

4TH EDITION

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# Federal Circuit Appeals from the PTAB and ITC

Summaries of Key 2020 Decisions

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## Introduction

Last year, the global COVID-19 pandemic created unprecedented challenges for American courts. By making several changes, however, the U.S. Court of Appeals for the Federal Circuit was able to largely continue its operations. The most visible of these changes was that the Court began to hear all arguments telephonically, with some early denials of at least some parties' requests for an oral hearing. Another less visible shift was that the Court issued summary affirmances in cases in which there was no oral argument.

At the same time, the number of appeals to the Court dipped this year, perhaps as a result of broader economic uncertainty. The largest drop was in post-grant review cases from the U.S. Patent and Trademark Office. The number of appeals from the PTO reached an all-time high in 2019 at more than 650 appeals. In 2020, that number was less than 550 appeals, which may reflect a settling of expectations since the number of post-grant institutions remained steady from FY2018 to FY2019. Despite having fewer appeals, there was an *increase* in the pendency time of appeals in post-grant review cases from the PTO, reaching an all-time average high of slightly more than 17 months from docketing of the appeal until the opinion was filed. Additionally, the Court issued the fewest precedential opinions in post-grant review cases in the last five years, by percentage. Most cases were decided by non-precedential opinions.

On the merits, there were significant decisions in 2020. But perhaps the most important cases dealt with the aftermath of the *Arthrex* decision, where the Federal Circuit held that the Administrative Patent Judges who decide post-grant review cases were unconstitutionally appointed. The Federal Circuit denied en banc rehearing in the case, but the Supreme Court has granted certiorari with a decision expected by mid-2021. The Supreme Court's decision in the case this term could have large implications for the PTO.

Besides *Arthrex*, we have chosen other important Federal Circuit cases to review from 2020, including ones that cover standing, real-party-in-interest, estoppels, scope of judicial review, and waiver. Also, for the first time, we have expanded our coverage beyond appeals from the PTO to include appeals from the U.S. International Trade Commission.

The summaries and statistics in this review are the results of a collaborative process. We thank our co-authors—Deirdre Wells, Kristina Caggiano Kelly, Pauline Pelletier, Trey Powers, William Milliken, Anna Phillips, Dallin Glenn, and Kathleen Wills.

Thank you for your interest. Please feel free to reach out to either of us if you have questions or wish to discuss the future of Federal Circuit appeals.

Best regards,



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## *Acoustic Technology, Inc. v. Itron Networked Solutions, Inc.*, 949 F.3d 1366 (Fed. Cir. 2020)

BY KATHLEEN WILLIS

Acoustic sued Itron for infringement of its patent, and the two parties settled, with Itron taking a license to the patent. Acoustic later sued Silver Spring for infringement. Silver Spring petitioned for *inter partes* review (IPR) of the patent, while also discussing a potential merger with Itron. The Patent Trial and Appeal Board subsequently instituted review, and Silver Spring and Itron completed their merger. The Board ruled against Acoustic.

On appeal, Acoustic asserted that the IPR was time-barred under 35 U.S.C. § 315(b). This provision provides that an IPR may not be instituted if the petition is filed more than one year after the date on which “the petitioner, real party in interest, or privy of the petitioner” is served with a complaint alleging patent infringement. Specifically, Acoustic argued that Itron became a real party in interest before the petition was filed because Itron discussed merging with Silver Spring. Acoustic also argued that the Board had post-institution authority to reevaluate § 315(b) when a real party in interest arises to prevent parties from waiting to initiate corporate deals until after institution to avoid time-bar challenges. Itron countered that Acoustic waived this challenge by not raising it before the Board and that Itron was not a real party in interest because it did not merge with Silver Spring until after the Board instituted the IPR. Itron also argued that the Board lacked authority to reevaluate the provision after institution.

The Federal Circuit held that, if it allowed Acoustic’s challenge for the first time on appeal, it would provide appellants with the unfair advantage of allowing them to wait for the Board’s decision on the merits and, if unfavorable, to challenge the Board’s jurisdiction on appeal. Since Acoustic knew about the merger months before the Board issued its final written decision, Acoustic’s failure to provide any reason for its untimely § 315(b) challenge deprived the court “of the benefit of the [Board’s] informed judgment.”

**Since time-bar challenges under 35 U.S.C. § 315(b) are not immune from waiver, parties should raise this issue before the Board.**

The Federal Circuit declined to decide whether the Board has the “authority or obligation” to reevaluate this statutory provision post institution. While this decision did not resolve whether pre-merger activities render a party a real party in interest, the court reiterated that real parties in interest include relationships arising before institution and those arising after a petition is filed. The court stated that it maintains “case-by-case” discretion over whether to apply waiver.

Since time-bar challenges under 35 U.S.C. § 315(b) are not immune from waiver, parties should raise this issue before the Board.

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### RELATED CASE

- *Power Integrations, Inc. v. Semiconductor Components Indus.*, 926 F.3d 1306 (Fed. Cir. 2019) (the real-party-in-interest determination includes relationships arising after the petition is filed and before institution).



## *In re Google Tech. Holdings LLC*, 980 F.3d 858 (Fed. Cir. 2020)

BY KATHLEEN WILLS

Google applied for a patent on video-on-demand systems. The Patent Trial and Appeal Board affirmed the examiner's rejection of the claims as obvious, stating that Google's responses to the examiner's rejections were "conclusory" and failed to include any construction of the contested terms.

Google appealed to the Federal Circuit. In analyzing whether Google was permitted to raise claim construction arguments on appeal, the court drew a distinction between the doctrines of waiver and forfeiture. The court acknowledged that it had used the terms "interchangeably at times," but also noted that "the two are really not the same, although our cases have so often used them interchangeably that it may be too late to introduce precision." Forfeiture is defined as the "failure to make the timely assertion of a right," while waiver is the "intentional relinquishment or abandonment of a known right." Having defined the doctrines, the Federal Circuit categorized Google's failure to raise its claim construction arguments before the Board as forfeiture. It also noted that Google didn't provide any reasonable explanation for why it failed to argue its construction of the disputed claim term before the examiner and the Board, so there were no "exceptional circumstances" justifying bringing it up on appeal.

The court held that allowing Google to raise these arguments on appeal would "deprive the Board, an expert body" of its role in reviewing patent application rejections. A party must argue construction during examination since "[t]he very word 'review' presupposes that a litigant's arguments have been raised and considered in the tribunal of first instance." This principle prevents "sandbagging." The court, however, noted that it maintains discretion to hear a claim that was not presented to the Board.

An applicant should use every opportunity to present arguments during the examination process that it may

**the Federal Circuit categorized Google's failure to raise its claim construction arguments before the Board as forfeiture.**

raise on appeal. If a party fails to raise an argument before the Board, however, the court may use its discretion to determine whether there exist exceptional circumstances that excuse any forfeiture.

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### RELATED CASE

- *In re Baxter Intern., Inc.*, 678 F.3d 1357, 1363 (2012) (Baxter waived claim construction arguments that it had not raised before the Board. Since Baxter did not address the examiner's rejection, the Board did not include an analysis of the term. The court found this was not enough to preserve the argument for appeal.)

## *Fanduel, Inc. v. Interactive Games LLC*, 966 F.3d 1334 (Fed. Cir. 2020)

BY JON E. WRIGHT

FanDuel petitioned for *inter partes* review (IPR) of certain claims of Interactive Games' patent. The Patent Trial and Appeal Board instituted review and found all but dependent claim 6 to be unpatentable as obvious.

Specifically, in its petition, FanDuel argued that claim 6 was obvious over three references: Carter, Walker, and an archived copy of a webpage (the Slot Payouts Webpage). Dependent claim 6 included a "lookup table" and an "ordered list." FanDuel relied on Carter to disclose the lookup table and on the Slot Payouts Webpage to argue that "ordered lists were extremely well-known as a way to organize information." Interactive Games' only argument for the validity of claim 6 was that the Slot Payouts Webpage did not qualify as prior art.

In its final written decision, the Board disagreed with FanDuel's position that Carter discloses the claimed "lookup table." The Board also rejected FanDuel's explanation that it would have been an obvious design choice to apply the "ordered list" of the Slot Payouts Webpage. Interactive Games had made none of these arguments in support of claim 6.

FanDuel argued on appeal that the Board's decision on claim 6 violated various provisions of Administrative Procedure Act (APA). According to FanDuel, the Board violated these provisions by adopting a "new theory" for why the combination of Walker, Carter, and the Slot Payouts Webpage failed to render claim 6 obvious.

The Federal Circuit disagreed. It explained that the "critical question for compliance with the APA and due process is whether [the appellant] received 'adequate notice of the issues that would be considered, and ultimately resolved, at that hearing.'" It found that "FanDuel's argument that it lacked notice that the Board might address and reject the obviousness arguments made in FanDuel's own petition strains credulity." The Federal Circuit also disagreed that the

**[A] patent owner's response, alone, does not define the universe of issues the Board may address in its final written decision.**

Board had "changed theories" since the Board "said nothing in its institution decision endorsing FanDuel's arguments" with respect to Carter and Walker. But the main reason the Federal Circuit rejected FanDuel's arguments was that to require the patent owner to engage in post-institution record development on whether the references disclosed elements of claim 6 before the Board could reach that issue "would effectively and impermissibly shift the burden to the patent owner to defend its claim's patentability."

This case cements the Board's authority, post-institution, to review anew the merits of the petition and to determine whether the petitioner has met its burden to prove unpatentability, irrespective of what issues patent owner may choose to raise in its response. The Board is not required to preview the substantive positions it will take in its final decision.

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### RELATED CASES

- *Alacritech, Inc. v. Intel Corp.*, 966 F.3d 1367 (Fed. Cir. 2020) (The Board failed to explain in an IPR decision how prior art taught certain claimed features, so the Federal Circuit could not reasonably discern whether the Board's analysis was correct and remanded the case.).
- *Apple Inc. v. Andrea Electronics Corp.*, 949 F.3d 697 (Fed. Cir. 2020) (The Federal Circuit held that a petitioner's reply in support of its IPR petition did not raise new theories of unpatentability. The Board thus abused its discretion by refusing to consider the reply arguments.).

***Network-1 Tech., Inc. v. Hewlett-Packard Co. et. al.*, Nos. 2018-2338, -2339, -2395, -2396, 2020 WL 6814481 (modified November 20, 2020) (Fed. Cir. 2020)**

BY DEIRDRE M. WELLS

Network-1 sued HP, among others, for patent infringement. Another defendant then filed an *inter partes* review (IPR) petition. Following institution, HP filed its own petition on different grounds and a motion to join the instituted IPR. The Board denied HP's request. HP then filed another IPR petition containing only the grounds on which the Board had instituted and filed a motion to join the instituted IPR. The Board granted HP's motion and held that the claims were not unpatentable. The Federal Circuit affirmed.

Following the IPR, the district court held a jury trial. The jury found the asserted patent was both not infringed and invalid based on prior art that was not at issue in the IPR. But the district court then granted Network-1's motion for judgment as a matter of law that HP was estopped from raising the invalidity arguments under 35 U.S.C. § 315(e)(2) because it had joined in the IPR and the invalidity arguments "reasonably could have been raised" in the IPR. Network-1 appealed the district court decision and HP cross-appealed.

On appeal, HP argued that no validity ground raised at trial "reasonably could have [been] raised" through its joinder to the IPR. The Federal Circuit agreed and held that HP was not estopped from raising its validity challenges. It stated that "the joinder provision does not permit a joining party to bring into the proceeding new grounds that were not already instituted." It may only join the already-instituted IPR. Under 35 U.S.C. § 315(e)(2), "a party is only estopped from challenging claims in the final written decision based on grounds that it 'raised or reasonably could have raised' during the IPR." The court held that "[b]ecause a joining party cannot bring with it grounds other than those already instituted, that party is not statutorily estopped from raising other invalidity grounds." The Federal Circuit thus vacated the district court's judgment as a matter of law and remanded the case.

**Statutory estoppel for a party who joins an instituted IPR is limited to the validity arguments actually raised in the IPR.**

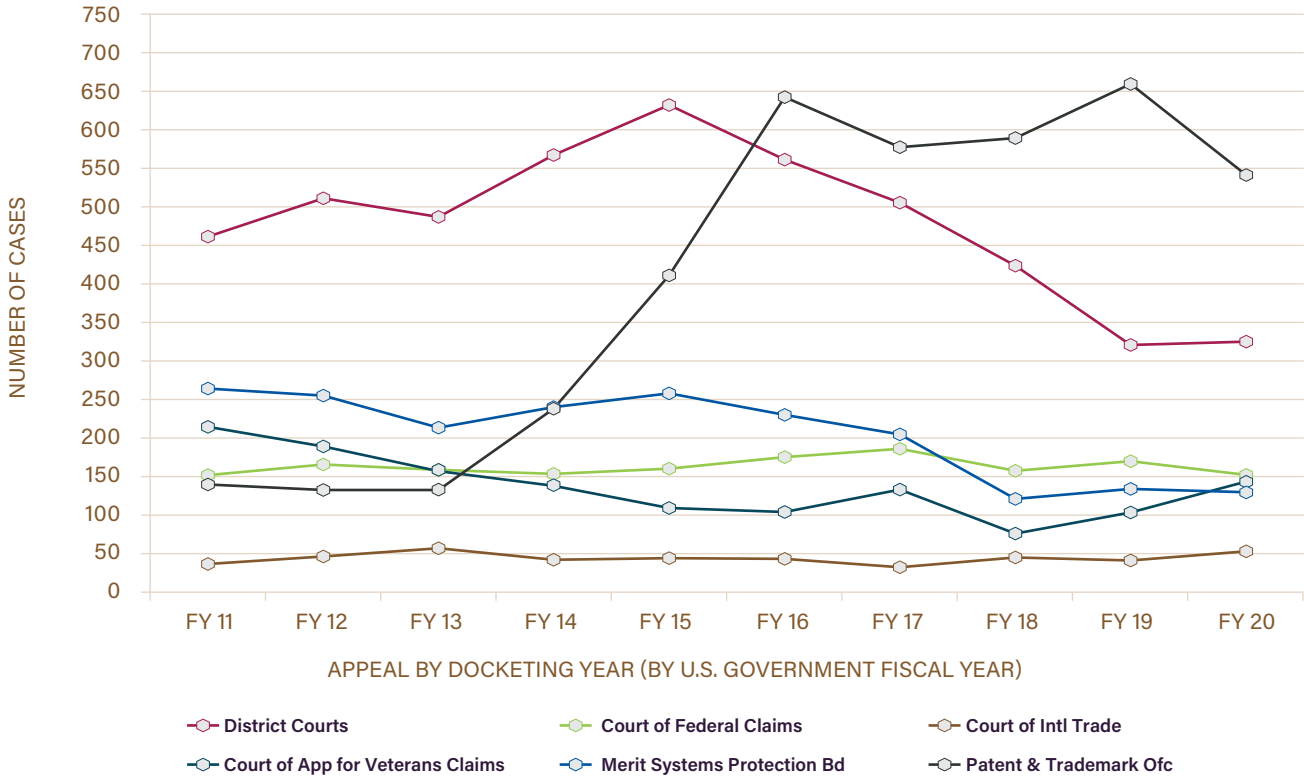
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#### **RELATED ESTOPPEL CASE**

- *Hologic, Inc. v. Minerva Surgical, Inc.*, 957 F.3d 1256 (Fed. Cir. 2020) (IPR provides patent assignors with a loophole for avoiding assignor estoppel. "Although [the company founded by the patent assignor] would have been estopped from challenging the validity of the [assigned] patent claims in district court, it was able to challenge their validity in an IPR proceeding and, hence, circumvent the assignor estoppel doctrine.").

# United States Court of Appeals for the Federal Circuit

## Major Origins of Appeals

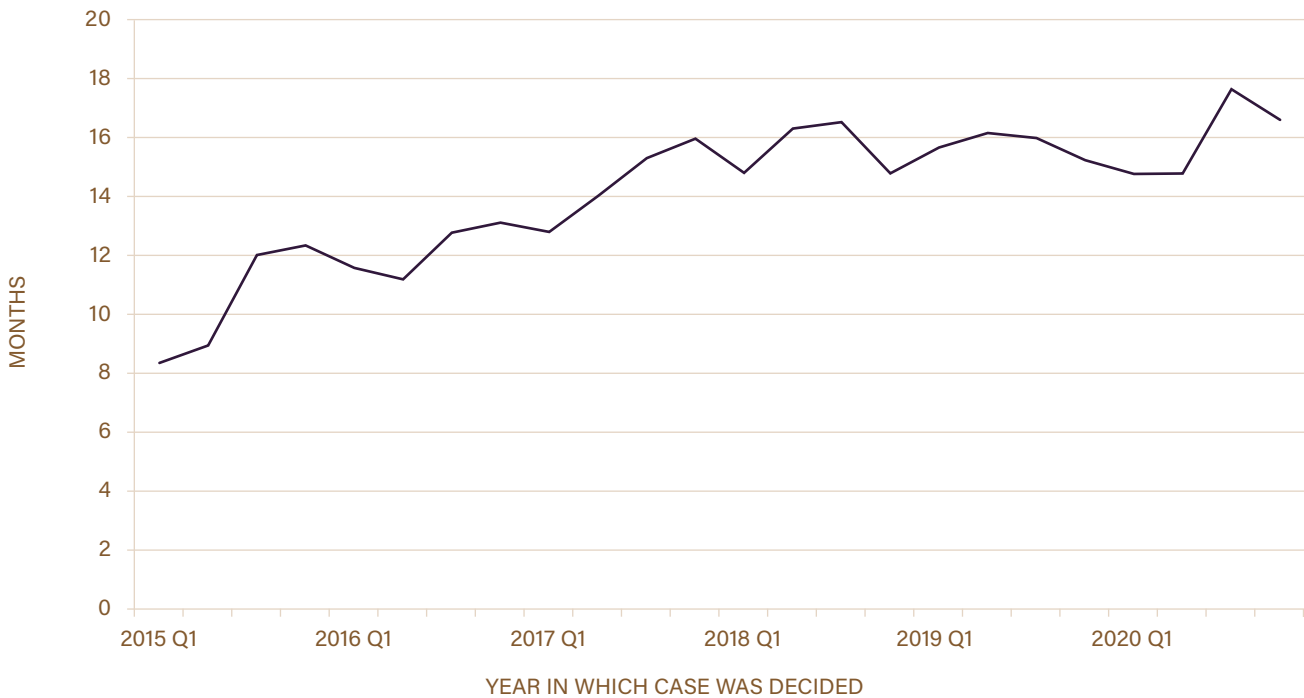


Notes: Includes reinstated, cross-, and consolidated appeals.

Appeals from the USPTO dipped in FY20, reaching their lowest level since FY15. After four consecutive years of declines in appeals from district courts, these cases levelled off in FY20.

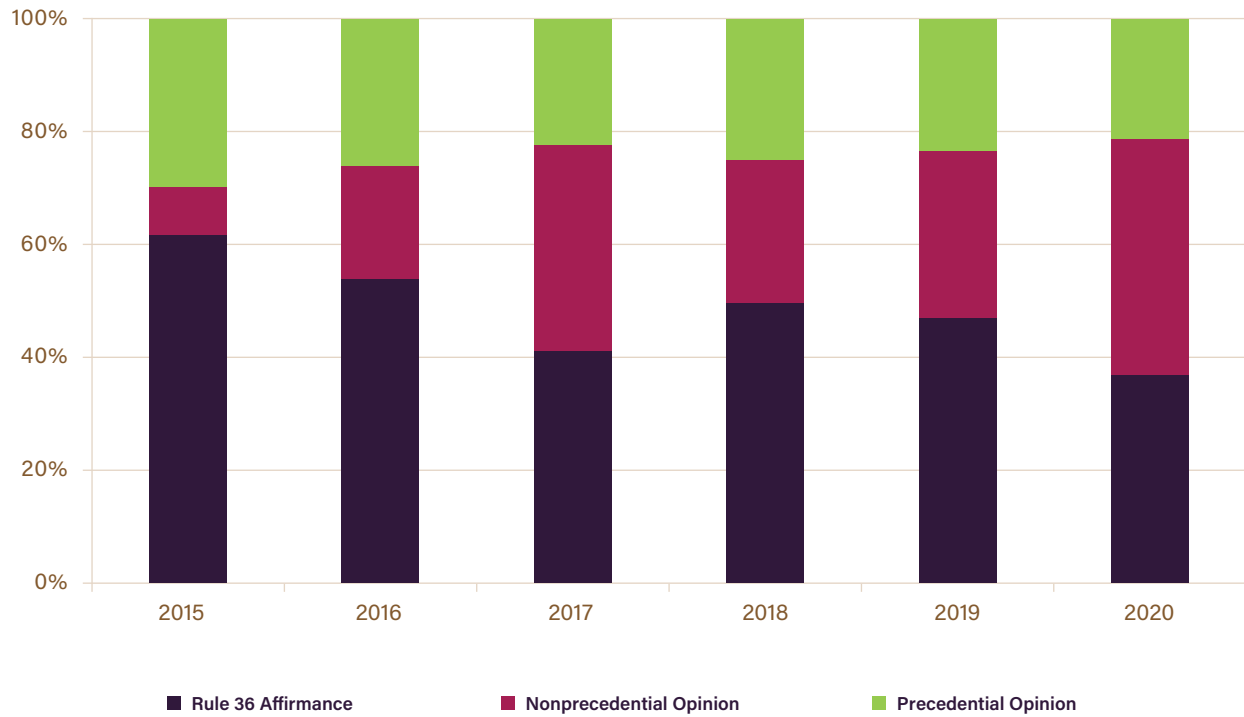
Source: U.S. Court of Appeals for the Federal Circuit

## Total IPR/CBM/PGR Appeal Pendency in Months



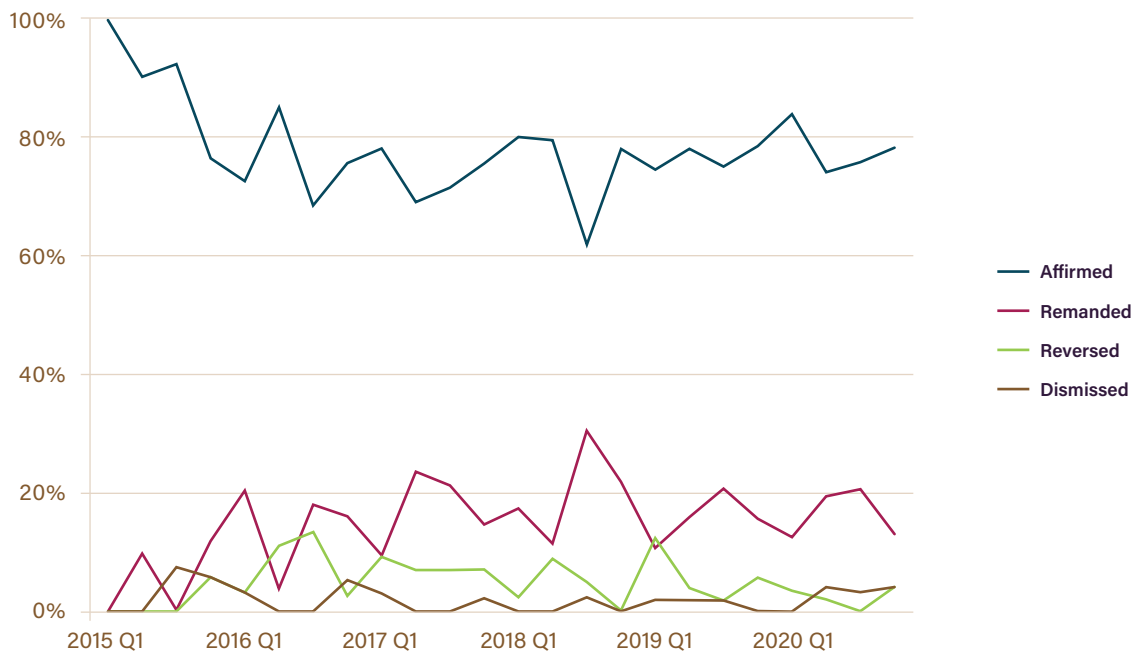
PTAB/AIA appeal pendency from docketing to opinion ticked up noticeably in the second half of 2020, likely due to COVID-19-related delays.

## IPR/CBM/PGR Appeal Disposition Types



37% of the Federal Circuit's 154 PTAB/AIA appeal decisions were Rule 36 summary affirmances in 2020, the smallest share ever recorded. Precedential opinions made up 21% of the Court's decisions.

## IPR/CBM/PGR Appeal Outcomes



Overall in 2020, 79% of the 154 PTAB/AIA decisions were affirmed, 16% were remanded, 3% were reversed, and 3% were dismissed. The affirmation rate has checked in between 73% and 79% for each of the last five years.



## *United States v. Arthrex, Inc.*, No. 19-1434 (U.S.)

BY WILLIAM H. MILLIKEN

In October 2020, the Supreme Court agreed to review the Federal Circuit's holding in *Arthrex Inc. v. Smith & Nephew Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), that the scheme for appointing the Patent Trial and Appeal Board's administrative patent judges is unconstitutional under the Appointments Clause.

The Constitution's Appointments Clause provides that principal "Officers of the United States" must be appointed by the president with the advice and consent of the U.S. Senate. "Inferior officers," however, may be appointed by the president alone, by heads of departments, or by the courts. In *Arthrex*, a panel of the Federal Circuit unanimously held that APJs are principal officers and hence that Congress acted impermissibly in vesting their appointment in the Secretary of Commerce. To remedy the constitutional violation, the panel severed and invalidated APJs' tenure protections, making them removable at will. This severance, the panel held, rendered the APJs inferior officers who may validly be appointed by the Secretary of Commerce. The full Federal Circuit denied rehearing en banc, with four judges dissenting, and all parties to the case—Arthrex, Smith & Nephew and the United States—petitioned for certiorari.

On Oct. 13, the Supreme Court agreed to take the case. The three petitions for certiorari collectively presented three issues for the Supreme Court's review: (1) whether APJs are principal or inferior officers; (2) whether, if APJs are principal officers, the Federal Circuit properly cured the Appointments Clause violation by severing and invalidating APJs' tenure protections; and (3) whether the Federal Circuit erred in considering Arthrex's Appointments Clause challenge given that the argument was not raised to the Board. The Supreme Court limited its grant of certiorari to the first two questions.

The parties are currently in the midst of briefing. As of the time this publication goes to press, the United

**The Supreme Court granted certiorari on two questions: (1) whether APJs are principal or inferior officers and (2) whether, if APJs are principal officers, the Federal Circuit properly cured the Appointments Clause violation by severing and invalidating APJs' tenure protections.**

States and Smith & Nephew have filed opening briefs on question (1), arguing that APJs are inferior officers and thus that the Federal Circuit erred in finding a constitutional violation. Arthrex has filed an opening brief on questions (1) and (2), arguing that APJs are principal officers and that the Federal Circuit's severance remedy was impermissible. Arthrex's position is that only Congress can fix the constitutional violation. The United States and Smith & Nephew are expected to file responsive briefs arguing that, if the Court agrees with the Federal Circuit that APJs were improperly appointed, the Court should affirm the Federal Circuit's remedy of severing and invalidating APJs' tenure protections.

The Court will hold oral argument on March 1, 2021, and a decision is expected by the end of the Supreme Court term in June.

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## RELATED DEVELOPMENTS

- *Preservation and Forfeiture: Who Is Entitled to Relief?* Federal Circuit panels have consistently ruled that parties preserve Appointments Clause arguments if and only if they raise them in their opening appeal brief. Thus, a party need not have raised the constitutional challenge before the Board in order to raise it on appeal. See, e.g., *Arthrex*, 941 F.3d at 1326–27. But Appointments Clause arguments not included in opening briefs are deemed forfeited—even if the appellant’s opening brief was filed before *Arthrex* was decided. See, e.g., *Customedia Techs., LLC v. Dish Network Corp.*, 941 F.3d 1173, 1174 (Fed. Cir. 2019). The Federal Circuit has likewise held that petitioners who have received an unfavorable Board decision cannot obtain relief under *Arthrex*, on the reasoning that, by affirmatively invoking the Board’s jurisdiction, petitioners have forfeited any challenge to the tribunal’s constitutionality. Having chosen to litigate before the Board, the court has reasoned, petitioners should not be able to then attack the legitimacy of that body if it renders an unfavorable decision. See *Ciena Corp v. Oyster Optics, LLC*, 958 F.3d 1157, 1162 (Fed. Cir. 2020). Finally, the Court has held that the *Arthrex* panel’s remedy took effect the day *Arthrex* was decided, meaning that final written decisions issued after that date are not subject to an Appointments Clause challenge. See *Caterpillar Paving Prods. v. Wirtgen Am., Inc.*, 957 F.3d 1342, 1342–43 (Fed. Cir. 2020).
- *Scope: To What Proceedings Does Arthrex Apply?* The Federal Circuit has since extended *Arthrex*’s holding to apply to all proceedings heard by APJs, including *inter partes* reexaminations, see *VirnetX Inc. v. Cisco Sys., Inc.*, 2020 WL 2511116, at \*1 (Fed. Cir. Jan. 24, 2020), and *ex parte* appeals, see *In re Boloro Global Ltd.*, 963 F.3d 1380, 1381 (Fed. Cir. 2020) (concluding that, if APJs are principal officers for purposes of IPRs, they are “principal officers for purposes of all governmental functions of their office”).

## *Mayborn Grp., Ltd. v. Int'l Trade Comm'n*, 965 F.3d 1350 (Fed. Cir. 2020)

BY DALLIN GLENN

Mayborn petitioned the International Trade Commission to rescind a general exclusion order (GEO) after the complainants informed Mayborn that its self-anchoring beverage containers were potentially subject to the order. The petition sought to prove that the patent was invalid, and the Commission denied the petition because the discovery of potentially invalidating prior art was not a “changed condition” under § 1337(k)(1). Mayborn appealed, and the Commission challenged Mayborn’s standing. The Federal Circuit held that Mayborn had standing but that the Commission correctly denied Mayborn’s petition.

The Commission challenged Mayborn’s standing because Mayborn’s products had not yet been excluded, and complainants’ efforts to enforce the GEO against Mayborn had nothing to do with the Commission’s decision not to rescind the GEO. The Commission reasoned that the complainants’ views on the scope of the GEO are irrelevant as Customs and the Commission enforce the GEO. The panel disagreed, noting that while the complainants may have brought the GEO to the attention of Mayborn, the Commission issued the GEO and retains the ability to enforce, modify, or rescind it. Accordingly, the Commission’s refusal to hear Mayborn’s petition caused Mayborn a redressable injury.

Mayborn argued that the Commission improperly denied its petition for a modification or rescission of the GEO because invalidity was a “changed condition” and because the public interest requires the Commission to consider validity. The panel held that patent invalidity was not a “changed condition” under subsection (k)(1), therefore the Commission lacked authority to grant Mayborn’s petition. Specifically, while a district court finding of invalidity changes the legal status of the patent, there is no similar effect of a petitioner’s mere assertion that the patent is invalid.

**The panel held that patent invalidity was not a “changed condition” under subsection (k)(1), therefore the Commission lacked authority to grant Mayborn’s petition.**

The panel also found that the statutory requirement to consider the public interest in remedy determinations does not fill this gap in the Commission’s authority.

## *Comcast Corp. v. Int'l Trade Comm'n*, 951 F.3d 1301 (Fed. Cir. 2020)

BY DALLIN GLENN

The International Trade Commission found a violation of Section 337 by Comcast X1 set-top boxes, and Comcast appealed two issues of statutory interpretation underlying the Commission's finding. First, Comcast argued that its set-top boxes did not infringe—directly or indirectly—at the time they were imported. Second, Comcast argued that others—not Comcast—imported the set-top boxes.

As to infringement, Comcast argued that the X1 set-top boxes could not violate Section 337 because any indirect infringement occurred only after importation. This is because the imported boxes are incapable of infringement until they link up to Comcast's domestic servers and to Comcast's customers' mobile devices. The Commission relied on both pre- and post-importation activities of Comcast in its decision, and the panel held that the decision was supported by substantial evidence. However, the panel did not explain whether pre- or post-importation activities carried the day, which suggests the distinction may not be important.

Comcast next argued that it did not import the set-top boxes because it did not physically bring the boxes into the United States and did not exercise any control over the process of importation. The panel again recited the Commission's reasoning and concluded that it was supported by substantial evidence. The ALJ had found that Comcast provided detailed, customized technical specifications to its suppliers and—knowing the set-top boxes are manufactured abroad—required delivery to Comcast in the United States. The ALJ concluded—and the Commission and the panel agreed—that “the evidence shows that Comcast is sufficiently involved with the design, manufacture, and importation of the accused products, such that it is an importer for purposes of Section 337.”

**The ALJ concluded—and the Commission and the panel agreed—that “the evidence shows that Comcast is sufficiently involved with the design, manufacture, and importation of the accused products, such that it is an importer for purposes of Section 337.”**

## *Nike, Inc. v. Adidas AG*, 955 F.3d 45 (Fed. Cir. 2020) and *Uniloc 2017 LLC v. Hulu, LLC*, 966 F.3d 1295 (Fed. Cir. 2020)

BY KRISTINA CAGGIANO KELLY

The patent claim survival rate before the Patent Trial and Appeal Board continues to strongly favor petitioners. Accordingly, motions to amend the challenged claims have been growing among patent owners in *inter partes* reviews (IPRs). While the Board is still confined to the petition and its rationales in reviewing the patentability of challenged claims, it is not so constrained in reviewing proposed amendments.

In *Nike, Inc. v. Adidas AG*, 955 F.3d 45 (Fed. Cir. 2020), the Federal Circuit confirmed that the Board may raise unpatentability grounds *sua sponte* when reviewing a motion to amend a claim in an IPR. Specifically, the court affirmed the Board’s rejection of substitute claims based on prior art that, while in the record, was not cited by the petitioner. *Id.* The court thus confirmed that Board judges evaluating substitute claims act more like examiners in the first instance, crafting their own rejections in view of the entirety of the record.

In *Uniloc 2017 LLC v. Hulu, LLC*, 966 F.3d 1295 (Fed. Cir. 2020), the court confirmed that the Board’s review of motions to amend was not limited to rejections based on 35 U.S.C. §§ 102 and 103—the statutory confines of an IPR challenge. See 35 U.S.C. § 311(b). Rather, the Board may deny motions to amend the claims based on subject matter ineligibility under 35 U.S.C. § 101 or for failing to comply with the requirements of 35 U.S.C. § 112.

The patent at issue in *Uniloc* was directed to a method for adjusting the number of devices allowed to use a digital product under license. Hulu successfully challenged the patent before the Board, who found the independent claims unpatentable over the prior art. Uniloc filed a motion asking the Board to enter substitute claims. Uniloc argued that its proposed amendments overcame the prior art and did not enlarge the scope of the claims or present new matter. However, the Board held that the substitute claims were patent ineligible under § 101.

**Substitute claims have never been examined before and should not escape an evaluation on all grounds of patentability simply because of the forum in which they were proposed.**

The Federal Circuit majority found that the statute authorizes the Board to determine the “patentability” of substitute claims without limitation. Substitute claims have never been examined before and should not escape an evaluation on all grounds of patentability simply because of the forum in which they were proposed. The court contrasted the IPR provisions for evaluating claim amendments from, for example, reexamination proceedings, which expressly prohibit the Patent and Trademark Office from considering substantial new questions of patentability beyond newly discovered prior art.

Judge O’Malley dissented, pointing out that IPR proceedings are designed to be limited reviews. Issued patent claims are already presumed to satisfy all statutory provisions, save for the prior art issues open to challenge. Reexamining substitute claims on §§ 101 and 112 grounds—where amendments do not broaden the scope of the claims or introduce new matter—amounts to a reexamination of the issued claims on grounds not permitted by the statutory scheme.

*Nike* and *Uniloc* provide essential guidance on how to navigate motions to amend. These cases, however, reduce the chances of success for such motions and increase the burden on patent owners hoping to survive post-grant proceedings with any claims intact.



## Sealy Tech., LLC v. SSB Manufacturing Co., 825 F. Appx. 795 (Fed. Cir. 2020)

BY DEIRDRE M. WELLS

SSB sought *inter partes* reexamination of a Sealy design patent. After reexamination, the decision was appealed to the Patent Trial and Appeal Board. The single claim in the patent recites “[t]he ornamental designs for a Euro-top mattress design, as shown and described.” Figure 1 of the patent (left) and the Aireloom Heritage mattress, which the Board found invalidated the patent, (right) are reproduced below.



In finding the claim invalid, the Board determined that it required, among other things, horizontal piping that has a contrasting appearance along the edges of the top and bottom of the mattress and along the top of the pillow layer. The Board determined that the contrast claimed in the patent encompassed any difference in appearance between the mattress piping and the remainder of the mattress. Despite the patent containing a second nearly identical mattress design with the piping claimed as brown, the Board rejected Sealy’s argument that the claimed contrast was limited to contrasting color or otherwise had to amount to something “strikingly different” from the remainder of the mattress. Applying this construction, the Board found the patent invalid over the Aireloom Heritage mattress.

**Claiming a contrast with shading without textual description covers any difference of appearance regardless how small.**

On appeal to the Federal Circuit, Sealy challenged both the Board’s claim construction regarding the claimed contrast and the Board’s obviousness determination. Regarding the claimed contrast, the court agreed that the shading technique in the figures merely indicated a contrast and did not limit the claimed contrast to the “strikingly different” degree that Sealy proposed. It also noted that the patent did not provide any textual description or limitation regarding the claimed contrast. Thus, the Federal Circuit held that the only contrast required by the claim is one of differing appearance, which may be achieved by, for example, contrasting fabric, contrasting color, contrasting pattern, or contrasting texture. The Federal Circuit then applied this construction to hold that the Aireloom Heritage monochromatic mattress rendered the claim invalid.

## *Thryv, Inc. v. Click-To-Call Technologies, Inc.*, 140 S. Ct. 1367 (2020)

BY PAULINE M. PELLETIER

In *Thryv, Inc. v. Click-To-Call Technologies, LP*, 140 S. Ct. 1367 (2020), the Supreme Court held that patent owners cannot appeal determinations by the Patent Trial and Appeal Board declining to apply the time bar of 35 U.S.C. § 315(b). In reaching this conclusion, the Supreme Court had to reconcile this outcome in *Thryv* with its decision in *SAS Institute Inc. v. Iancu*, 138 S. Ct. 1348 (2018). In *SAS*, the Court rejected the argument that the appeal bar of 35 U.S.C. § 314(d) precluded judicial review of the Board's then widely utilized partial-institution practice. The majority opinion in *Thryv* (authored by the late Justice Ginsburg) distinguished the issue raised in *SAS*—namely, whether the Board can properly institute an *inter partes* review (IPR) on some, but not all, claims challenged in a petition—as relating to “the manner in which the agency's review ‘proceeds’ once instituted” as opposed to “whether the agency should have instituted review at all.”

The *Thryv* majority reasoned that “[b]ecause § 315(b)'s sole office is to govern institution...[the] contention remains, essentially, that the agency should have refused to institute *inter partes* review,” and, “§ 314(d) makes that contention unreviewable.” Justice Gorsuch, joined in part by Justice Sotomayor, dissented from the majority's interpretation of § 314(d) on the grounds that its scope is expressly limited, consistent with the presumption of judicial review.

In the wake of *Thryv*, the Federal Circuit has aligned related aspects of its precedent. In *ESIP Series 2, LLC v. Puzhen Life USA, LLC*, 958 F.3d 1378, 1384 (Fed. Cir. 2020), the patent owner appealed a final determination by the Board that the petitioner had named “all real parties in interest” as required by 35 U.S.C. § 312(a)(2). In declining to review the real party in interest issue, the Federal Circuit held that, based on *Thryv*, “we find no principled reason why preclusion of judicial review under § 314(d) would not extend to a Board decision concerning the ‘real parties in interest’ requirement.” In *SIPCO, LLC v. Emerson Elec. Co.*, 980 F.3d 865, 873 (Fed. Cir. 2020), the Federal Circuit held that covered-business-method eligibility is likewise unreviewable.

Similarly, in *In re Cisco Sys. Inc.*, 2020 WL 6373016 (Fed. Cir. Oct. 30, 2020), the Federal Circuit rejected the petitioner's bid to prevent the Board's reliance on its

The *Thryv* majority reasoned that “[b]ecause § 315(b)'s sole office is to govern institution... [the] contention remains, essentially, that the agency should have refused to institute *inter partes* review,” and, “§ 314(d) makes that contention unreviewable.”

own precedents, which look to the stage of any parallel proceedings in assessing whether to deny institution of an IPR. The court explained, “[a]t bottom, Cisco is challenging whether the Board has authority to consider the status of parallel district court proceedings as part of its decision under § 314(a) in deciding whether to deny institution,” noting that “[s]uch challenges, both procedural and substantive, rank as questions closely tied to the application and interpretation of statutes relating to the Patent Office's decision whether to initiate review, and hence are outside of our jurisdiction.”

However, *Thryv* still permits challenges to “the manner in which the agency's review ‘proceeds’ once instituted.” This distinction was critical to the Federal Circuit's decision in *Facebook, Inc. v. Windy City Innovations, LLC*, 973 F.3d 1321 (Fed. Cir. 2020), which rejected the Board's interpretation of the joinder provision of 35 U.S.C. § 315(c). Facebook had argued that *Thryv* precludes appellate review of the Patent and Trademark Office's “decision to institute a second IPR and join it to an existing IPR,” emphasizing that § 315(c) requires a request for joinder to be accompanied by a petition for IPR. According to Facebook, “Windy City's attack on joinder is that the follow-on IPRs should not have been instituted at all,” making it among the issues that *Thryv* categorized as non-appealable under Section 314(d). The Federal Circuit disagreed, holding that “[t]he statute makes clear that the joinder decision is made *after* a determination that a petition warrants institution, thereby affecting the manner in which an IPR will proceed,” and, because the joinder decision is a separate and subsequent to the institution decision, “[n]othing in § 314(d), nor any other statute, overcomes the strong presumption that we have jurisdiction to review that joinder decision.”

## Security People, Inc. v. Iancu, 971 F.3d 1355 (Fed. Cir. 2020)

BY R. WILSON "TREY" POWERS III

Security People lost an *inter partes* review (IPR) and appealed to the Federal Circuit. It lost that appeal and was denied certiorari at the Supreme Court. Security People never raised constitutional arguments in any of these proceedings. Security People subsequently filed suit against the Patent and Trademark Office in district court alleging that the application of the IPR proceeding to cancel its patent violated Security People's constitutional right to due process. The district court dismissed the case for lack of subject matter jurisdiction. Security People then appealed to the Federal Circuit.

On appeal, Security People alleged that the district court erred in holding that Security People could only raise its constitutional challenge before the Federal Circuit on direct appeal from the IPR. First, Security People argued that the Board lacked authority to consider constitutional challenges for the first time on appeal because retroactivity challenges raise issues requiring factual resolution. Second, Security People argued that its constitutional challenge was not ripe until the cancellation of its claims, which required Federal Circuit affirmance of the Board's decision.

The Federal Circuit rejected both arguments. First, the court noted that it is "not unusual for an appellate court reviewing the decision of an administrative agency to consider a constitutional challenge to a federal statute that the agency concluded it lacked the authority to decide." The Federal Circuit reasoned its jurisdiction vests regardless of whether there are disputed factual questions because the court can take judicial notice of facts relevant to the constitutional question. The court also noted the Board has broad fact-finding authority that allows it to resolve disputed factual questions, even if it could not decide the legal question for which those factual questions are relevant.

Turning to Security People's second argument, the Federal Circuit noted that the Patent and Trademark Office's "decision-making process in an IPR is complete after issuance of the final written decision (or,

**The statutes providing for exclusive review by the Federal Circuit preclude district courts from exercising APA jurisdiction over constitutional claims related to a final written decision in an IPR.**

if parties move for reconsideration, after the Board issues its decision on reconsideration)." Issuance of the certificate of cancellation (which happens after appeals) is a compulsory formality involving no agency decision making. Therefore, the Federal Circuit reasoned that Security People's constitutional challenge was ripe as of the direct appeal from the IPR, whether or not the Board had the authority to decide Security People's constitutional challenges and whether or not the Board had issued a certificate of cancellation for the challenged patent claims.

Additionally, the Federal Circuit agreed with the district court that the statutes providing for exclusive review by the Federal Circuit preclude district courts from exercising APA jurisdiction over constitutional claims related to a final written decision. The Federal Circuit found that the structure of the statutory scheme indicates congressional intent to preclude district court review. And the Federal Circuit noted that the final decision in an IPR is reviewable by statute, "but [only] in the Federal Circuit, not in an APA-based collateral attack in a district court."

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### RELATED CASES

- *In re Rudy*, 956 F.3d 1379 (Fed. Cir. 2020) (The Federal Circuit applies its law and Supreme Court precedent, not Patent Office guidance, when analyzing subject matter eligibility. And merely applying a patent ineligible abstract idea to a tangible method and conventional physical steps does not render a claim patentable.).
- *Christy, Inc. v. U.S.*, 971 F.3d 1332 (Fed. Cir. 2020) (cancellation of a patent claim in an *inter partes* review is not a Fifth Amendment taking).

## *Amneal Pharm. LLC v. Almirall, LLC*, 960 F.3d 1368 (Fed. Cir. 2020)

BY ANNA G. PHILLIPS

Abbreviated new drug (ANDA) applicant Amneal petitioned for an *inter partes* review (IPR) of Almirall's patent listed in the Food and Drug Administration's (FDA) Orange Book for a prescription drug to treat acne. Almirall brought suit in district court after Amneal filed its ANDA. During settlement discussions, Almirall offered Amneal a covenant not to sue on one of its patents contingent upon dismissal of the IPR, but the parties could not reach a settlement.

The Patent Trial and Appeal Board found that the claims were not unpatentable. Amneal appealed, but subsequently filed a motion for voluntary dismissal. Despite agreeing that the appeal should be dismissed, Almirall asked the court to award attorneys' fees and costs pursuant to 35 U.S.C. § 285, arguing that Amneal unreasonably continued to litigate the IPR in the face of the offered covenant not to sue and because Almirall had requested that the FDA remove the patent from the Orange Book listing.

Citing cases from the Court of Customs and Patent Appeals—the Federal Circuit's predecessor—the court held that § 285 does not apply to appeals from administrative proceedings. In doing so, the court distinguished appeals originating with the Board from appeals originating in district courts where § 285 applies. The court further acknowledged that the Board has its own means of sanctioning litigation misconduct under its regulations (37 C.F.R. § 42.12). The court further noted that, even if § 285 were to apply, the statute does not authorize the court to award fees for work conducted "before this court has ever asserted jurisdiction." Almirall sought fees for litigation before the Board, not fees incurred after the appeal had commenced.

The Federal Circuit acknowledged that fees have been awarded in district court cases for a parallel administrative proceeding that was "intimately tied" to the resolution of the civil action. Thus, the award of

**Citing cases from the Court of Customs and Patent Appeals—the Federal Circuit's predecessor—the court held that § 285 does not apply to appeals from administrative proceedings.**

fees for administrative proceedings is not entirely foreclosed, but civil court proceedings must be also pending and depend on the outcome of the administrative proceedings for any such fees to be considered.

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### RELATED SANCTIONS CASE

- *Apple Inc. v. Voip-Pal.com, Inc.*, 976 F.3d 1316 (Fed. Cir. 2020) (the Board has discretion to issue sanctions not explicitly provided in 37 C.F.R. § 42.12 so long as the sanction is reasonable).

## *Adidas AG v. Nike, Inc.*, 963 F.3d 1355 (Fed. Cir. 2020)

BY ANNA G. PHILLIPS

Adidas petitioned for *inter partes* reviews (IPR) of two Nike patents. The Patent Trial and Appeal Board concluded that Adidas had not met its burden to show that the challenged claims in Nike's patents were obvious. Adidas appealed.

As a threshold issue, the Federal Circuit addressed Adidas's Article III standing to appeal. Nike asserted that Adidas lacked standing because it had not suffered an injury in fact; Nike had not sued or threatened to sue Adidas for infringement of either of the two patents. The court rejected Nike's argument, reasoning that Adidas "has engaged in, is engaging in, or will likely engage in activity that would give rise to a possible infringement suit." The court explained that Adidas and Nike were direct competitors and Nike had accused Adidas of infringing another of Nike's patents on similar technology. In fact, Nike had expressed to Adidas its intent to protect its intellectual property rights globally "against further infringing acts." In addition, Nike had asserted one of the patents-at-issue against a third-party product "similar" to Adidas's products. The court also gave weight to the fact that Nike refused to grant Adidas a covenant not to sue, "confirming that Adidas' risk of infringement is concrete and substantial." Accordingly, the court held Adidas had constitutional standing to appeal.

Having decided the threshold issue of standing, the court concluded that there was substantial evidence to support the Board's finding and affirmed.

**The court also gave weight to the fact that Nike refused to grant Adidas a covenant not to sue, "confirming that Adidas' risk of infringement is concrete and substantial."**



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