

*In The*  
**United States Court of Appeals**  
*For The Federal Circuit*

**PERSONAL AUDIO, LLC,**

*Appellant,*

v.

**ELECTRONIC FRONTIER FOUNDATION,**

*Appellee.*

**APPEAL FROM THE UNITED STATES PATENT AND TRADEMARK  
OFFICE, PATENT TRIAL AND APPEAL BOARD, IN NO. IPR2014-00070.**

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**MOTION FOR LEAVE TO FILE BRIEF AND  
BRIEF OF *AMICUS CURIAE* APPLICATIONS IN INTERNET TIME, LLC  
IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING AND  
REHEARING *EN BANC***

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Steven C. Sereboff  
SOCAL IP LAW GROUP LLP  
1332 Anacapa, Suite 201  
Santa Barbara, California 93101  
(805) 230-1350  
info@socalip.com

*Counsel for Amicus Curiae*  
*Applications in Internet Time, LLC*

*Dated September 20, 2017*

## CERTIFICATE OF INTEREST

Counsel for *amicus* Applications in Internet Time, LLC certifies:

1. The full name of every party or *amicus* represented by me is:  
Applications in Internet Time, LLC.
2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is: not applicable.
3. All parent corporations and any publicly held corporations that own 10 percent or more of the stock of the party or *amicus curiae* represented by me are: not applicable.
4. The names of all law firms and the partners or associates that appeared for the party or *amicus* now represented by me in the trial court or agency or are expected to appear in this Court are: Steven C. Sereboff of SoCal IP Law Group LLP.

September 20, 2017

/Steven C. Sereboff/  
Steven C. Sereboff, Esq.

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**SUBSECTION B**

*Petition for Inter Partes Review by Zhejiang Yankon Group, Ltd; Case no. IPR2015-01420 (PTAB November 25, 2015)*

*Petition for Inter Partes Review by Aceto Agricultural Chemicals Corp., Case No. IPR2015-01016 (PTAB October 2, 2015).*

### SUBSECTION C

*Petition for Inter Partes Review by Reflectix, Inc.*

IPR2015-00039, IPR2015-00042, IPR2015-00044, IPR2015-00045, IPR2015-00047 (PTAB April 24, 2015) (blurred lines of corporate separation between the companies)

*Petition for Inter Partes Review by General Electric Company*

IPR2014-01380, IPR2014-01505, IPR2014-01559 (PTAB April 15, 2015) (privity found because petitioner had control of un-named party's defense in related lawsuit)

*Petition for Inter Partes Review by VMware, Inc.*

IPR2015-00027, IPR2015-00030, IPR2015-00031 (PTAB March 6, 2015) (corporate parent was in privity with subsidiary)

*Petition for Inter Partes Review by VMware, Inc.*

IPR2014-01324 (PTAB February 20, 2015) (corporate parent was in privity with subsidiary)

*Petition for Inter Partes Review by Galderma SA*

IPR2014-01422, IPR2014-01417 (PTAB March 5, 2015) (substantial overlap in the boards of directors of related companies)

*Petition for Inter Partes Review by Zerto, Inc.*

IPR2014-01254, IPR2014-01295, IPR2014-01329, IPR2014-01332 (PTAB March 3, 2015) (blurred lines of corporate separation between the companies)

*Petition for Inter Partes Review by Paramount Home Entertainment Inc.*

IPR2014-00961, IPR2014-00962 (PTAB December 29, 2014) (unnamed parent exercised control over the petition)

*Petition for Inter Partes Review by RPX Corporation*

IPR2014-00171, IPR2014-00172, IPR2014-00173, IPR2014-00174, IPR2014-00175, IPR2014-00176, IPR2014-00177 (PTAB July 14, 2014) (unnamed party directly funded the petitions)

*Petition for Inter Partes Review by ZOLL Lifecor Corporation*  
IPR2013-00606, IPR2013-00607, IPR2013-00609, IPR2013-00612,  
IPR2013-00613, IPR2013-00615, IPR2013-00616, IPR2013-00618 (PTAB  
March 20, 2014) (unnamed parent exercised control over the petition)



## **MOTION FOR LEAVE TO FILE *AMICUS* BRIEF**

Applications in Internet Time, LLC (AIT) hereby moves for leave to file this *amicus curiae* brief. This motion is accompanied by AIT's proposed *amicus curiae* brief. AIT has no stake in either of the parties to this litigation. Both Appellant Personal Audio, LLC ("Personal Audio") and Appellee Electronic Frontier Foundation ("EFF") have consented to the filing of AIT's *amicus* brief. Neither party has contributed money that was intended to fund preparing or submitting this brief. No person — other than the *amicus curiae*, its members, or its counsel — contributed money that was intended to fund preparing or submitting this brief.

The Court should grant Personal Audio's petition for rehearing and rehearing *en banc* because the Court's initial decision here conflicts with Court precedent. *Amicus curiae* argues that the appellee here lacks Article III standing and the Board decision below should be vacated.

AIT's motion will not delay these proceedings. Pursuant to Federal Circuit Rule 35(g), coming within fourteen days of Personal Audio's petition for rehearing and rehearing *en banc*, a grant of this motion will not prejudice any party with respect to any delay in the disposition of this appeal.

WHEREFORE, for the foregoing reasons, AIT respectfully requests that this motion for leave to file a brief as *amicus curiae* supporting the petition of Personal Audio for rehearing and rehearing *en banc* be granted.

**About Applications in Internet Time, LLC**

AIT is the appellant in an unrelated case before the Court, *Applications in Internet Time, LLC v. RPX Corporation*, case no. 2017-1698. However, the issue subject of this brief, standing, is also at issue in AIT's case. Like the appellant here, AIT is a patent owner which turned to a district court for enforcement of its patent rights, and instead was deprived of those rights by the Patent Trial and Appeal Board upon petition for *inter partes* review by a putative disinterested party.

## INTRODUCTION

*Amicus curiae* writes in support of appellant Personal Audio, LLC, though on different grounds. That is, the appellee here lacks Article III standing. Thus, the Court should vacate the Board's decision which is subject of the appeal.

## ARGUMENT

The Court should grant Personal Audio's petition for rehearing and rehearing *en banc* because the Court's initial decision here conflicts with Court precedent. In its decisions in *Consumer Watchdog* and *Phigenix*, the Court held that an interloper lacks standing in an appeal of a Board's *inter partes* decision. Here, the Court held that an interloper has standing in an appeal of a Board's *inter partes* decision. This later, conflicting view cannot stand and should be corrected. Furthermore, when an interloper lacks standing in an appeal, as here, the Court should either dismiss the appeal, if by the interloper, or otherwise vacate the Board decision.

### **I. The Court's Conflicting Decisions**

#### **A. No Standing: *Consumer Watchdog* (June 4, 2014)**

In *Consumer Watchdog v Wisconsin Alumni Research Foundation*, 753 F.3d 1258 (2014), *cert. denied*, 135 S. Ct. 1401 (2015), the Court held

that an interloper lacked Article III standing in its appeal of an *inter partes* reexam confirming validity.

Chief Judge Rader wrote the opinion. Chief Judge Prost and Judge Hughes concurred.<sup>1</sup>

**B. No Standing: *Phigenix* (January 9, 2017)**

In *Phigenix, Inc. v Immunogen, Inc.*, 845 F.3d 1168 (Fed. Cir. 2017), the Court extended its *Consumer Watchdog* rationale. *Phigenix* was an appeal from the Board's decision in an *inter partes* review. The facts of *Phigenix* paralleled those in *Consumer Watchdog*. That is, a petitioner sought to invalidate a patent, the patent owner resisted, and the Board confirmed validity of the patent. The petitioner appealed, and the patent owner challenged the petitioner's standing on appeal.

The Court held that it is not enough that the statute allows a petitioner to appeal decisions favorable to patentability<sup>2</sup> if the appellant otherwise fails to meet the standing requirements of Article III. *Id.* Because the appellant in *Phigenix* did not establish an "injury in fact" sufficient to confer Article III

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<sup>1</sup> The decision was published on June 4, 2014. However, on May 30, 2014 Chief Judge Rader vacated the position of chief judge, and the following day Judge Prost assumed that position.

<sup>2</sup> "Any party to the *inter partes* review shall have the right to be a party to the appeal." 35 U.S.C. § 319.

standing, notwithstanding its statutory right to appeal as the petitioner, the Court dismissed the appeal. *Id.*

Judge Wallach wrote the opinion. Judges Dyk and Hughes concurred.

**C. Standing Upheld: *Personal Audio* (August 7, 2017)**

In this case, *Personal Audio, LLC. v. Electronic Frontier Foundation*, case no. 2016-1123 (Fed. Cir. August 7, 2017), a petitioner sought to invalidate a patent, the patent owner resisted, and the Board held the claims to be unpatentable. The patent owner appealed, and the Court *sua sponte* ordered limited briefing on an expedited schedule on the issue of the petitioner's standing on appeal. The Court summarily held: "With Article III satisfied as to the appellant, EFF is not constitutionally excluded from appearing in court to defend the PTAB decision in its favor."

The Court did not cite *Phigenix*, and gave short attention to *Consumer Watchdog*. As authority, the Court cited one of several concurrences in *U.S. Department of Labor v. Triplett*, 494 U.S. 715, 732 (1990) (Marshall, concurring), and took a quote out of context: "Because respondent has not invoked the authority of any federal court, then, federal standing principles are simply inapplicable to him."

The *Triplett* majority opinion, however, viewed the standing issue entirely differently. First, *Triplett* majority explicitly analyzed the

respondent's argument for its standing and agreed with the respondent that he had standing. *Id.* p. 720. Second, and more problematic here, the *Triplett* majority expressly criticized Justice Marshall's concurrence. *Id.*, n. \*\* (citing "longstanding precedent"). In short, the Court's *Personal Audio* decision conflicts with the Supreme Court's precedent in *Triplett*, and conflicts with this Court's precedent in *Phigenix* and *Consumer Watchdog*.

Judge Newman wrote the opinion. Judges Clevenger and O'Malley concurred.

## **II. The Court Should Resolve its Conflicting Decisions**

In sum, there is a clear split of opinion on the standing of an interloper in an appeal of an *inter partes* case from the Board. The stronger precedent holds that all parties to an appeal must have Article III standing.

Resolving the Article III standing issue is especially important because of its close relationship with standing before the Board under 35 U.S.C. § 315(b). The concern is especially acute because of the PTO's troubling history on § 315(b). Nobody petitions for IPR just for fun. Despite a strong implication of gamesmanship in many IPRs, the PTO stubbornly avoids and rebuffs § 315(b) issues.

The AIA was intended to prevent defendants from getting "a second bite at the apple" through IPRs. The AIA limits standing through § 315(b),

which specifically prevents *inter partes* review if a “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.” The legislative history indicates that § 315(b) was intended to set a “deadline for allowing an accused infringer to seek *inter partes* review after he has been sued for infringement.” The deadline helps to ensure that *inter partes* review is not used as a “tool[] for harassment” by “repeated litigation and administrative attacks.” H.R. Rep. No. 112-98 at 48, as reprinted in 2011 U.S.C.C.A.N. at 78. Allowing such attacks “would frustrate the purpose of the section as providing quick and cost effective alternatives to litigation.” *Id.*

Yet the Board gives defendants a second bite at the apple by allowing interlopers to act indirectly on their behalf. The Board has been misinterpreting § 315(b) by construing “real party in interest” too narrowly and ignoring “privy.” The issue is not reaching this Court, however, because of the Court’s decision in *Achates Reference Publishing, Inc. v. Apple, Inc.*, 803 F.3d 652 (2015). In *Achates*, the Court held that it had very limited authority to review the Board’s decision to grant a petition for IPR. The result has been that the Board’s decisions on § 315(b) escape review from this Court.

To make matters worse, although the Board is empowered to authorize discovery on § 315(b) issues, it routinely denies the patent owner's request. Thus, the Board neatly prevents the Court from ever reviewing § 315(b) standing because the patent owner almost never has the critical facts to show that the petitioner is actually a proxy for a time-barred defendant.

Overall, *amicus*' research shows that the Board has instituted IPR over the patent owner's § 315(b) argument 178 times (listed in Subsection A of the Table of Authorities), and that does not even account for patent owners that considered the argument to be futile and did not even try. This contrasts dramatically with the rare instances in which the Board denied institution under § 315(b). In the last two years, the Board denied institution of an IPR just two times under § 315(b) (listed in Subsection B of the Table of Authorities), and both times because of blurred lines of corporate separation between the companies. In fact, almost all petition denials under § 315(b) came in a flurry of nine decisions in February, March and April 2015 (listed in Subsection C of the Table of Authorities). After that, the music stopped. In sum, the PTO has found a § 315(b) violation just 11 times, and rejected the patent owner's § 315(b) challenge 178 times. While the patent owner might have been wrong in some of those cases, the Board's record on this issue demonstrates the hurdles the Board has created.



The PTO's troubling approach to managing IPRs is discussed in a recent concurring opinion by Judge Dyk. *See Nidec Motor. Nidec Motor Corp. v. Zhongshan Broad Ocean Motor Co.*, case no. 2016-2321 (Fed. Cir. August 22, 2017). In that concurrence, Judge Dyk, joined by Judge Wallach, expressed "serious questions as to the Board's (and the Director's) interpretation of the relevant statutes and current practices." *Concurrence* at p. 2. This problem infects the Board's work, and has nullified Congressional intent to limit harassment as expressed in § 315(b).

### **III. Resolving Article III Standing in IPR Appeals**

While resolving the conflict between the Court's initial decision here and *Phigenix* and *Consumer Watchdog*, the Court should also address several related issues. First, the Court should provide a clear rule on what constitutes Article III standing in an IPR appeal. Second, the Court should dictate a fair outcome in this case, where the appellee is an interloper. Third, the Court should address the PTO's right to intervene in these cases.

The Supreme Court's decision in *DaimlerChrysler* makes plain that the petitioner bears the burden of proving its Article III standing: "Nonetheless, because we presume that federal courts lack jurisdiction unless the contrary appears affirmatively from the record, the party asserting federal jurisdiction when it is challenged has the burden of establishing it."

*DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 n. 3 (2006) (cites and internal quotation marks omitted). Thus, under *DaimlerChrylser*, a lack of standing is presumed.

**A. A Proposed Model for Deciding Article III Standing**

An excellent model for Article III standing in IPR appeals can be found in the Court's post-*Medimmune* declaratory judgment precedents. That is, a petitioner has Article III standing before the Court if the petitioner shows that it engages or plans to engage in activity which either (a) the patentee alleges infringes, or (b) the petitioner admits infringes. This is the petitioner's burden. The IPR statutes should be interpreted to be consistent with DJ precedent such that no one should be able to bring either a DJ action or an IPR. Congress could not intend that a party without standing be able to bring an IPR to end run these constitutional protections given all the other elaborate protections Congress did build into the statutory framework to protect patent holders from harassment even by an accused infringer.

After *MedImmune, Inc. v. Genentech, Inc.*, 549 US 118 (2007), the Court provided contours to DJ jurisdiction in *SanDisk Corp. v. STMicroelectronics, Inc.*, 480 F.3d 1372 (Fed. Cir. 2007) and *Hewlett-Packard Co. v. Acceleron LLC*, 587 F.3d 1358 (Fed. Cir. 2009). *SanDisk* expressly discusses Article III standing, and provided an excellent rule that

further the public policy of the Declaratory Judgement Act: “We hold only that where a patentee asserts rights under a patent based on certain identified ongoing or planned activity of another party, and where that party contends that it has the right to engage in the accused activity without license, an Article III case or controversy will arise and the party need not risk a suit for infringement by engaging in the identified activity before seeking a declaration of its legal rights.” *Id.* at 1381.

In many ways, an IPR validity challenge is akin to a declaratory judgement (DJ) action. In both, a party is challenging a patent owner’s right to assert its patent. In a DJ action, the plaintiff commonly alleges that the patent is invalid. Likewise, in an IPR, the petitioner alleges that the patent is invalid.

Congress apparently presumed in enacting the AIA that IPR petitioners would be akin to DJ plaintiffs. Nothing in the Congressional Record shows that Congress envisioned a cottage industry of firms skirting the Board’s unduly narrow view of § 315(b). Congress never envisioned unlimited IPRs by purportedly disinterested third parties. Congress never envisioned the charade of IPRs filed by interlopers who easily evade the Congressional mandate against filings on behalf of a “real party in interest, or privy of the petitioner.”

In crafting covered business method reviews (CBMs), however, Congress expressly limited standing of a petitioner to only persons (or their privies) who have been sued or charged with infringement under a patent are permitted to file a petition seeking a covered business method patent review of that patent. Leahy-Smith America Invents Act, Pub. L. No. 112–29, 125 Stat. 284, § 18(a)(1)(B) (2011). Under rules established by the PTO, “Charged with infringement means a real and substantial controversy regarding infringement of a covered business method patent exists such that the petitioner would have standing to bring a declaratory judgment action in Federal court.” 37 C.F.R. § 42.302(a). *See e.g., Fed. Reserve Bank of Atlanta v. Bozeman Fin. LLC*, CBM2017-00035, Paper No. 23 (Aug. 29, 2017). Though the Court cannot mandate that the PTO implement similar rules for IPRs, the PTO could and should do this on its own initiative. A suggestion by the Court, and a strong ruling in this case, may provide appropriate motivation to the PTO for the rule change.

**B. Resolution of a Petitioner’s Lack of Article III Standing**

In an appeal by a petitioner which fails to show that it has Article III standing, the *Phigenix* precedent should be followed and the appeal should be dismissed.

In an appeal by the patent owner in which the petitioner fails to show standing, the Board's decision should be vacated as dictated by *DaimlerChrysler*.

**C. The Director's Limited Right to Intervene**

There is some appeal to inviting the Director of the PTO to intervene where the petitioner lacks standing. However, this does not resolve the issue because the petitioner and the PTO have different interests. “[A]n intervenor’s right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III.” *Diamond v. Charles*, 476 U.S. 54, 68 (1986) (emphasis added). Accordingly, the Director must independently meet all Article III requirements to support its litigating positions. Furthermore, the Director is generally limited to defending the Board’s decision using only “the grounds upon which the agency acted in exercising its powers.” *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943). Thus, the Director cannot stand in the same position as the interloper.

## CONCLUSION

*Amicus curiae* AIT respectfully urges the Court to grant Personal Audio's petition for rehearing and rehearing *en banc*, to hold that EFF lacks Article III standing before the Court, and to vacate the Board's underlying decision.

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/s/ Steven C. Sereboff  
Steven C. Sereboff, Esq.  
SoCal IP Law Group LLP  
1332 Anacapa, Suite 201  
Santa Barbara, CA 93101  
www.socalip.com  
(805) 230-1350  
fax (805) 230-1355  
info@socalip.com

For *Amicus Curiae*  
Applications in Internet Time,  
LLC

## CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 20th day of September, 2017, I caused this Brief of *Amicus Curiae*, Applications in Internet Time, LLC, in Support of Appellant's Petition for Rehearing and Rehearing *En Banc* to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

Jeremy Seth Pitcock  
THE PITCOCK LAW GROUP  
1501 Broadway, 12th Floor  
New York, New York 10036  
(646) 571-2237

*Counsel for Appellant*

Papool S. Chaudhari  
CHAUDHARI LAW, PLLC  
Post Office Box 1863  
Wylie, Texas 75098  
(214) 702-1150

*Counsel for Appellant*

Nicholas A. Brown,  
GREENBERG TRAURIG LLP  
Four Embarcadero Center, Suite 3000  
San Francisco, CA 94111  
(415) 655-1271

*Counsel for Appellee*

I further certify that the required number of copies will be hand filed at the Office of the Clerk, United States Court of Appeals for the Federal Circuit in accordance with the Federal Circuit Rules.

/s/ Steven C. Sereboff  
*Counsel for Amicus Curiae,*  
Applications in Internet Time, LLC

## CERTIFICATE OF COMPLIANCE

1. This brief complies with the 2,600 word type-volume limits of Fed. Cir. R. 35(g) because, excluding the parts of the document exempted by Fed. R. App. R. 32(f) (cover page, disclosure statement, table of contents, table of citations, statement regarding oral argument, signature block, certificates of counsel, addendum, attachments):

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Dated: September 20, 2017

/s/ Steven C. Sereboff  
*Counsel for Amicus Curiae,*  
Applications in Internet Time, LLC