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DUE PROCESS IN AIA PROCEEDINGS AFTER *SAS INSTITUTE INC. V. IANCU*

MIKAELA STONE & BRITTON DAVIS

I. INTRODUCTION

Following the Supreme Court's recent abolishment of partial institution decisions in *inter partes* reviews of patents, in *SAS Institute Inc. v. Iancu* ("*SAS II*"),¹ the Patent Trial and Appeal Board ("PTAB") runs a greater risk than it previously did of due process violations in its final written decisions. Because all claims will be instituted if a reasonable likelihood of success is found for even one claim, the PTAB may have less incentive to provide the same depth of analysis previously provided in the institution decision for all claims and all grounds. Less analysis early-on by the PTAB means the parties have less notice of the PTAB's positions and, thus, less of a meaningful opportunity to be heard, increasing the risk that any change of position by the PTAB at a final written decision will result in a due process violation against petitioners and patent owners. Because of this, *SAS II* may have the practical impact of placing an additional onus on patent owners to set forth in their preliminary response any arguments that might, if institution is granted, serve as a basis for the PTAB finding claims not unpatentable, to decrease the likelihood that such a final written decision will be found to violate petitioners' due process rights.

This article begins by discussing the boundaries that due process and the Administrative Procedure Act ("APA") impose on the actions of administrative adjudicatory bodies like the PTAB. The article then analyzes how the Supreme Court's *SAS II* decision disincentivizes fulsome analysis by the PTAB in its institution decisions, the additional burden faced by patent owners electing to file a preliminary response, and the attendant

1. *SAS Inst. Inc. v. Iancu*, 138 S. Ct. 1348 (2018).

increased risk of due process violations by the PTAB. Finally, this article concludes with recommendations for practitioners and a discussion of what is necessary to preserve a party's right to appeal a due process violation.

II. DUE PROCESS AND THE ADMINISTRATIVE PROCEDURE ACT AT THE PTAB

A. *The Administrative Procedure Act Protects Both Patent Owners and Petitioners*

America Invents Act (“AIA”) proceedings are subject to due process limits and the APA,² which provides, *inter alia*, that “[p]ersons entitled to notice of an agency hearing shall be timely informed of . . . the matters of fact and law asserted.”³ This protection has always been understood to apply to patent owners because they are in danger of losing their intellectual property.⁴ In addition, the Federal Circuit has identified two reasons to support the application of the APA’s protections to petitioners as well. First, the Court has cited the APA’s coverage of “[p]ersons entitled to notice of an agency hearing,” explaining that “[i]n an IPR proceeding, this class of persons includes the petitioner.”⁵ Second, the Court explained:

[A]ffording petitioners with the benefit of § 554(b)(3) is appropriate because petitioners are not disinterested parties in an IPR proceeding. Rather, petitioners stand to lose significant rights in an instituted IPR proceeding because of the estoppel effects that trigger against them if the Board issues a final written decision.⁶

The rationale behind the *inter partes* review estoppel provision, 35 U.S.C. § 315(e), was to prevent successive challenges to a patent by those

2. 5 U.S.C. § 706 (2012); *WesternGeco LLC v. ION Geophysical Corp.*, 889 F.3d 1308, 1316 (Fed. Cir. 2018) (“We review Board decisions using the standard set forth in the *Administrative Procedure Act (APA)*, 5 U.S.C. § 706 *et seq.*”); *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2142 (2016) (“[S]henanigans’ may be properly reviewable in the context of § 319 and under the Administrative Procedure Act, which enables reviewing courts to ‘set aside agency action’ that is ‘contrary to constitutional right,’ ‘in excess of statutory jurisdiction,’ or ‘arbitrary [and] capricious.’”); *SAS Inst. Inc.*, 138 S. Ct. at 1360.

3. 5 U.S.C. § 554(b)(3) (2012).

4. *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1369 (2018) (“The decisions should not be misconstrued as suggesting that patents are not property for purposes of the Due Process Clause or the Takings Clause.”).

5. *SAS Inst., Inc. v. ComplementSoft, LLC (SAS I)*, 825 F.3d 1341, 1351 (Fed. Cir. 2016), *rev’d on other grounds*, 138 S. Ct. 1348 (2018) (citing 5 U.S.C. § 554(b)(3)).

6. *Id.* (citing 35 U.S.C. § 315(e) (2012)).

who previously have had the opportunity to challenge the patent before the PTAB.⁷ However, the application of this estoppel provision presumes that a party has previously *had the opportunity* to challenge the patent. To ensure that estoppel is not wrongfully applied to petitioners who did not have that opportunity, it is necessary to afford a petitioner the protections of the APA, as well as the right to appeal alleged violations.⁸

B. The PTAB's Boundaries Under Due Process and the Administrative Procedure Act

Under the APA, the Federal Circuit is required to “hold unlawful and set aside agency action . . . not in accordance with law [or] . . . without observance of procedure required by law.”⁹ “The indispensable ingredients of due process are notice and an opportunity to be heard by a disinterested decision-maker.”¹⁰ As such, the APA requires the PTAB to timely inform a party of the “matters of fact and law asserted” and provide an opportunity to submit facts and argument.¹¹

The Federal Circuit has explained that to ensure that both parties are properly afforded notice and the opportunity to be heard, an agency may not “change theories in midstream without giving respondents reasonable notice of the change and the opportunity to present argument under the new theory.”¹² In applying this test to PTAB proceedings, the Federal Circuit has focused its analysis on whether the new theory served as the basis for

7. *See* *Aruze Gaming Macau, Ltd. v. MGT Gaming, Inc.*, No. IPR2014-01288, Paper 13 at 14 (P.T.A.B. Feb. 20, 2015); *see also* 35 U.S.C. § 315(e) (2012).

8. It is worth noting that Courts have called into question whether the estoppel faced by non-practicing petitioners is enough to support standing for an appeal to an Article III court. *See* *Consumer Watchdog v. Wis. Alumni Research Found.*, 753 F.3d 1258, 1261–63 (Fed. Cir. 2014); *Phigenix, Inc v. Immunogen, Inc.*, 845 F.3d 1168, 1175–76 (Fed. Cir. 2017) (finding that the estoppel provision for IPRs does not constitute an injury in fact when the appellant is not engaged in activity “that would give rise to a possible infringement suit”); *Altaire Pharm., Inc. v. Paragon Biotech, Inc.*, 889 F.3d 1274, 1282–83 (Fed. Cir. 2018). When the touchstone of preclusion is whether a party already had the opportunity to be heard, it seems significant that, under particular circumstances, a petitioner may not only be denied the opportunity to be heard by the PTAB, but may then also be found to lack standing to be heard at the Federal Circuit regarding the PTAB’s potential due process violation. In such a case, estoppel would be wrongfully applied to a petitioner at the district court, and the agency would effectively have freedom to make intellectual property validity determinations without oversight.

9. 5 U.S.C. § 706; *see also* *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2141–42 (2016); *SAS Inst. Inc. v. Iancu*, 138 S. Ct. 1348, 1359 (2018).

10. *Belden Inc. v. Berk-Tek LLC*, 805 F.3d 1064, 1080 (Fed. Cir. 2015) (quoting *Abbott Labs. v. Cordis Corp.*, 710 F.3d 1318, 1328 (Fed. Cir. 2013)).

11. 5 U.S.C. § 554(b)(3); *see also* *Novartis AG v. Torrent Pharm. Ltd.*, 853 F.3d 1316, 1324 (Fed. Cir. 2017).

12. *Belden*, 805 F.3d at 1080; *Novartis*, 853 F.3d at 1324 (internal citation omitted).

the decision and whether the party was denied a meaningful opportunity to respond to the new theory.¹³

For example, where the parties have argued a determinative issue in their briefing (either of their own accord or because the issue was introduced in the institution decision), the Federal Circuit has found that the parties were given meaningful opportunity to be heard.¹⁴ But where the basis for the PTAB's final decision has been introduced at oral arguments, or as a new argument in the reply with no opportunity for sur-reply, the Federal Circuit has found a due process and APA violation.¹⁵ These conclusions are in line with the traditional analysis of due process.¹⁶ It is worth noting is that the "new theory" must serve as the basis for the final written decision—where new factual grounds regarding a reference already at issue have merely been used as motivation to combine or to describe the state of the art, the Federal Circuit has found no violation.¹⁷

In its previous decisions, the Federal Circuit has placed special significance on whether the PTAB has been inconsistent between its findings in the institution decision and the final written decision—

13. *See Dell Inc. v. Accelaron, LLC*, 818 F.3d 1293, 1301–02 (Fed. Cir. 2016) (finding that a party was denied its procedural rights when the PTAB based its decision on a factual assertion introduced at oral argument, after the party "could meaningfully respond"); *Novartis*, 853 F.3d at 1325–26 (finding no due process violation when the PTAB rejected a reference as anticipatory in the institution decision, but relied on the reference in a final written decision for motivation to combine two other references because the PTAB had not been inconsistent and the parties had been heard regarding the very same issue); *Securus Techs., Inc. v. Global Tel*Link Corp.*, 685 F. App'x 979, 985–86 (Fed. Cir. 2017) (finding no due process violation when the Board based its decision on an argument in petitioner's reply brief, which clarified an argument found in the petition, and when the patent owner did not exhaust his procedural options to be heard on the issue); *Belden*, 805 F.3d at 1080–82 (finding no due process violation when party did not use the regulatory safeguards of due process to request an opportunity to be heard); *In re NuVasive*, 841 F.3d 966, 970 (Fed. Cir. 2016) (finding due process violation when a party was denied its request to respond to an argument raised in the reply brief and was therefore denied the opportunity to be heard on a new issue); *Genzyme Therapeutic Prods. Ltd. P'ship v. Biomarin Pharm. Inc.*, 825 F.3d 1360, 1366–67 (Fed. Cir. 2016) (finding no APA violation when references cited in the final written decision merely served to describe the state of the art and did not serve as invalidating references).

14. *E.g.*, *BASF Corp. v. Iancu*, No. 2017-1425, 2018 WL 3456307, at *6 (Fed. Cir. July 17, 2018) (finding no due process violation where the basis for the final written decision was introduced in the petition, acknowledged in the institution decision, and discussed at oral argument); *Anacor Pharms., Inc. v. Iancu*, No. 2017-1947, 2018 WL 2187768, at *4–6 (Fed. Cir. May 14, 2018).

15. *Dell Inc.*, 818 F.3d at 1301–02; *In re NuVasive*, 841 F.3d at 970. *But see Securus Techs., Inc.*, 685 F. App'x at 985–86 (finding that because the parties had been given an opportunity to be heard regarding the PTAB's new interpretation of the prior art, the APA's requirements were satisfied).

16. Nicholas J. Doyle, *Confirmation Bias and the Due Process of Inter Partes Review*, 57 THE J. OF THE FRANKLIN PIERCE CTR. FOR INTELL. PROP. 29, 41–43 (2017) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 346 (1976)).

17. *Novartis*, 853 F.3d at 1325–26; *Genzyme Therapeutic Prods. Ltd. P'ship*, 825 F.3d at 1366–67.

circumstances which would indicate a “change [in] theories in midstream.”¹⁸ When such an inconsistency occurs, the parties must be given the opportunity to respond to the change; otherwise, the PTAB commits a possible due process violation. These opinions demonstrate that for any question of due process, the analysis will focus on where and when the case-dispositive issue was first raised and whether that provided the responding party with sufficient notice and an opportunity to meaningfully respond in either its briefing or oral arguments.

C. SAS Effects & The Increased Risk for Due Process Violations

It is in each party’s self-interest to ensure that its briefs sufficiently develop the arguments supporting its position to provide the basis for a final written decision that will not be overturned due to an APA violation.¹⁹ As always, petitioners must be certain to raise all arguments and claim construction positions in the petition or they must be ready to forfeit the right to rely on “new arguments” later in the reply.²⁰ But now, as explained below, the decision in *SAS II* has erected an increased hurdle for patent owners to avoid institution. Because of the reduced incentive for the PTAB to provide complete analysis in its institution decisions on all claims and on all grounds, it is more important than ever that patent owners forgo the temptation to skip a preliminary response, to help ensure that their counterarguments and claim construction positions are fully developed and available to provide a permissible basis for patentability determinations at final written decision.

D. Brief Summary of SAS and What It Means for PTAB Practice

The Supreme Court’s recent decision in *SAS II* rejected the propriety of the “partial institution” practice previously followed by the PTAB to sometimes institute on only some of the challenged claims.²¹ While the decision whether to institute review remains discretionary following *SAS II*, the Court emphasized the fact that it is the petition, not the Board, that defines the scope of the review if it is instituted.²² Based on this holding,

18. *Novartis*, 853 F.3d at 1324–26; *Genzyme Therapeutic Prods. Ltd. P’ship*, 825 F.3d at 1366–67.

19. *See supra* Part II.B.

20. 35 U.S.C. § 312(a)(3) (2012); *Intelligent Bio-Sys., Inc. v. Illumina Cambridge Ltd.*, 821 F.3d 1359, 1369 (Fed. Cir. 2016).

21. *SAS Inst. Inc. v. Iancu*, 138 S. Ct. 1348, 1358–59 (2018).

22. *Id.* at 1355.

the PTAB's guidance following the release of the *SAS II* decision, and recent Federal Circuit guidance, all claims and grounds will now rise or fall as one at the institution stage.²³

The relevant statutory language affords the PTAB discretion as to how much information it includes in its institution decision.²⁴ The PTAB has confirmed this reading of the statute, concluding that analysis of only one representative claim in an institution decision does not constitute an abuse of discretion.²⁵ But the Federal Circuit has implied that guidance by the PTAB in its institution decision is necessary to avoid a due process violation.²⁶ On appeal from a final written decision in *EmeraChem Holdings, LLC v. Volkswagen Group of America, Inc.*, the Federal Circuit found that the PTAB's statements in its institution decision did not make clear that it was relying on a particular prior art reference to invalidate the dependent claims, as well as the independent claims discussed in its decision to institute.²⁷ When the PTAB relied on the reference in its final written decision as a primary invalidating piece of prior art, the Federal Circuit found that the parties were never "on notice" and the PTAB had violated the patent owner's due process right to be heard.²⁸ Thus, the PTAB has the power to shape and direct the parties as to what case-determinative issues should be included in the briefing by providing a fulsome analysis in its institution decision, but it is not required to do so.

E. Potential Due Process and Administrative Procedure Act Concerns

As always, it remains important that petitioners continue to ensure that all potential arguments are raised in the petition and to provide their relevant claim construction positions under 37 C.F.R. § 42.204(b)(3).

23. *Id.* at 1354; *PGS Geophysical AS v. Iancu*, 891 F.3d 1354, 1359–60 (Fed. Cir. 2018); David Ruschke, et al., *Chat with the Chief on SAS*, U.S. PAT. & TRADEMARK OFF. 5–6 (Apr. 30, 2018), https://www.uspto.gov/sites/default/files/documents/chat_with_chief_sas_5.3.18.pdf.

24. 35 U.S.C. § 318(a); *PGS Geophysical*, 891 F.3d at 1359–60; David Ruschke, et al., *Chat with the Chief on SAS*, U.S. PAT. & TRADEMARK OFF. (Apr. 30, 2018) (unpublished conference call).

25. *Alcatel-Lucent USA Inc. v. Oyster Optics, LLC*, No. IPR2018-00070, Paper 27 (P.T.A.B. Aug. 31, 2018).

26. *EmeraChem Holdings, LLC v. Volkswagen Grp. of Am., Inc.*, 859 F.3d 1341, 1348–50 (Fed. Cir. 2017); *see also* *Shaw Indus. Grp., Inc. v. Automated Creel Sys., Inc.*, 817 F.3d 1293, 1303 (Fed. Cir. 2016) (Reyna, J., concurring) (noting that "regardless of whether the Board's institution decisions can be appealed, the Board cannot create a black box decisionmaking process").

27. *EmeraChem Holdings, LLC*, 859 F.3d at 1348–50.

28. *Id.* at 1350–51.

Should a petitioner fail to do so, it would lose the ability to make the argument because the petition defines the scope of the review.²⁹

The *SAS II* decision has increased the hurdle faced by patent owners in opposing the institution of a PTAB proceeding and, at the same time, in at least some senses disincentivizes patent owners from raising counterarguments early on, in a preliminary response. This is because the patent owner, under *SAS II*, will have to address and win on every claim and every ground to avoid institution.³⁰ However, the need to develop arguments early on in the proceedings remains even after *SAS II*, because, as discussed above, only arguments upon which the parties have been heard may serve as the PTAB's basis for protecting the validity of a patent.

A particular example of this can be seen concerning claim construction. While the analysis provided in an institution decision is preliminary, the Federal Circuit has made it clear that the PTAB may not inconsistently construe terms between its institution decision and final written decision without giving the parties an opportunity to be heard, because doing so would be an impermissible change of theories in midstream.³¹ Where a patent owner chooses not to file a preliminary response, it may inadvertently delay the parties' arrival at a focused claim construction dispute, increase the risk that an argument is raised without meaningful notice, and lose the ability to rely on an alternative construction without a due process violation.

SAS II has also removed any general requirement for the PTAB to analyze the relative strengths of the various challenges raised in a petition in the institution decision because all claims and grounds will rise or fall as one.³² Following *SAS II*, the PTAB need only address one claim in its institution decision, since a showing of reasonable likelihood of success as

29. *Intelligent Bio-Sys., Inc. v. Illumina Cambridge Ltd.*, 821 F.3d 1359, 1369 (Fed. Cir. 2016); *SAS Inst. Inc. v. Iancu*, 138 S. Ct. 1348, 1355 (2018).

30. *See supra* Part II.D.; 37 C.F.R. § 42.107 (2016).

31. *SAS Inst., Inc. v. ComplementSoft, LLC*, 825 F.3d 1341, 1351 (Fed. Cir. 2016), *rev'd on other grounds*, 138 S. Ct. 1348 (2018) ("What concerns us is not that the Board adopted a construction in its final written decision, as the Board is free to do, but that the Board 'change[d] theories in midstream.") (quoting *Belden Inc. v. Berk-Tek LLC*, 805 F.3d 1064, 1080 (Fed. Cir. 2015); *Intellectual Ventures II LLC v. Ericsson Inc.*, 686 F. App'x 900, 905–06 (Fed. Cir. 2017) (finding that when the PTAB adopted a construction raised by neither party and first raised at oral argument, there was no due process violation because the parties vigorously debated the issue at the hearing and neither sought rehearing or a sur-reply). But when a party puts the construction at issue by disputing an initial construction, the party is on notice that the PTAB could alter it. *WesternGeco LLC v. ION Geophysical Corp.*, 889 F.3d 1308, 1328–30 (Fed. Cir. 2018).

32. *SAS Inst. Inc.*, 138 S. Ct. at 1354; *Ruschke et al.*, *supra* note 23.

to even one claim will allow institution of the entire petition.³³ Since the *SAS II* decision issued, the majority of panels appear to be largely continuing their practice of providing analysis of all claims and grounds in their institution decisions, helping guide the focus of the parties' briefing.³⁴ But such analysis is not guaranteed. For example, in *Alcatel-Lucent USA Inc. v. Oyster Optics, LLC*, the Board instituted *inter partes* review and provided analysis of only one representative claim in its institution decision.³⁵ On request for rehearing, the Board quoted the Supreme Court's decision in *SAS II*, stating that "Section 314(a) does not require the Director to evaluate every claim individually. Instead, it simply requires him to decide whether the petitioner is likely to succeed on at least 1 claim."³⁶

Where the PTAB declines to provide guidance on all claims and all grounds in its institution decisions, it may limit the permissible basis for both patentability and unpatentability determinations in its final written decision under the APA, should the PTAB recognize an issue or evidence not directly addressed by the parties. The institution decision can help give notice of, frame, and focus the parties' subsequent briefing on case-dispositive issues. For example, in *Alcatel-Lucent*, while explaining that analysis of one claim was sufficient, the Board, in actuality, provided additional guidance by discussing weaknesses in the preliminary response and identifying a critical claim construction issue.³⁷ Without the rehearing order, the parties would never have received this initial evaluation. During its preliminary analysis, the PTAB may develop an initial impression as to particular weaknesses in the prior art or an appropriate claim construction.³⁸ Should the parties fail to recognize the significance of a case-dispositive issue, they may choose to focus the briefing elsewhere. If the PTAB were to rule on the basis of such an issue, and it was not included in the institution decision, the parties may not have been given a full opportunity to be heard on the issue and one or both parties might have grounds for an appeal under the APA.³⁹

33. See *SAS Inst. Inc.*, 138 S. Ct. at 1359.

34. *Id.*; See Ruschke et al., *supra* note 23 (encouraging panels to continue providing analysis of all claims challenged).

35. *Alcatel-Lucent USA Inc. v. Oyster Optics, LLC*, No. IPR2018-00070, Paper 27 (P.T.A.B. Aug. 31, 2018).

36. *Id.* at 4.

37. *Id.* at 5.

38. See generally Doyle, *supra* note 15.

39. *Belden Inc. v. Berk-Tek LLC*, 805 F.3d 1064, 1080 (Fed. Cir. 2015); *SAS Inst., Inc. v. ComplementSoft, LLC*, 825 F.3d 1341, 1351 (Fed. Cir. 2016), *rev'd on other grounds*, (quoting *Belden*, 805 F.3d at 1080).

III. PRACTICE POINTERS

The increased risk of due process violations resulting from *SAS II* increases the importance that the parties ensure their right to be heard is both satisfied and preserved. Moving forward, it continues to be important that a petitioner raise all arguments in the petition or forfeit the right to rely on the argument later in the proceeding. Despite the decision in *SAS II* and the resulting hurdle at the institution phase, it is also now more important that patent owners use their preliminary response to raise counterarguments and claim construction positions, placing the petitioner on notice of the same, and preserving the PTAB's ability to rely on such positions as a basis for finding patentability without violating a petitioner's due process rights. Patent owners should pay special attention to claim construction opportunities for all challenged claims at the institution stage. Given the Federal Circuit's determination that the Board may not come to inconsistent claim construction determinations between the institution decision and the final written decision without the parties having an opportunity to be heard,⁴⁰ winning a preliminary claim construction at the institution stage could be significant.

Both parties must be vigilant for due process violations, and either use the procedural safeguards of the PTAB proceedings to address them or face waiver or forfeiture. To appeal a decision under the APA, a party must be able to show that it was denied a meaningful opportunity to be heard on a case-dispositive issue.⁴¹ That is, the party must preserve its right to appeal by using the procedures available to it, including requesting leave to file a motion for observation of evidence, leave to file a sur-reply to address new evidence and argument, or a rehearing of a final written decision based on a new factual basis.⁴² The Federal Circuit has made it clear that if parties do not avail themselves of the procedural safeguards built into the PTAB proceedings to request an opportunity to be heard, then they are not necessarily denied the right to be heard and no due process violation may have occurred.⁴³ To ensure that an appeal of a due process violation is not

40. *SAS I*, 825 F.3d at 1351.

41. *Dell Inc. v. Accelaron, LLC*, 818 F.3d 1293, 1301–02 (Fed. Cir. 2016); *In re NuVasive*, 841 F.3d 966, 970–71 (Fed. Cir. 2016).

42. 37 C.F.R. §§ 42.51(b)(2)(i), 42.20(b), 42.71(d) (2015); Office Patent Trial Practice Guide, 77 Fed. Reg. 48756, 48767–68 (Aug. 14, 2012).

43. *Belden*, 805 F.3d at 1082 (“With no Board denial of concrete, focused requests before us, we are not prepared to find that Belden was denied a meaningful opportunity to respond to the grounds of rejection . . .”); *In re NuVasive*, 841 F.3d at 970 (finding a due process violation where a party's request to respond to an argument raised in the reply brief was denied); *Securus Techs., Inc. v. Global Tel*Link*

waived or forfeited, it is imperative that the parties are aware of their procedural rights and seek to timely vindicate them in the PTAB after a violation has occurred.

IV. CONCLUSION

With the possibility of less analysis occurring at the institution stage, the risk for due process violations has only increased post-*SAS II*. Both the PTAB and the parties must make an effort to be forthcoming with their prior art positions, evidence, and claim construction positions, and parties must take advantage of procedural protections to preserve their right to appeal a due process violation.

Corp., 685 F. App'x 979, 985–86 (Fed. Cir. 2017) (finding no due process violation where patent owner did not exhaust its procedural options to be heard on the issue).