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EXPLAIN YOURSELF: FEDERAL CIRCUIT REVIEW OF PTAB DECISIONS UNDER THE APA

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INTRODUCTION

The U.S. Court of Appeals for the Federal Circuit (“Federal Circuit”) retains exclusive jurisdiction over appeals of final written decisions from the United States Patent and Trademark Office (“USPTO”) Patent Trial and Appeal Board (“PTAB”).¹ And because the PTAB acts as the adjudicatory arm of the USPTO, a federal agency, Federal Circuit review of PTAB decisions is subject to the Administrative Procedure Act (“APA”).² Section 706 of the APA provides that a reviewing court shall, among other things, “hold unlawful and set aside agency action, findings, and conclusions found

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1. The relevant statutory provisions: “The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction of an appeal from a decision of the Patent Trial and Appeal Board of the United States Patent and Trademark Office with respect to. . .inter partes review under title 35[.]” 28 U.S.C. § 1295(a)(4)(A) (2012); “A party dissatisfied with the final written decision of the Patent Trial and Appeal Board under section 318(a) may appeal the decision pursuant to sections 141 through 144. Any party to the inter partes review shall have the right to be a party to the appeal.” 35 U.S.C. § 319 (2012); “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 under section 318(a) or 328(a) (as the case may be) may appeal the Board’s decision only to the United States Court of Appeals for the Federal Circuit.” 35 U.S.C. § 141(c) (2012).

2. *See, e.g.,* Rovalma, S.A. v. Bohler-Edelstahl GmbH & Co. KG, 856 F.3d 1019, 1024 (Fed. Cir. 2017) (“We review the Board’s decisions under the Administrative Procedure Act (APA).”).

to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” “without observance of procedure required by law,” or “unsupported by substantial evidence.”³ Translating this standard into practice, the Federal Circuit has required that the PTAB provide “a sufficiently detailed explanation of its determinations both to enable meaningful judicial review and to prevent judicial intrusion on agency authority.”⁴ When the Federal Circuit finds that the PTAB fails to meet this standard, the Federal Circuit remands (or, more rarely, reverses) decisions to the PTAB for further clarity.

This article examines instances when the Federal Circuit remanded the case to the PTAB for failure to comply with the substantive requirements of the APA and analyzes how the PTAB addressed the issues post-remand. The article proceeds in four Parts. Part I describes some of the unique challenges present in PTAB practice that may give rise to APA issues in agency trials. Part II discusses the standards for substantive APA review. Part III explores examples of how the Federal Circuit reviews and accounts for perceived APA violations, and discusses how the PTAB handles these remanded decisions. Part IV concludes with suggestions and practice pointers in view of either defending or raising such APA challenges at the Federal Circuit.

I. UNIQUE ASPECTS OF PTAB PRACTICE

Certain rules and regulations covering post-grant proceedings at the PTAB provide tight control over the proceeding without much room for deviation. For example, except for good cause shown, the PTAB must conclude its review in an *inter partes* review (“IPR”) within one year, per congressional mandate.⁵ The USPTO’s regulations provide for “just, speedy, and inexpensive resolution of every proceeding.”⁶ To that end, there are strict limits on the length of pleadings in all phases of the IPR, beginning with the pre-institution petitions and preliminary patent owner responses,

3. 5 U.S.C. § 706 (2012).

4. *Rovalma*, 856 F.3d at 1024 (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 88, 94 (1943)).

5. The statute provides: “[The Director shall prescribe regulations]. . .requiring that the final determination in an inter partes review be issued not later than 1 year after the date on which the Director notices the institution of a review under this chapter, except that the Director may, for good cause shown, extend the 1-year period by not more than 6 months, and may adjust the time periods in this paragraph in the case of joinder under section 315(c).” 35 U.S.C. § 316(a)(11) (2012).

6. 37 C.F.R. § 42.1(b) (2017).

and continuing with the trial-phase replies and patent owner responses.⁷ That is to say, each argument a party makes has limited space in its papers before the PTAB.

Discovery at the PTAB is also limited.⁸ Initial disclosures, while not required, may be exchanged, either by party agreement or motion.⁹ Additional routine discovery includes submission of any exhibit cited in a paper or testimony, cross-examination of affidavit testimony, and “unless previously served, a party must serve relevant information that is inconsistent with a position advanced by the party during the proceeding concurrent with the filing of the documents or things that contains the inconsistency.”¹⁰ The parties may also agree to additional discovery.¹¹ If the parties cannot agree, one party may move for additional discovery but must show that such “additional discovery is in the interests of justice, except in post-grant reviews where additional discovery is limited to evidence directly related to factual assertions advanced by either party in the proceeding.”¹² The Federal Circuit has recognized the strict constraints on post-grant practice that the PTAB’s regulations place on the parties, concluding that “in some cases, a challenge can fail even if different evidence and arguments might have led to success.”¹³

Added together, this creates a situation at the PTAB wherein the parties are under tight word limits to make their arguments, the parties have limited discovery opportunities, and except for good cause shown, the Administrative Patent Judges (“APJ”) must conclude with a final written decision within one year of institution.

II. APA STANDARDS AT THE FEDERAL CIRCUIT

The APA provides that any aggrieved party adversely affected by an agency’s action is entitled to judicial review of that action, subject to other

7. 37 C.F.R. § 42.24 (2017) (mandating, *e.g.*, a 14,000-word limit for petitions requesting IPR; the same limit for patent owner preliminary responses and post-institution responses; and a 5,600-word limit for replies to patent owner responses).

8. 37 C.F.R. § 42.51(b) (2017) (“A party is not entitled to discovery except as provided in paragraph (a) of this section, or as otherwise authorized in this subpart.”).

9. 37 C.F.R. § 42.51(a)(1) (2017) (“Parties may agree to mandatory discovery requiring the initial disclosures set forth in the Office Patent Trial Practice Guide.”); 37 C.F.R. § 42.51(a)(2) (2017) (Where the parties fail to agree to the mandatory discovery set forth in paragraph (a)(1), a party may seek such discovery by motion.”).

10. 37 C.F.R. § 42.51(b)(1) (2017).

11. 37 C.F.R. § 42.51(b)(2) (2017).

12. 37 C.F.R. § 42.51(b)(2)(i) (2017).

13. *Ariosa Diagnostics v. Verinata Health, Inc.*, 805 F.3d 1359, 1367 (Fed. Cir. 2015).

limits of such review.¹⁴ Such limits include, for example, traditional Article III standing requirements.¹⁵ The Federal Circuit has confirmed that the APA provides an independent basis for the reviewability of PTAB actions.¹⁶ And the Federal Circuit remands, or sometimes reverses, decisions that it finds fail to meet the APA's requirements.¹⁷

The APA standard of review accounts for both substantive explanation and procedural fairness. On substantive issues, the Federal Circuit will “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” or “unsupported by substantial evidence.”¹⁸ Procedurally, decisions may be held unlawful if the PTAB conducted the proceeding “without observance of procedure required by law.”¹⁹ This paper deals only with the Federal Circuit's treatment of substantive violations of the APA.

Focusing in on substance, the Federal Circuit does not require the PTAB to provide “ideal clarity” for its decisions. Instead, the Federal Circuit will “uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.”²⁰ The Federal Circuit will not, however, “supply a

14. The statute provides: “A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.” 5 U.S.C. § 702 (2012).

15. *JTekt Corp. v. GKN Auto. Ltd.*, 898 F.3d 1217, 1221 (Fed. Cir. 2018) (finding IPR petitioner lacked Article III standing where petitioner did not have “. . . concrete plans for future activity that create[d] a substantial risk of future infringement. . .”).

16. The court in *Arthrex* states as follows: “The first issue is whether the adverse final judgment is appealable. . . . The Supreme Court has recognized ‘the strong presumption that Congress intends judicial review of administrative action.’ Here, the language of 28 U.S.C. § 1295 appears to provide for appeal. . . . We need not decide whether the right to appeal comes directly from § 1295 or in conjunction with § 704 of the [Administrative Procedure Act]. Both statutes play a role in defining the reviewability of [PTAB] decisions.” *Arthrex, Inc. v. Smith & Nephew, Inc.*, 880 F.3d 1345, 1348, 1348 n.1 (Fed. Cir. 2018) (citations omitted).

17. *E.g., Ariosa*, 805 F.3d at 1359 (remanding); *Arendi S.A.R.L. v. Apple Inc.*, 832 F.3d 1355, 1366 (Fed. Cir. 2016) (reversing). Although not based exclusively on APA-related issues, a study indicated that, from September 2012 through December 2018, the Federal Circuit has remanded over 14 percent of decisions from the PTAB. LegalMetric Custom Report, *Remands of PTAB Appeals Sept. 2012 to Dec. 2018* at 2 (on file with author).

18. *Rovalma, S.A. v. Bohler-Edelstahl GmbH & Co.*, 856 F.3d 1019, 1024 (Fed. Cir. 2017) (quoting 5 U.S.C. § 706).

19. *Id.*

20. *Id.*

reasoned basis for the agency's action that the agency itself has not given."²¹ The PTAB must articulate logical and rational reasons for its decisions.²²

The basis for not affirming decisions that the Federal Circuit finds inadequately explained is grounded in a separation-of-powers concern: the court wants to avoid "judicial intrusion on agency authority."²³ The Federal Circuit has explained that this requirement is rooted in two Supreme Court rationales that predate the APA. The first was a concern that the judiciary could not exercise its duty of review unless it were advised of the considerations underlying the agency action.²⁴ The second was a concern that the judiciary, without a clear explanation of agency action, would intrude on agency authority to make factual, policy, and discretionary determinations committed to the agency.²⁵

III. FEDERAL CIRCUIT DECISIONS REVIEWING PTAB DETERMINATIONS

Against this backdrop, the Federal Circuit will critically analyze PTAB decisions and remand, or sometimes reverse, those it finds to be inadequately explained.²⁶ In *Arendi S.A.R.L. v. Apple Inc.*, the Federal Circuit reversed, rather than remanded, an IPR determination.²⁷ The Federal Circuit determined that the PTAB improperly found claims obvious by relying on "common sense" without further analysis.²⁸ Instead of remanding to allow the PTAB an opportunity to elaborate on its reasoning, the Federal Circuit found that this was "not a case where a more reasoned explanation than that provided by the [PTAB] can be gleaned from the record."²⁹

It is more common for the Federal Circuit to remand decisions that it finds insufficiently explained.³⁰ In *In re Van Os*, for example, which dealt

21. *Id.* (citing *Bowman Transp. Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 285–86 (1974); *SEC v. Chenery Corp.*, 332 U.S. 194, 196–97 (1947)).

22. *Pers. Web Techs., LLC v. Apple Inc.*, 848 F.3d 987, 992 (Fed. Cir. 2017) (citing *Synopsys, Inc. v. Mentor Graphics Corp.*, 814 F.3d 1309, 1322 (Fed. Cir. 2016)).

23. *Id.* at 992; *see also Rovalma*, 856 F.3d at 1024 ("Thus the Board must, as to issues made material by the governing law, set forth a sufficiently detailed explanation of its determinations both to enable meaningful judicial review and to prevent judicial intrusion on agency authority.") (citations omitted).

24. *Pers. Web*, 848 F.3d at 992 (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943)).

25. *Id.*

26. The Federal Circuit may also reverse in cases where it finds that the PTAB's conclusions lack substantial evidence. *E.g.*, *DSS Tech. Mgmt., Inc. v. Apple Inc.*, 885 F.3d 1367 (Fed. Cir. 2018).

27. 832 F.3d 1355, 1366 (Fed. Cir. 2016).

28. *Id.*

29. *Id.*

30. *See, e.g.*, *BASF Corp. v. Enthone, Inc.*, 749 Fed. Appx. 978 (Fed. Cir. 2018) (unpublished); *Emerson Elec. Co. v. SIPCO, LLC*, 745 Fed. Appx. 369 (Fed. Cir. 2018) (unpublished); *Arista Networks, Inc. v. Cisco Sys., Inc.*, 726 Fed. Appx. 787 (Fed. Cir. 2018) (unpublished); *L.A. Biomedical Res. Inst.*

with an appeal from an examiner's obviousness rejection during patent prosecution, the Federal Circuit remanded the PTAB's decision finding that pending claims would have been obvious.³¹ The Federal Circuit reasoned that the PTAB's rationale for a motivation to combine was lacking: "Absent some articulated rationale, a finding that a combination of prior art would have been 'common sense' or 'intuitive' is no different than merely stating the combination 'would have been obvious.'"³² Reasoning that the decision was "potentially lawful but insufficiently or inappropriately explained," the Federal Circuit, vacated and remanded for further proceedings.³³ In dissent, Judge Newman opined that she would have reversed the PTAB's decision and ordered the challenged claims be allowed.³⁴ She reasoned that the PTAB erred not on account of "a lack of specificity or absence of citation to the record or to legal authority," but rather because it failed to meet its "statutorily required burden of demonstrating unpatentability."³⁵

After a remand based on APA violations, the PTAB often adopts procedures, like granting further briefing, to address those deficiencies. The additional procedures sometimes, though not always, lead to a different result than the original.

Ariosa Diagnostics v. Verinata Health, Inc. provides an example of the PTAB's briefing procedures on remand when the PTAB's legal justification for discounting potentially critical evidence was unclear. In the case, Ariosa petitioned for IPR of Verinata's patents related to noninvasive prenatal testing.³⁶ The PTAB instituted IPR but, in the final written decision, concluded that Ariosa failed to meet its burden of showing the challenged claims were obvious. The PTAB's analysis included a statement assigning no weight to an exhibit originally attached to one of Ariosa's declarations accompanying its petitions, which Ariosa attempted "through a second declaration" to "bolster the reliance placed in the Petitions" on that reference.

at Harbor–UCLA Med. Ctr. v. Eli Lilly & Co., 849 F.3d 1049 (Fed. Cir. 2017); Microsoft Corp. v. Parallel Networks Licensing, LLC, 715 Fed. Appx. 1013 (Fed. Cir. 2017) (unpublished); Rovalma, S.A. v. Bohler-Edelstahl GmbH & Co., 856 F.3d 1019 (Fed. Cir. 2017); Pers. Web Techs., LLC v. Apple Inc., 848 F.3d 987 (Fed. Cir. 2017); Securus Techs., Inc. v. Global Tel*Link Corp., 685 Fed. Appx. 979 (Fed. Cir. 2017) (unpublished); *In re Nuvasive, Inc.*, 842 F.3d 1376 (Fed. Cir. 2016); *Ariosa Diagnostics v. Verinata Health, Inc.*, 805 F.3d 1359 (Fed. Cir. 2015).

31. *In re Van Os*, 844 F.3d 1359, 1360 (Fed. Cir. 2017).

32. *Id.* at 1361.

33. *Id.* at 1362 (citing *In re Lee*, 277 F.3d 1338, 1346 (Fed. Cir. 2002)).

34. *Id.*

35. *Id.* at 1363 (Newman, P., concurring in part and dissenting in part).

36. *Ariosa Diagnostics v. Verinata Health, Inc.*, 805 F.3d 1359, 1360 (Fed. Cir. 2015).

On appeal, Ariosa challenged the PTAB's treatment of the exhibit, arguing that the PTAB erred in refusing to consider what background knowledge a skilled artisan would have possessed about DNA indexing at the time of the challenged invention.³⁷ The Federal Circuit agreed, reasoning that it was improper to discount the exhibit because art "can legitimately serve to document the knowledge that skilled artisans would bring to bear in reading the prior art identified as producing obviousness."³⁸ The problem, however, was that the Federal Circuit could not discern the basis on which the PTAB discounted the exhibit:

That the language of the Board regarding [the challenged exhibit] is readily susceptible of being read to rest on an incorrect legal proposition, by itself, does not require setting aside the Board's decisions. We may affirm an agency ruling if we may reasonably discern that it followed a proper path, even if that path is less than perfectly clear. We also may affirm if an erroneous portion of an agency's ruling is ultimately non-prejudicial, i.e., not material to the bottom-line result given other portions of the agency's ruling. But we must not ourselves make factual and discretionary determinations that are for the agency to make.³⁹

Because the Federal Circuit could not discern the basis on which the PTAB discounted the exhibit, the Federal Circuit remanded the case. In remanding on the issue, the Federal Circuit recognized that the Board has control of its proceedings, and accordingly did not order further briefing or taking of evidence.⁴⁰ Instead, the Federal Circuit left it to the PTAB to determine the best procedure for ensuring that its next written opinion would be fully reasoned and APA-compliant.

During remand, the PTAB provided the parties guidance in addressing the issues the Federal Circuit outlined in the initial ruling.⁴¹ Procedurally, the PTAB held a conference call to discuss the post-remand procedure and authorized a 15-page brief, 15-page response, and 5-page reply to address the challenged exhibit.⁴² The PTAB would not entertain argument or evidence not before the Federal Circuit on appeal.⁴³

37. *Id.* at 1365.

38. *Id.*

39. *Id.* at 1365 (citations omitted).

40. *Id.* at 1367 (leaving to the PTAB the "determination of what remand proceedings are appropriate given the governing policies.").

41. *Ariosa Diagnostics v. Verinata Health, Inc.*, No. IPR2013-00276 & IPR2013-00277, 2016 WL 8944596 (P.T.A.B. Aug. 15, 2016).

42. *Id.* at *2.

43. *Id.*

After the submissions, the PTAB concluded, again, that the Petitioner had not met its burden to determine that the challenged claims were obvious. The PTAB recognized that the challenged exhibit “may be evidence of the level of skill in the art.”⁴⁴ The issue for the PTAB, however, was that the Petitioner had not explained how the exhibit remedied the deficiencies in the prior art’s demonstration that the challenged claims were not obvious.⁴⁵ Thus, the PTAB concluded, when the prior art was considered in view of the state of the art as described in the challenged exhibit, there was no “rational underpinning as to why the ordinary artisan would have combined the cited teaching to arrive at” the claim limitations.⁴⁶ In light of *Ariosa*, practitioners should carefully tie the evidence to their arguments, lest the PTAB cannot make out a fully reasoned case.

In another example illustrating the PTAB’s substantive APA violations, in *Rovalma, S.A. v. Bohler-Edelstahl GmbH & Co. KG*, the Federal Circuit remanded the PTAB’s final written decision finding that the challenged claims relating to hot-work steel with high thermal conductivity were obvious.⁴⁷ The Federal Circuit found that the PTAB’s decision was deficient, on evidentiary and procedural grounds, under the APA. Regarding evidentiary insufficiency, the Federal Circuit emphasized the importance of a clear explanation to support an obviousness determination, explaining:

The Supreme Court has recognized the importance of clarity with respect to obviousness determinations. . . . We have repeatedly insisted on such explanations in reviewing the adequacy of the Board’s analysis—both as a matter of obviousness law and as a matter of administrative law. We have noted that the amount of explanation needed varies from case to case, depending on the complexity of the matter and the issues raised in the record.⁴⁸

The Federal Circuit found that the PTAB failed to meet that standard because it did not “sufficiently lay out the basis for its implicit findings” on the question of obviousness.⁴⁹ The Federal Circuit took issue with the PTAB finding that a person of ordinary skill in the art would have “inherently” completed certain of the claimed method steps, when the PTAB had “not

44. *Id.* at *9.

45. *Id.*

46. *Id.* at *10.

47. 856 F.3d 1019, 1021 (Fed. Cir. 2017).

48. *Id.* at 1025 (internal citations omitted).

49. *Id.*

explain[ed] the evidentiary basis for those determinations, and [Petitioner] did not provide any explanation regarding these process claim elements that the Board could adopt as its own.”⁵⁰ Accordingly, the Federal Circuit remanded the decision to the PTAB for further proceedings to more fully develop its reasoning so that the Federal Circuit could fully consider appellee’s substantial-evidence challenge.⁵¹

On remand, as in *Ariososa*, the PTAB first held a teleconference to discuss post-remand procedures and authorized briefing pertinent to evidence the PTAB relied on to support its implicit factual findings, how the PTAB interpreted that evidence, and what inferences the PTAB drew from it.⁵²

In its analysis on remand, the PTAB came to a different conclusion on the obviousness of the challenged claims by now upholding patentability. While originally it determined that a person of ordinary skill in the art would have been motivated to increase the thermal conductivity of prior art steel, the PTAB recognized that the Federal Circuit disagreed with that conclusion.⁵³ The Federal Circuit found, instead, that teachings related to high thermal conductivity did not support a finding of motivation to *increase* thermal conductivity.⁵⁴ After reviewing the arguments that the Petitioner reiterated in post-remand briefing related to the prior art, the PTAB concluded that “the record as a whole does not support a finding that a person of ordinary skill in the art would have been motivated to increase the thermal conductivities of hot-work steels as set forth in the challenged claims.”⁵⁵ Thus, the PTAB demonstrated that on remand from a Federal Circuit determination that it has not adequately explained its reasoning, a different outcome is possible.

IV. PRACTICE TIPS FOR RAISING OR DEFENDING APA CHALLENGES

In short, the Federal Circuit seems sensitive to the PTAB’s thorough review of the record, and petitioners and patent owners can assist the PTAB with this analysis. Petitioners and patent owners should start considering APA issues at the early stages of the case. For petitioners, given tight page limits and discovery related to the proceedings, focusing in on fewer, more thoroughly argued positions may be a winning strategy by avoiding

50. *Id.*

51. *Id.* at 1026.

52. *Bohler-Edelstahl GmbH & Co. KG v. Rovalma*, No. IPR2015-00150, Paper 46 at 1 (P.T.A.B. Dec. 6, 2017).

53. *Id.* at 4.

54. *Id.* at 5.

55. *Id.*

successful appeals on APA grounds. In particular, petitioners can help ensure the Final Written Decision is well reasoned by providing ample citations to record evidence and make explicit the connection from the evidence to the argued point. Again, because of the limited amount of space, discovery, and tight timeframe for APJs to arrive at a Final Written Decision, the more factual support that can shepherd evidence to a legal argument will assist petitioners' efforts.

For a party dissatisfied with a Final Written Decision, consider making an APA-related challenge on appeal. By showing that a Final Written Decision is not sufficiently reasoned, either because there was an insufficient explanation of *which* evidence was relied on or *how* it was relied on, parties may be able to secure a remand. And on remand, the key for petitioners is to link evidence and legal conclusion explicit, and patent owners should explain how no such link is possible or supported.