

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

PERSONAL AUDIO, LLC,

Appellant,

v.

ELECTRONIC FRONTIER FOUNDATION,

Appellee.

APPEAL FROM THE
PATENT AND TRADEMARK OFFICE – PATENT TRIAL AND APPEAL BOARD IN
INTER PARTES REVIEW NO. IPR2014-00070

**PETITION FOR REHEARING AND
REHEARING *EN BANC***

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CERTIFICATE OF INTEREST

Counsel for Appellant Personal Audio, LLC certifies the following:

1. The full name of every party represented by me is:

Personal Audio, LLC
2. The names of the real parties in interest (if the party named in the caption is not the real party in interest) represented by me are:

None.
3. All parent corporations and any publicly held companies that own 10% or more of the stock of the party or amicus curiae represented by me are:

None.
4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by us in the trial court or agency or are expected to appear in this Court are:

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Dated: September 6, 2017

Respectfully submitted,

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STATEMENT OF COUNSEL – FEDERAL CIRCUIT RULE 35(B)

Based on my professional judgment, I believe this appeal requires an answer to the following precedent-setting questions of exceptional importance. Whether the Board’s decision invalidating Appellant’s patent in *inter partes* review violates the Reexamination Clause of the Seventh Amendment by overturning a jury’s findings of facts in the prior district court action, *Personal Audio, LLC v. CBS Corp.*, C.A. No. 2:13-cv-270 (E.D. Tex. Apr. 11, 2013).

Whether *inter partes* review violates Article III of the Constitution and Appellant’s Seventh Amendment right to jury trial, by extinguishing patent rights well after the patent was issued, through a non-Article III forum without a jury.

Whether the ‘504 patent claims should have been construed under the *Phillips* standard since the patent expired prior to the panel’s August 7, 2017 decision and whether the *Phillips* standard should be applied by the Board when determining whether to institute an IPR for patents that are soon to expire.

The panel’s decision, and the underlying Board’s Decision it affirmed, conflict with the following decisions of the Supreme Court of the United States: *In re CSB-System International, Inc.*, 832 F.3d 1335 (Fed. Cir. 2016); *Stern v. Marshall*, 564 U.S. 462, 484 (2011); *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 432 (1996); *Granfiancera, S.A. v. Nordberg*, 492 U.S. 33, 52 (1989); *United States v. Nixon*, 418 U.S. 683, 704 (1974); *McCormick Harvesting Mach. Co. v. C.*

Aultman & Co., 169 U.S. 606, 609 (1898); *United States v. Am. Bell Telephone Co.*, 128 U.S. 315, 362–4 (1888); *Moore v. Robbins*, 96 U.S. 530, 533 (1878); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272 (1856).

Dated: September 6, 2017

Respectfully submitted,

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I. INTRODUCTION

Personal Audio respectfully petitions for this Court to rehear *en banc*, or for the panel to rehear the constitutional and construction issues raised by the final written decision (“Decision”) of the U.S. Patent Trial and Appeal Board (the “Board”) invalidating Personal Audio’s U.S. Patent No. 8,112,504 B2 (“the ‘504 patent”) during *inter partes* review (“IPR”). This case raises a conflict between IPR procedures and the Seventh Amendment not addressed by previous decisions of this Court. Pursuant to its Seventh Amendment right, Personal Audio had set the matter of the validity of its ‘504 patent in light of the Compton/CNN prior art reference before a jury in a prior district court proceeding. The jury rendered its verdict finding the asserted claims 31-35 of the ‘504 patent were neither anticipated nor obvious in light of the Compton/CNN reference.

The Board’s Decision found claims 31-35 of the ‘504 patent are unpatentable as anticipated and/or obvious in light of two references: (1) Charles L. Compton, *Internet CNN NEWSROOM: The Design of a Digital Video News Magazine*, Massachusetts Institute of Technology (Aug. 10, 1995) (“Compton/CNN”) and (2) Andrew S. Patrick, *et al*, *CBC Radio on the Internet: An Experiment in Convergence*, 21 CANADIAN J. OF COMM’N 1, 125–140 (1996) (“Patrick/CBC”). The Patrick/CBC reference adds nothing, disclosing operative facts nearly identical to Compton/CNN but with far less technical detail thereby leaving out critical claim

elements not even addressed in the panel's decision much less addressed by the Board. As a result, the same arguments, evidence and operative facts set before the jury were also set before the Board during *inter partes* review.

Whether IPRs violate the Constitution by extinguishing private property rights in a non-Article III forum without a jury is currently before the Supreme Court in *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, No. 16-712 (Fed. Cir. No. 15-1855). Thus, Personal Audio wishes to preserve these arguments, but will not extensively brief the Seventh Amendment right to jury trial and Article III issues to be decided in that case. While those same issues are raised herein, the Board's Decision in this case directly overturns a jury's operative factual findings in the earlier district court proceeding by determining that the '504 patent was anticipated and/or rendered obvious in light of Compton/CNN and Patrick/CBC. The Seventh Amendment's Reexamination Clause prohibits overturning jury findings of fact in this manner. Even if deemed constitutional, *inter partes* review cannot be implemented in such a way that violates the separation of powers, Article III of the Constitution, the right to jury trial and the Reexamination Clause of the Seventh Amendment.

Finally, as the patent expired prior to the panel's decision, the *Phillips* standard should have been applied in the panel's decision as to claim construction. This case raises another important question as to when the *Phillips* standard should be applied during the appeal of an IPR once a patent expires.

II. ARGUMENT

A. The Board's Decision Violates the Seventh Amendment's Right to a Jury Trial and Article III of the Constitution

Personal Audio respectfully submits that *inter partes* review has eviscerated its right to a jury trial and hopelessly conflicts with Article III of the Constitution. As a different panel of this Court recently held in *MCM Portfolio LLC v. Hewlett-Packard Co.*, No. 15-1091 slip op. (Fed. Cir. Dec. 2, 2015), *cert. denied*, 137 S. Ct. 292 (2016), that *inter partes* review does not violate the right to a jury trial found in the Seventh Amendment nor Article III, Personal Audio recognizes that the panel that initially heard its case is bound by *MCM* “unless relieved of that obligation by an *en banc* order of the court or a decision of the Supreme Court.” *Deckers Corp. v. United States*, 752 F.3d 949, 959 (Fed. Cir. 2014). Because these issues are also relevant to the Seventh Amendment's Reexamination Clause, however, Personal Audio briefly raises and preserves those arguments herein.

Congress has provided, pursuant to 35 U.S.C. § 261, that a patent “shall have the attributes of personal property.” 35 U.S.C. § 261. The patent becomes the personal property of the patentee wholly apart from the government once granted. *See Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2427 (2015) (quoting *James v. Campbell*, 104 U.S. 356, 358 (1882); *United States v. Am. Bell Tel. Co.*, 128 U.S. 315, 370 (1888)). As such, an issued patent “is entitled to the same

legal protection as other property.” *McCormick Harvesting Machine Co. v. Aultman*, 169 U.S. 606, 609 (1898) (emphasis added). Patent rights vest upon grant such that even subsequent repeals of a patent statute cannot impact an issued patent. *McClurg v. Kingsland*, 42 U.S. (1 How.) 202, 206 (1843).

Essential to the federal court system are the protections provided by the Seventh Amendment which ensures a jury trial “[i]n Suits at common law.” U.S. CONST., amend. VII. The Supreme Court has recognized that the “thrust of the Amendment was to preserve the right to jury trial as it existed in 1791.” *Curtis v. Loether*, 415 U.S. 189, 193 (1974). The Seventh Amendment applies to resolution of disputes of a “legal” nature – including those regarding right to possession of property when the resolution is entrusted to a forum which customarily employs a jury. *Pernell v. Southall Realty*, 416 U.S. 363 (1974). The Seventh Amendment “also applies to actions brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty.” *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989); *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446 (1830).

In 1791, disputes relating to patent validity were required to be tried at law by a jury and were binding on courts in equity and the Chancery. *See Oil States*, No. 16-712, *Amici Curiae* Brief of H. Tomas-Gomez-Arostegui and Sean

Bottomley at 6–7, 12, 30. This right cannot be regulated away by Congress to an administrative agency consistent with the Seventh Amendment. *Granfinanciera*, 492 U.S. at 52.

Even if IPRs did not violate the Seventh Amendment’s right to jury trial, they would nonetheless violate Article III. The Supreme Court has “long recognized that, in general, Congress may not ‘withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.’” *Stern v. Marshall*, 564 U.S. 462, 484 (2011) (quoting *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 284 (1855)). The judicial power of Article III is not to be shared with other branches of government. *United States v. Nixon*, 418 U.S. 683, 704 (1974); *see also Stern*, 564 U.S. at 483.

Despite such constitutional prohibitions, the judicial power, however, has severely eroded with the expansion of review procedures for invalidating long-issued and even expired patents. *See e.g., In re Baxter Int’l, Inc.*, 678 F.3d 1357, 1364 (Fed. Cir. 2012); *In re Swanson*, 540 F.3d 1368, 1377 (Fed. Cir. 2008); *In re Translogic Tech., Inc.*, 504 F.3d 1249, 1251 (Fed. Cir. 2007) (appeal from Board); *Translogic Tech., Inc. v. Hitachi, Ltd.*, 250 F. App’x 988, 988 (Fed. Cir. 2007) (unpublished decision). This is particularly disturbing since the judges assembled in PTAB proceedings are not subject to the protections and mandates

of Article III and are instead inherently subject to the mandates of the Executive. *See, e.g.*, Selection Process for assigning judges to expanded PTAB panels <http://www.717madisonplace.com/?p=9143> (citing *Yissum Research Development Co. v. Sony Corp.* (Fed. Cir. 2015) (oral argument transcript)).

B. The Board’s Decision Violates the Seventh Amendment’s Reexamination Clause

Regardless of whether a constitutional right to jury trial exists for patent invalidity adjudications, Congress has authorized the adjudication of private disputes over patent validity in federal courts under 28 U.S.C. §§ 1331 and 1338(a). More recently, with the enactment of Section 6 of the Leahy-Smith America Invents Act of 2011 (“AIA”), 35 U.S.C. §§ 311–19, Congress has also established a competing Article I forum for adjudicating invalidity actions between private parties. Even if IPRs are deemed constitutional, the adjudication of invalidity actions by the agency tribunal cannot be used to overturn a prior jury’s findings of fact in a district court proceeding without violating the Reexamination Clause of the Seventh Amendment.

Congress, through the AIA, did not by statute directly authorize agency reexamination of a jury’s findings of fact in a prior district court proceeding. Rather, this Court, in *Fresenius USA, Inc v Baxter Int’l, Inc.*, 721 F.3d 1330 (Fed. Cir. 2013), has held in the reexamination context that the USPTO’s cancellation of patent claims in a parallel proceeding trumps the District Court’s enforcement

of those same claims, even after an affirmation by the Federal Circuit on the merits. Since *Fresenius* was decided, a jury's findings of fact such as the jury's findings in Personal Audio's prior district court proceeding can now be directly overturned by an agency's findings of fact invalidating patent claims in a concurrent agency IPR proceeding. This is plainly proscribed by the Seventh Amendment. The second clause of the Seventh Amendment provides: "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. CONST., amend. VII. Therefore, Personal Audio respectfully requests that *Fresenius* be reconsidered *en banc*, so that the agency's decision, if allowed to stand, shall not conflict with the Reexamination Clause of the Seventh Amendment.

Beginning on January 7, 2013, Personal Audio filed suits for infringement of its '504 patent against various parties in the Eastern District of Texas including, *Personal Audio, LLC v. CBS Corporation*, C.A. No. 2:13-cv-270 (E.D. Tex. Apr. 11, 2013). In response to those suits, the Electronic Frontier Foundation ("EFF"), which describes itself as a non-profit public interest organization filed a revised petition for *inter partes* review of Claims 31-35 of the '504 patent on October 30, 2013. Appx509-574. Although the EFF is not a party to the district court proceedings, its filing of a petition for *inter partes* review arose in direct response to, and Personal Audio believes in coordination with, the defendants in the district

court proceedings. Personal Audio tried but was unable to ascertain in discovery whether the initial defendants in the district court proceedings had any affiliation with the EFF.¹

EFF alleged that five references anticipated and/or rendered the challenged ‘504 Patent claims obvious. *Id.* at Appx531-532. The Board instituted review with respect to only two of the grounds presented: obviousness of Claims 31-35 in view of Compton/CNN and anticipation of Claims 31-35 in view of Patrick/CBC. Appx613-639. After Personal Audio had dedicated significant resources in the district court proceeding, the jury rendered its verdict on September 15, 2014 finding the ‘504 Patent valid in light of CNN/Compton. Personal Audio submitted this jury verdict to the Board on December 10, 2014. Appx718-728. Nonetheless, the Board issued its Decision on April 10, 2015, finding claims 31-35 to be unpatentable as anticipated and obvious over Compton/CNN and anticipated over Patrick/CBC.

While this Court has recognized that a prior holding of validity is not necessarily inconsistent with a subsequent holding of invalidity, here, the very same reference and arguments were before both the jury and the Board. *EPlus*,

¹ The proliferation of “public interest” organizations that obtain funding from multiple third parties to collectively invalidate patents is a change encouraged by enactment of the AIA. Since nearly any third party may file an IPR, collective efforts to invalidate patents severely tilts the playing field in favor of the party or parties seeking invalidation who can marshal third party entities to attack the patent in the Article I forum.

Inc. v. Lawson Software, Inc., 790 F.3d 1307 (Fed. Cir. 2015) (quoting *In re Baxter Int'l, Inc.*, 678 F.3d 1357, 1364 (Fed. Cir. 2012) (internal citations omitted); see also *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1316–17 (2015) (in the context of issue preclusion finding “if federal law provides a single standard, parties cannot escape preclusion simply by litigating anew in tribunals that apply that one standard differently”). Under *Fresenius*, the Board’s decision would overturn the jury’s findings that the patent was neither anticipated nor rendered obvious by Compton/CNN in plain violation of the Reexamination Clause.

In addition to protecting the right to a jury trial, the reexamination clause of the Seventh Amendment “controls the allocation of authority to review verdicts.” *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 432 (1996). Jury verdicts can only be reconsidered if the process for reconsideration is one that was available at common law when the Seventh Amendment was ratified. The only options at common law to reexamine facts decided by a jury are: (1) the granting of a new trial; or (2) review *de novo* for legal errors. See *Capital Transaction Co. v. Hof*, 174 U.S. 1, 13 (1899). Once the jury’s verdict has been rendered, the reexamination clause forbids review of the jury verdict by any court of the federal government.

The Board's Decision under *Fresenius* exceeds its authority by violating the Reexamination Clause of the Seventh Amendment.² Accordingly, this Court should reconsider *Fresenius*, or reverse the Board's Decision to the extent it exceeds the Board's constitutional authority and overturns the jury verdict. Because the Patrick/CBC reference adds nothing to Compton/CNN but in fact leaves out critical elements not addressed by the Board or panel, but included in Personal Audio's briefing before the panel, adopting the jury's findings of facts would materially change the outcome of this case.

Substantial evidence supported the jury's determinations. For example, Personal Audio was able to impeach the credibility of the Defendant's expert testimony concerning the hardware configuration requirements of the claimed

² This validity determination was made based on underlying factual determinations. Anticipation and prior art teachings present questions of fact. *In re NTP, Inc.*, 654 F.3d 1279, 1297 (Fed. Cir. 2011). With respect to obviousness, the Supreme Court identified "several basic factual inquiries": "Under 103, the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved." *Graham v. John Deere Co.*, 383 U.S. 1, 17 (1966). It is to be presumed that factual findings in support of the general verdict are implied. *See Quaker City Gear Works, Inc. v. Skil Corp.*, 747 F.2d 1446, 1453 (Fed. Cir. 1984) (explaining that when a Rule 49(a) verdict form includes a legal question, "since the answer to the legal question necessarily resolves any disputed underlying factual issues, we have undertaken to review the factual findings on which the legal conclusion is based, applying the substantial evidence standard.") (citation omitted)).

apparatus.³ Contrary to the technically incorrect and identical assertions in the Schmandt declaration, which were adopted by the Board and the panel’s decision, the hardware claim elements of the patented apparatus require a specific hardware configuration, namely, a “processor coupled with a data storage server coupled with a communications interface” in which the presence of a second processor could not be gleaned simply by accessing a website or mere disclosure of a web server. For this reason, the jury properly determined a factual matter—that the prior art apparatuses did not disclose all the claim limitations of the patented invention. *See also* Appx645; Appx650; Appx661; Appx680; Appx1196. The same operative facts are at issue in Patrick/CBC although that reference discloses even fewer of the claim elements particularly the back-end hardware configuration described by the ‘504 patent and required by the claims. There is absolutely no constitutional authority for the Board’s overturning of the underlying factual determinations made by the jury, in violation of the Appellant’s Seventh Amendment rights.⁴

³ 9/11/14 AM Tr. 19:8-16 (Appx2057); 24:14-24 (Appx2062); 9/11/14 PM Tr. at 22:6-14 (Appx2171); 24:13-30:20 (Appx2173-2179); 35:11-19 (Appx2184); 43:16-46:5 (Appx2192-2195); 49:14-50:1 (Appx2198-2199); 52:10-53:15 (Appx2201-2202); 54:12-55:11 (Appx2203-2204); 61:18-62:23 (Appx2210-2211); 63:12-18 (Appx2212).

⁴ Even if the IPR decision were found to have had only prospective effect, it would violate the Seventh Amendment. But where, as here, the decision can be used to upset a previous determination by a jury, the Seventh Amendment Reexamination Clause clearly prohibits contrary factual findings at least as to the defendant against whom the verdict was directed, as such a collateral attack on the jury’s fact finding in that case would clearly be prohibited by the common law.

The Court's decision in *MCM* relies on its earlier decision in *Patlex Corp. v. Mossinghoff*, 758 F.2d 594 (Fed. Cir. 1985). The case at bar is distinguishable from *Patlex*, however, because here validity challenges on precisely the same prior art (Compton/CNN) were decided by the jury prior to the determination of the Board.

Even assuming, *arguendo*, that Congress could have delegated all patent validity determinations to the PTO for adjudication, it has not. Federal courts and juries still have authority to determine issues of validity under 28 U.S.C. §§ 1331 and 1338(a). There is no authority, however, to support the notion that an agency can overturn those very same factual determinations, because such actions violate the Reexamination Clause. The Board's decision in this particular case exceeds its constitutional authority and should be reversed, or *Fresenius* should be reconsidered. This case raises an issue of exceptional importance to this Court concerning the constitutionality of *inter partes* review.

C. This Court Should Have Applied *Phillips* in Claim Construction

This case also raises as an issue of exceptional importance concerning the appropriate standard of review under which the '504 patent claims should have been construed. The Board's Decision and the panel's affirmation of that decision are based upon the broadest reasonable interpretation ("BRI") standard. The rationale for permitting this broader standard in IPRs is that a patent owner before

the PTO with an unexpired patent “may amend claims to narrow their scope,” negating any unfairness that may otherwise result from adopting the BRI standard. *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2145–46 (2016).

However, the ‘504 patent expired prior to the panel’s August 7, 2017 decision. This Court has found that the standard set forth under *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312–15 (Fed. Cir. 2005) (*en banc*) should apply upon expiration of the patent, regardless of whether the BRI standard was used at the outset of the proceeding. *In re CSB-System International, Inc.*, 832 F.3d 1335 (Fed. Cir. 2016) (citing *In re Rambus Inc.*, 753 F.3d 1253, 1256 (Fed. Cir. 2014) and *Facebook, Inc. v. Pragmatus AV, LLC*, 582 F. App’x 864, 868–69 (Fed. Cir. 2014) (non-precedential) (applying *Phillips* standard when patent expired after the Board’s reexamination decision pending appeal to the Federal Circuit)).

Personal Audio submits that the fiction of allowing amendments to the patent claims under review is unreasonable when a patent is set to expire during the interim or appeal of an IPR proceeding in that it must then, in the course of a single proceeding, argue in favor of validity under changing standards of review: BRI when the IPR is instituted and under the *Phillips* standard during the pendency of the appeal. The use of shifting legal standards of review during agency adjudication of the invalidity dispute is both unnecessary and unreasonable and deprives Personal Audio a meaningful opportunity to be heard

by imposing changing standards of review at different stages of the proceedings thereby forcing patentees to defending validity under two different standards of review on claim construction. *See, e.g., Edwards v. Shinseki*, 582 F.3d 1351, 1355 (Fed. Cir. 2009) (“The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’”) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 332–33 (1976)). Therefore, Personal Audio respectfully submits that the claims should have been construed from the outset of the IPR under *Phillips*, but certainly should have been once the patent expired, regardless of the stage of the proceedings.

Under *Phillips*, the claims would not have been read so broadly as to embrace every embodiment in the specification. *AllVoice Computing PLC v. Nuance Commc’ns, Inc.*, 504 F.3d 1236, 1248 (Fed. Cir. 2007) (“[E]very claim need not contain every feature taught in the specification.”); *Nazomi Commc’ns, Inc. v. ARM Holdings, PLC*, 403 F.3d 1364, 1369 (Fed. Cir. 2005) (holding that claim may “embrac[e] different subject matter than is illustrated in the specific embodiments in the specification”). Under BRI, the panel determined that “[t]he ’504 specification explains that “episode segments” are “serialized program segments” that can be downloaded “at one time or separately when necessary to conserve space or to handle sequential presentations which evolve in real time.” ’504 Patent, col. 39, ll. 36–40. Because of this disclosure in the specification, the panel held that “[s]equential presentation is an option, but not a

requirement of episodes in a series.” However, the claim language requires that “from time to time, as new episodes represented in said series of episodes become available, storing an updated version of a compilation file in one of said one or more data storage servers at a storage location identified by a predetermined URL, said updated version of said compilation file containing attribute data describing currently available episodes in said series of episodes, said attribute data for each given one of said currently available episodes . . .” This claim language, construed under *Phillips* instead of BRI, cannot be read to encompass episodes in a series that do not require “sequential presentation.”

III. CONCLUSION

For the foregoing reasons, the Court should reverse the Board’s final written decision cancelling claims 31-35 in favor of a finding of validity, or alternatively remanded so as to correct the errors of the Board.

Dated: September 6, 2017

Respectfully submitted,

/s/ Jeremy S. Pitcock

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ADDENDUM

United States Court of Appeals for the Federal Circuit

PERSONAL AUDIO, LLC,
Appellant

v.

ELECTRONIC FRONTIER FOUNDATION,
Appellee

2016-1123

Appeal from the United States Patent and Trademark
Office, Patent Trial and Appeal Board in No. IPR2014-
00070.

Decided: August 7, 2017

JEREMY SETH PITCOCK, The Pitcock Law Group, New
York, NY, argued for appellant. Also represented by
PAPOOL SUBHASH CHAUDHARI, Chaudhari Law, PLLC,
Wylie, TX.

NICHOLAS A. BROWN, Greenberg Traurig LLP, San
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JAMES R. BARNEY, Finnegan, Henderson, Farabow,
Garrett & Dunner, LLP, Washington, DC, for amicus
curiae Unified Patents Inc. Also represented by DAVID
MROZ, PHILIP ANDREW RILEY; JONATHAN RUDOLPH

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KOMINEK STROUD, KEVIN JAKEL, Unified Patents Inc.,
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represented by JOHN P. HANISH; BRIAN TIMOTHY BURGESS,
Goodwin Procter LLP, Washington, DC.

Before NEWMAN, CLEVINGER, and O'MALLEY, *Circuit
Judges.*

NEWMAN, *Circuit Judge.*

Personal Audio, LLC appeals the decision of the Patent Trial and Appeal Board (PTAB or “Board”) in *inter partes* review (IPR) of United States Patent No. 8,112,504 (“the ’504 Patent”). This IPR was instituted on petition of the Electronic Frontier Foundation (“EFF”), described as a non-profit organization that advocates in the public interest of consumers of digital technology. The PTAB held claims 31–35 of the ’504 Patent unpatentable as anticipated under 35 U.S.C. § 102 and/or obvious under 35 U.S.C. § 103, leading to this appeal.¹ On the merits of the appeal, we affirm the judgment of unpatentability.

BACKGROUND

The ’504 Patent, entitled “System for Disseminating Media Content Representing Episodes in a Serialized Sequence,” is directed to a system and apparatus for storing and distributing episodic media files. Personal Audio describes the ’504 Patent as directed to podcast technology. A podcast is a digital media file made availa-

¹ *Electronic Frontier Foundation v. Personal Audio, LLC*, No. IPR2014-00070, 2014 WL 8584938 (P.T.A.B. April 10, 2014) (“PTAB Op.”).

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ble through web syndication, in which new installments or “episodes” are automatically received by subscribers.

The '504 Patent claims an apparatus whose components receive and control playback of the episodes. Claim 31 was agreed to be representative:

31. Apparatus for disseminating a series of episodes represented by media files via the Internet as said episodes become available, said apparatus comprising:

one or more data storage servers,

one or more communication interfaces connected to the Internet for receiving requests received from remotely located client devices, and for responding to each given one of said requests by downloading a data file identified by a URL specified by said given one of said requests to the requesting client device,

one or more processors coupled to said one or more data storage servers and to said one or more communications interfaces for:

storing one or more media files representing each episode as said one or more media files become available, each of said one or more media files being stored at a storage location specified by a unique episode URL;

from time to time, as new episodes represented in said series of episodes become available, storing an updated version of a compilation file in one of said one or more data storage servers at a storage location identified by a predetermined URL, said

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updated version of said compilation file containing attribute data describing currently available episodes in said series of episodes, said attribute data for each given one of said currently available episodes including displayable text describing said given one of said currently available episodes and one or more episode URLs specifying the storage locations of one or more corresponding media files representing said given one of said episodes; and

employing one of said one or more communication interfaces to:

(a) receive a request from a requesting client device for the updated version of said compilation file located at said predetermined URL;

(b) download said updated version of said compilation file to said requesting client device; and

(c) thereafter receive and respond to a request from said requesting client device for one or more media files identified by one or more corresponding episode URLs included in the attribute data contained in said updated version of said compilation files.

EFF requested *inter partes* review of claims 31–35, on the ground, first, that the claims are anticipated by Andrew S. Patrick et al., *CBC Radio on the Internet: An Experiment in Convergence*, 21 Can. J. of Commc'n 125 (1996), available at <http://www.cjconline.ca/index.php/journal/article/view/926/832> (“Patrick/CBC”) (pagination *infra* is to online version). Patrick/CBC describes an experimental trial conducted in 1996 to determine if there was

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demand for regular radio programming distributed as digital audio files over the Internet. In that trial “the Quirks & Quarks science magazine show was recorded each week, broken down into its component parts, and made available on the server.” Patrick/CBC at 3. The components, or “segments,” were described in accompanying text available as part of a menu. *Id.* at 7.

EFF also requested *inter partes* review on the ground that claims 31–35 were invalid for obviousness, in view of a thesis of Charles L. Compton entitled *Internet CNN NEWSROOM: The Design of a Digital Video News Magazine* (May 12, 1995) (B.S. and M.E. Thesis, Massachusetts Institute of Technology) (“Compton/CNN”). The thesis describes a searchable digital video library based on the CNN NEWSROOM program, wherein each fifteen-minute video program is broken into individual news stories or segments, then converted to digital video files presented in a Table of Contents along with a short text summary, and made available at a URL containing the date of the broadcast. *Id.* at 14. Compton/CNN states that the system can be used for “any other program for which users might want to be able to see past episodes (i.e., other news programs, sitcoms, soap operas . . .).” *Id.* at 29. Granting EFF’s Petition, the PTAB instituted review on the grounds of anticipation in view of Patrick/CBC and obviousness in view of Compton/CNN.

The PTAB construed “episode” as “a program segment, represented by one or more media files, which is part of a series of related segments, e.g., a radio show or a newscast.” PTAB Op. at *5. The PTAB construed “compilation file” as “a file that contains episode information.” *Id.* at *6. Based on the constructions of these terms, the PTAB held that the challenged claims are anticipated by CBC/Patrick and obvious over CNN/Compton.

I

“Standing” of Electronic Frontier Foundation

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We asked the parties to brief the question of whether EFF has standing to participate in this appeal, in view of the court's holding in *Consumer Watchdog v. Wisconsin Alumni Research Foundation*, 753 F.3d 1258 (Fed. Cir. 2014), that a PTAB petitioner that does not meet the Article III case-or-controversy requirement does not have standing to invoke judicial power, and thus does not have standing to appeal to this court from a PTAB decision on *inter partes* reexamination. The court in *Consumer Watchdog* stated that “although Article III standing is not necessarily a requirement to appear before an administrative agency, once a party seeks review in a federal court, ‘the constitutional requirement that it have standing kicks in.’” *Id.* at 1261 (quoting *Sierra Club v. E.P.A.*, 292 F.3d 895, 899 (D.C. Cir. 2002)). Thus the court held that *Consumer Watchdog*, a non-profit organization described as representing the public interest, did not have standing to appeal to the Federal Circuit from the PTAB decision that sustained the validity of the patent *Consumer Watchdog* had challenged.

35 U.S.C. § 141(c) provides the right of appeal to the Federal Circuit for “[a] party to an *inter partes* review or a post-grant review who is dissatisfied with the final written decision of the Patent Trial and Appeal Board.” *Consumer Watchdog* raises no question as to whether EFF has standing to appear in this court to defend the judgment of the PTAB, for EFF is not the appellant. The Court explained in *ASARCO Inc. v. Kadish*, 490 U.S. 605 (1989), in an appeal from the Arizona Supreme Court to the United States Supreme Court, that standing to appeal is measured for the party “seek[ing] entry to the federal courts for the first time in the lawsuit”:

Although respondents would not have had standing to commence suit in federal court based on the allegations in the complaint, they are not the party attempting to invoke the federal judicial power. Instead it is petitioners, the defendants in the

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case and the losing parties below, who bring the case here and thus seek entry to the federal courts for the first time in the lawsuit. We determine that petitioners have standing to invoke the authority of a federal court and that this dispute now presents a justiciable case or controversy for resolution here.

Id. at 618. The following year, in *U.S. Department of Labor v. Triplett*, 494 U.S. 715, 732 (1990), Justice Marshall explained in concurrence that: “Because respondent has not invoked the authority of any federal court, then, federal standing principles are simply inapplicable to him.”

Here, the party invoking judicial review is Personal Audio; it is apparent that Personal Audio, on cancellation of its patent claims by the PTAB, has experienced an alteration of “tangible legal rights . . . that is sufficiently ‘distinct and palpable’ to confer standing under Article III.” *Virginia v. Hicks*, 539 U.S. 113, 121 (2003) (internal citations omitted). 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.

II

Claim Construction

Personal Audio argues that the PTAB misconstrued several claim terms and misapplied the references, erring in law and fact.

Claim construction is a matter of law, and determination of the meaning and scope of claim terms receives plenary review on appeal. If issues of claim construction require subsidiary factual findings based on evidence extrinsic to the patent prosecution record, such findings are reviewed for support by substantial evidence. *Mi-*

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crosoft Corp. v. Proxyconn, Inc., 789 F.3d 1292, 1297 (Fed. Cir. 2015).

The PTAB is authorized to construe the claims in accordance with their broadest reasonable interpretation, *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2146 (2016), recognizing that the claims cannot be divorced from the specification and the prosecution history, as perceived by persons in the field of the invention. *Microsoft*, 789 F.3d at 1298.

“Episode”

Before the PTAB, Personal Audio argued that “episode” should be construed as “a program, represented by one or more media files, that is part of a series.” PTAB Op. at *4. Personal Audio also argued that “episodes” are “a complete thing of the same theme,” and that a “series of episodes” would be “related to one another with a common theme.” Record of Oral Hearing at 23. Citing the ’504 Patent specification and the testimony of EFF’s expert Dr. Schmandt, the PTAB construed “episode” as “a program segment, represented by one or more media files, which is part of a series of related segments, *e.g.*, a radio show or a newscast.” PTAB Op. at *5.

Personal Audio now argues that the PTAB’s construction of “episode” improperly excludes the temporal limitation that episodes in the series issue over time, as the claims require. Personal Audio states that the PTAB’s construction, which encompasses subparts of a single program, *i.e.*, “program segments,” reads out other claim limitations referring to new episodes “becom[ing] available.”

EFF responds that the PTAB’s construction is consistent with the specification, pointing out that the specification describes an “episode” as a “program segment” and that the specification uses news stories as examples of “program segments.”

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We conclude that the PTAB's construction of "episode" is in accord with the specification, and is correct. The specification states that "[a] given program segment may represent an episode in a series." '504 Patent, col. 19, ll. 36–38. As used in the '504 Patent, "program segment" refers to a subpart of individually selectable content. For example, the specification teaches that a user can "easily move from program segment to program segment, skipping segments in a forward or reverse direction, or to jump to a particular segment." '504 Patent, col. 8, l. 65–col. 9, l. 2. The specification describes an embodiment in which a compilation file of "episodes" is composed of "four news subjects [world news, national news, local news, computer trade news]," each of which is composed of "structured program segments." '504 Patent, col. 30, ll. 18–28.

The PTAB also correctly held that the "temporal limitations" that Personal Audio states modify "episodes" do not restrict the application to episodes produced at different times. Claim 31 states that "from time to time, as new episodes represented in said series of episodes become available," an updated version of the compilation file may be created with "currently available episodes." The terms "become available" and "currently available" do not restrict or define the timing of the creation of the episodes, past or present; they refer only to the availability of episodes to clients. And these terms do not describe the production of episodes, but instead refer to the conditions under which an updated version of a compilation file is produced.

Personal Audio's assertion that episodes must issue over time is not a distinction from the cited references. The '504 specification explains that "episode segments" are "serialized program segments" that can be downloaded "at one time or separately when necessary to conserve space or to handle sequential presentations which evolve in real time." '504 Patent, col. 39, ll. 36–40. Sequential

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presentation is an option, but not a requirement of episodes in a series.

We affirm the PTAB's construction of "episode" as "a program segment, represented by one or more media files, which is part of a series of related segments, e.g., a radio show or a newscast." Further, the PTAB's findings that both Compton/CNN and Patrick/CBC disclose "episodes" are supported by substantial evidence. Figure 1 of CNN/Compton illustrates news stories or "episodes," and the science news stories described in Patrick/CNN are correctly described as "episodes."

"Updated Version of a Compilation File"

Personal Audio also disputes the PTAB's construction of "an updated version of a compilation file," in each of the challenged claims. The PTAB construed "compilation file" as "a file that contains episode information," and held that "updated version" did not require construction. PTAB Op. at *5–6. The PTAB found that the claims do not require an "updated version of a compilation file" to be created only by amending a previously existing compilation file, and applied this construction to hold that Compton/CNN and Patrick/CBC both disclose an "updated version of a compilation file."

Personal Audio argues that the "updated version of a compilation file must contain attribute data for 'currently available episodes in said series of episodes.'" Personal Audio Br. 25 (emphasis omitted). Personal Audio states that an updated version of a compilation file must be updated by dynamically distributing previously available and newly available episodes together, and that an "over-written" updated version that contains information about episodes issued on a single day does not meet the claim limitation.

Claim 31 of the '504 Patent includes the requirement:

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from time to time, as new episodes represented in said series of episodes become available, storing an updated version of a compilation file in one of said one or more data storage servers at a storage location identified by a predetermined URL, said updated version of said compilation file containing attribute data describing currently available episodes in said series of episodes, said attribute data for each given one of said currently available episodes

This provision describes the contents of the updated version of the compilation file as containing information about “currently available episodes.” The ’504 specification does not require the updated version of the compilation file to be created from a previously existing compilation file, and “currently available” does not require or imply a temporal limitation. The claims are directed to the content of the compilation file, not how the compilation file is created.

The PTAB found that Compton/CNN’s disclosure of automatically generating and storing a new version of the “contents.html” file with the day’s news stories is an “updated version of a compilation file.” PTAB Op. at *9–10. The PTAB also found that Patrick/CBC’s disclosure of making episodes of Quirks & Quarks available each week, along with accompanying text, satisfied the claim limitation. *Id.* at *13–14. We discern no error in the PTAB’s determination that these references disclose an “updated version of a compilation file.”

“Back-end Configuration”

The ’504 Patent claims require “one or more processors” coupled to “one or more data storage servers” and “one or more communications interfaces.” The parties refer to these components as the “back-end configuration.” The only depiction of this “back-end configuration” in the ’504 Patent describes the claimed hardware components

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as part of a single “host computer” with a single processor. Figure 1 of the ’504 Patent depicts communications interfaces 125, 127, and 129 within host server 101.

The PTAB found that the “communications interface” in the ’504 Patent is part of the host server computer. ’504 Patent, col. 5, ll. 57–66; col. 6, l. 60–col. 7, l. 9. The PTAB credited the testimony of EFF’s expert Dr. Schmandt that the hardware components related to this configuration would be “trivial to the person of ordinary skill in the art,” and that disclosure of a host server “necessarily would have included processors and a communications interface.” PTAB Op. at *11.

Personal Audio argues that the PTAB erred in holding that CNN/Compton disclosed the ’504 Patent’s “back-end configuration” of processors and servers. Personal Audio states that this claim limitation would only be taught if a reference shows two processors, because data storage servers necessarily include a processor. Personal Audio argues that the disclosure of a web server, without stating how the server is configured, does not teach this limitation.

EFF responds that Personal Audio’s “two processors” argument excludes a preferred embodiment in the ’504 Patent and moreover, that Compton/CNN discloses two processors. The PTAB found that the Compton/CNN reference discloses “one or more processors coupled to said one or more data storage servers and to said one or more communications interfaces,” as recited in claim 31. Compton/CNN discloses the “NMIS Internet server” and the “encoding station,” which is hardware performing a conversion function. Compton/CNN, Fig. 3. Because the encoding station in Compton/CNN is physically separate from the NMIS Internet server, it reasonably must contain a separate processor. We conclude that substantial evidence supports the PTAB’s findings on this issue.

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We have considered all of Personal Audio's arguments, and affirm the PTAB's conclusion that the challenged claims are anticipated by the Patrick/CBC reference, and alternatively that the claims are invalid as obvious in view of the Compton/CNN reference.

CONCLUSION

The decision of the PTAB, holding claims 31–35 of the '504 Patent unpatentable, is affirmed.

AFFIRMED

CERTIFICATE OF FILING AND SERVICE

I hereby certify that, on September 6, 2017, I electronically filed the foregoing Petitioner for Rehearing and Rehearing *En banc* with the Clerk of Court using the CM/ECF System, which will send notice of such filing to all registered users.

I further certify that, upon acceptance and request from the Court, the required paper copies of the foregoing will be deposited with United Parcel Service for delivery to the Clerk, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, 717 Madison Place, N.W., Washington, D.C. 20439.

The necessary filing and service were performed in accordance with the instructions given to me by counsel in this case.

Dated: September 6, 2017

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

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Dated: September 6, 2017

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