness. Prior art is limited to patents and printed publications. The USPTO Director serves as gate-keeper, while the parties present the arguments and art. A challenger to validity of an existing patent files a petition with the PTO,⁷ limited to Section 102 (novelty) or 103 (obviousness) on the basis of prior art patents or printed publications.⁸ The petition must identify with particularity both the grounds and the evidence that challenge each claim.⁹ The patentee may then file a preliminary response setting forth why the PTO should not institute IPR.¹⁰

The IPR process streamlines and stages discovery and, absent good cause shown, requires a final written decision within twelve months.¹¹ If the PTAB institutes IPR, the patentee may conduct limited discovery, including depositions of petitioner’s declarants.¹² The patentee may also respond with particularity to the petition and file supporting affidavits or declarations.¹³ If the patentee responds, petitioner may conduct limited discovery, including depositions of the patentee’s declarants, and may file a reply.¹⁴ Either party may request an oral hearing.¹⁵ A panel of at least three administrative patent judges conducts the hearing, which the AIA considers to be a trial.¹⁶ (Unlike a district court trial, the proceeding excludes live witnesses and relies instead on the parties’ paper submissions and attorney argument.¹⁷) Like district court decisions in patent cases, IPR decisions of the PTAB are directly reviewable by the U.S. Court of Appeals for the Federal Circuit.¹⁸

Absent good cause shown, motions to amend are limited to one per patent, only after conferring with the Board.¹⁹ As in *Cuozzo*, IPR Boards routinely deny such motions.²⁰ Since the AIA took effect in September 2012, parties have filed over 3,400 IPR petitions.²¹ As of June 15, 2015, the PTAB had allowed motions to amend in only four IPR proceedings.²² In practice, then, the right to amend has been largely illusory.

In sum, to improve patent quality and to reduce litigation costs, the AIA created IPRs as “an inexpensive and speedy alternative to litigation.”²³ The process bears little, if any, resemblance to any previous proceedings within the USPTO.²⁴

A. *The Problem with Inter Partes Review*

As Petitioners’ opening cert petition shows, IPRs filed since the AIA’s effective date have yielded an unexpectedly high rate of patent claim cancellation. Of the over 3,400 IPR petitions filed since the AIA’s inception, as of October 6, 2015, nearly 85% have resulted in cancellation of some or all the claims under review.²⁵ One reason, petitioners believe, is that the PTAB applies a broader standard of claim construction than the federal courts.²⁶ By construing claims more broadly than the courts, the PTAB necessarily considers a larger universe of prior art and heightens the potential impact of a given piece of art. Concomitantly, this increases the likelihood of finding a patent either anticipated under Section 102 or obvious under Section 103.

Promoting the progress of the useful arts requires not only awarding valid patents but also administering a non-arbitrary system for challenging or upholding them. A non-arbitrary system requires that the standards for challenging or upholding validity be the same regardless of the forum. To achieve its constitutional purpose, the patent system must also strike an

appropriate balance between patent rights holders and other innovators. It cannot, and should not, attempt to tilt the playing field based on popular perceptions or political winds. The Supreme Court should therefore clarify that the proper standard for claim construction in assessing validity of an issued patent does not depend on whether the initial forum is a district court or the PTAB.

Yet the PTAB's claim construction standard for IPR is decidedly inconsistent with the standard used by federal courts. When construing claims in accordance with applicable law, federal courts must construe claims according to the "plain and ordinary meaning" of the language of the claim.²⁷ An IPR Board, however, applies the "broadest reasonable construction" consistent with the specification. To achieve consistency and coherence in recognizing the property rights of patent owners, the Supreme Court should grant cert in *Cuozzo* to clarify that the litigation standard—"plain and ordinary meaning"—applies in IPRs as well.

Nothing in the AIA itself requires that IPR Boards employ a "broadest reasonable" claim construction. To the contrary, such construction is an anachronistic holdover from the USPTO's examination and re-examination processes. In those proceedings, the USPTO examines prior art and raises potential arguments against patentability using the "broadest reasonable interpretation" of the claims consistent with the patent's specification. The applicant then has the opportunity to amend its claims in view of the prior art to point out more particularly the invention claimed. In this give-and-take examinational process, a "broadest reasonable interpretation" makes perfect sense. In the context of the AIA's IPRs it does not.

B. Promoting A Single Standard for Judicial Review

To achieve the AIA's aims, two adjudicative bodies reviewing the same patent's validity over the same prior art should reach the same result. Indeed, it would frustrate the intent of Congress and the purpose of the Constitution's patent clause to do otherwise. All adjudications should therefore require a clear, single standard applicable to all such reviews, irrespective of the reviewing body.

As with patent infringement, the prerequisite for determining patent validity is claim construction.²⁸ A patent's claims determine its metes and bounds and therefore what distinguishes it from the prior art. This establishes novelty; that is, what makes the patent neither anticipated under Section 102 nor obvious under Section 103.

Without guidance from the Congress or the Supreme Court, the PTAB has been construing patent claims in IPRs using the same standard that PTO examiners use in examining patents prior to issue. That scope is the "broadest reasonable interpretation consistent with the specification."²⁹ In patent examinations and re-examinations that standard makes sense because the process is iterative: the applicant and the examiner effectively work in give and take fashion to refine the scope of the proposed claims.³⁰

But district courts, in contrast, are bound by the Supreme Court's and Federal Circuit law to give claims their "plain and ordinary meaning."³¹ And, since *Markman*, it has been the duty of the court, as a matter of law, to determine the meaning of

the claims.³² The difference between these two standards—"broadest possible interpretation" on the one hand, "plain and ordinary meaning" on the other—is believed to be the reason for the unexpectedly high rate—nearly 85%—of IPR claims cancellation to date.³³

At best, the application of two different standards invites confusion and forum-shopping. Because the IPR Board is a surrogate for the district court, the two standards should be the same.

V. PROMOTING COST-EFFECTIVENESS THROUGH A SINGLE STANDARD

Congress could not have been clearer that IPRs should be cost-effective surrogates for litigation.³⁴ Both administrative adjudication under the AIA and district court adjudication are reviewable by the same court, namely the United States Court of Appeals for the Federal Circuit. And although factual determinations underpinning the district court's claim construction may be entitled to deference,³⁵ the Federal Circuit reviews all legal aspects of the claim construction de novo. Like the district court's construction, that de novo review, requires giving claim language its plain and ordinary meaning.³⁶

A valid patent must "distinctly claim" the inventor's invention.³⁷ A proper claim construction is therefore an essential element of promoting the progress of the useful arts. Specifically, a proper claim construction is central not only to an infringement analysis but also to a patent's validity.³⁸ While the former determines the scope of the patent holder's right to exclude, the latter determines the right to exclude at all.

Applying differing standards to a claim construction reached under an IPR from one reached by a district court would quickly lead to incoherence. In and of itself, that would mean that the patent challenger's choice of forum—i.e., whether to file IPR petition or a federal lawsuit—could be dispositive, up to and including the level of Federal Circuit review. More important, it would unacceptably permit differing tribunals charged by the same Congress to reach differing results on the same evidence.³⁹

A coherent approach consistent with the language and intent of the AIA would apply the same claim construction standard with which district courts and the Federal Circuit are already familiar. That standard is the "plain and ordinary meaning" of the claim language to one of ordinary skill in the art.⁴⁰ The "plain and ordinary meaning" standard is particularly appropriate under the AIA because of the limited opportunity for claim amendment. As the majority below recognized in both its original and amended opinions, even the USPTO does not employ the "broadest reasonable interpretation" when re-examining the claims of an expired patent because the patentee is unable to amend the claims.⁴¹

Nothing in the AIA, moreover, requires the IPR Board to employ the "broadest reasonable interpretation" for claim construction. To the contrary, a simple panel majority of two judges below decided that Congress "impliedly approved" the rule merely by creating the new IPR proceedings.⁴²

As the Supreme Court has long recognized, however, "Congress' silence is just that—silence."⁴³ Here, the purpose of Congress was to create a streamlined alternative to district

court litigation. As with district court litigation, the process is adjudicative, reviewable by the Federal Circuit. If the goal is to reach the same result on claim constructions, then the standard should be the same.

Indeed, if the standard is not the same, then the law directed to claim construction will become increasingly muddled. Inevitably, law developed and refined by the Federal Circuit when addressing district court claim constructions under the “plain and ordinary meaning” standard will diverge from that arising when the Federal Circuit reviews decisions based on the “broadest reasonable construction” standard. This would be a disservice to patentees that has no place in patent law and no grounding in the AIA.

VI. CUOZZO’S SECOND ISSUE

Of less importance, perhaps, from the standpoint of intellectual property law but of great importance from a structural separation of powers point of view is whether the PTAB’s decision to institute an IPR is even judicially reviewable. On its face, 35 U.S.C. § 314(d) provides that “whether to institute an inter partes review under this section shall be final and nonappealable.” But does that mean the law merely prohibits interlocutory appeals of the PTO’s decision to institute such a proceeding, or that an aggrieved party may not ultimately appeal on the grounds that the Board improperly instituted a proceeding?

In normal patent litigation, of course, nothing prohibits a party from appealing a district court’s decision on the grounds that the court lacked jurisdiction in the first place or that it erred in failing to grant a motion to dismiss. But does a party’s choice to challenge a patent’s validity in an IPR accomplish exactly the opposite result?

The issue arises in *Cuozzo* because of the narrow language of the AIA’s jurisdictional grant of IPR authority to the PTAB. Under the AIA, the petition for IPR must identify with particularity “the grounds on which the challenge to *each* claim is based, and the evidence that supports the grounds for the challenge to *each* claim.”⁴⁴ The PTO may then institute IPR only if “the Director determines that the information presented *in the petition ... and any response ...* shows that there is a reasonable likelihood that the petitioner would prevail.”⁴⁵

Yet in *Cuozzo*, Garmin as the petitioner had raised certain prior art only against claims 10 and 14, and the Director found that this art did not raise questions of Section 102 or 103 unpatentability against either one of those claims. Instead, the Director applied against claims 10 and 14 prior art that Garmin had cited only against claim 17, and invalidated all three claims. *Cuozzo* claims that this exceeds the PTAB’s granted authority because, in essence, neither the petition nor the response⁴⁶ presented any evidence of the cited prior art with respect to either claim 10 or claim 14.

In support of its argument, *Cuozzo* notes that IPR is but one of three new adversarial administrative proceedings that the AIA has created for challenging validity of issued patents. In addition to the IPR at issue in *Cuozzo*, the AIA also created “post-grant review,” which is available for patents during the first nine months after issuance,⁴⁷ and “covered business method,” or “CBM,” review.⁴⁸ The difference in how the Federal Circuit has treated IPRs from CBMs at least lends support to petitioners’

position that the PTAB’s decision to institute an IPR should be judicially reviewable.

All three types of adjudication are procedurally similar in that the PTAB decides in response to a challenger’s petition whether to instate the proceeding, then conducts a trial-like proceeding and issues a final written decision regarding patentability. Despite acknowledging in the CBM context that reviewability of the Board’s decisions is “a question of tremendous prospective importance” that may affect “countless future appeals,”⁴⁹ the PTO argues that such findings are nonreviewable in both cases.

Yet just one day after a divided panel of the Federal Circuit held in *Cuozzo* that the Board’s decision to institute IPR is not reviewable because of 35 U.S.C. 314(d), another divided Federal Circuit panel held in *Versata* that the Board’s decision to institute a CBM proceedings *is* reviewable, even though the governing statutory language is identical.⁵⁰ A later Federal Circuit panel tried unconvincingly to distinguish *Versata* as “limited to the unique circumstance of [CBM review]” but was forced to acknowledge in *Achates Reference Publ’g, Inc. v. Apple Inc.*,⁵¹ that the statutory provisions governing IPR and CBM review are “identically worded.”⁵²

Accordingly, petitioners in *Cuozzo* argue, the Supreme Court of the United States should accept this opportunity to provide its guidance to the highest lower court of review on the question, which has already aired the merits of both sides of the argument in their respective opinions in two separate cases. Whether the High Court will do so we don’t yet know; as of December 11, 2015, no conference had yet been set to vote on whether to grant the petition for certiorari in *Cuozzo*.

Endnotes

- 1 U.S. CONST., Art I, Sec, 8, cl. 8.
- 2 Pub. L. No. 112-29, 125 Stat. 284.
- 3 See H.R. Rep. No. 112-98, Pt. 1, at 39-40 (2011).
- 4 See H. R. Rep. No. 112-98, pt. 1, at 39-40 (2011); *In re Cuozzo Speed Technologies, LLC*, 793 F.3d 1268, 1285 (Fed. Cir. 2015) (Newman, J., dissenting); Changes to Implement Transitional Program for Covered Business Method Patents, 77 Fed. Reg. 7080, 7081 (Feb. 10, 2012).
- 5 See 157 Cong. Rec. S7413 (Nov. 14, 2011) (Statement of Rep. Smith).
- 6 See 37 C.F.R. 42.121 (new claims limited to one-for-one replacement of existing claims; burden on patentee to demonstrate patentability of claims affirmatively before amendment allowed).
- 7 See 35 U.S.C. 311(a).
- 8 35 U.S.C. 311(b).
- 9 35 U.S.C. 312(a)(3).
- 10 35 U.S.C. 313.
- 11 35 U.S.C. 316(a)(11).
- 12 See, e.g., 35 U.S.C. 316(a)(5); 37 C.F.R. 42.51.
- 13 See 35 U.S.C. 316(a)(8); 37 C.F.R. 42.120.
- 14 See 35 U.S.C. 316(a)(5), (13); 37 C.F.R. 42.51.

- 15 See 35 U.S.C. 316(a)(10); 37 C.F.R. 42.70.
- 16 See 35 U.S.C. 6(c), 316(c).
- 17 See 35 U.S.C. 316(a)(10); 37 C.F.R. 42.70.
- 18 35 U.S.C. 141(c).
- 19 37 C.F.R. 42.121(a), (c).
- 20 See, e.g., *Idle Free Systems, Inc. v. Bergstrom, Inc.*, Case IPR2012-00027 (JL), 2013 WL 5947697, at *7 (June 11, 2013).
- 21 U.S. Patent and Trademark Office, Patent Trial and Appeal Board Statistics 8/31/2015, available at <http://www.uspto.gov/sites/default/files/documents/2015-08-31%20PTAB.pdf>.
- 22 See “PTAB Allows Motion to Amend in IPR Challenging Neste Oil Patent,” MANAGING INTELLECTUAL PROPERTY, June 15, 2015, available at <http://www.finnegan.com/news/newsdetail.aspx?news=d0d18aee-10e8-4511-bfa5-3b2962da1a39>.
- 23 157 Cong. Rec. S7413 (Nov. 14, 2011) (Statement of Rep. Smith).
- 24 Cf. *Belden Inc. v. Berk-Tek LLC*, Nos. 2014-1574, -1576 (Fed. Cir. Nov. 5, 2015), slip. op. at 8-9 (description of process).
- 25 Pet. Br. (I).
- 26 See Paul R. Michel, *Why Rush Patent Reform?*, 7 LANDSLIDE 49, 51 (2015); Gregory Dolin, *Dubious Patent Reform*, 56 B.C. L. Rev. 881, 916 (2015).
- 27 *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312 (Fed. Cir. 2005) (en banc); see generally Sarnoff & Manzo, An Introduction to, Premises of, and Problems with Patent Claim Construction, in PATENT CLAIM CONSTRUCTION IN THE FEDERAL CIRCUIT 9 (E. Manzo ed. 2014).
- 28 *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 996 n. 7 (Fed. Cir. 1995) (Mayer, J., concurring) (“A claim must be construed before determining its validity just as it is first construed before deciding infringement.”), *aff’d*, 517 U.S. 370 (1996); see generally Sarnoff & Manzo, *supra*, (“Patent claims ... should be construed from an objective perspective of a [skilled artisan], based on what the applicant actually claimed, disclosed, and stated during the application process.”).
- 29 See, e.g., *In Re Prater*, 415 F.2d 1393, 1405 (Ct. Cust. App. 1969) (“[C]laims yet unpatented are to be given the broadest reasonable interpretation consistent with the specification during the examination of a patent application since the applicant may then amend his claims, the thought being to reduce the possibility that, after the patent is granted, the claims may be interpreted as giving broader coverage than is justified.”).
- 30 *In re Buszard*, 504 F.3d 1364, 1366-67 (Fed. Cir. 2007) (“[T]he patent examiner and the applicant, in the give and take of rejection and response, work toward defining the metes and bounds of the invention to be patented.”); *In re Zletz*, 893 F.2d 319, 322 (Fed. Cir. 1989) (“During patent prosecution is when claims can be amended, ambiguities should be recognized, scope and breadth of language explored, and clarification imposed.”); see generally U.S. Patent and Trademark Office, Manual of Patent Examining Procedure (9th ed., Mar. 2014) § 2111 (requiring application of the “broadest reasonable interpretation” to pending claims).
- 31 *Phillips*, 415 F.3d at 1312.
- 32 *Supra* note 29.
- 33 Pet. Br. (I).
- 34 *In re Cuozzo Speed Technologies*, 793 F.3d at 1285 (Newman, J., dissenting).
- 35 *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 574 U.S. ____ , 135 S. Ct. 831, 836 (2015).
- 36 *Phillips*, 415 F.3d at 1312; *Markman*, 517 U.S. 370.
- 37 35 U.S.C. § 112(b).
- 38 *Nautilus, Inc. v. Biosig Instruments, Inc.*, 572 U.S. ____ , 134 S.Ct. 2120, 2128 (2014) (citing Sarnoff & Manzo, *supra*).
- 39 *In re Cuozzo Speed Technologies, LLC*, 793 F.3d at 1285 (Newman, J., dissenting).
- 40 *Phillips*, 415 F.3d at 1312.
- 41 *In re Cuozzo*, 793 F.3d at 1276 n.6 (citing *In re Rambus, Inc.*, 753 F.3d 1253, 1256 (Fed. Cir. 2014)).
- 42 *Id.* at 1277.
- 43 *Cnty. For Creative Non-Violence v. Reid*, 490 U.S. 730, 749 (1989).
- 44 35 U.S.C § 312(a)(3).
- 45 35 U.S.C. § 314.
- 46 See 35 U.S.C. § 314.
- 47 See 35 U.S.C. § 321(c).
- 48 CBM review is a temporary program, sunseting in 2020, that allows those who’ve been sued or charged with infringement to challenge patents of a financial product or service. See AIA 18(a)-(d), 125 Stat. at 329-331.
- 49 PTO Petition for Rehearing En Banc at 5 & n.1, *Versata Dev. Grp., Inc. v. SAP, Inc.*, 793 F.3d 1306 (Fed. Cir. 2015) (No. 2014-1194) (PTO Reh’g Pet.).
- 50 *Versata*, 793 F.3d at 1323.
- 51 No 2014-1767, 2015 WL 5711943, at * 1 (Fed. Cir. Sept. 30, 2015).
- 52 *Id.* at *5, *3.

