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## Federal Circuit Patent Updates - January 2017

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***Cumberland Pharmaceuticals v. Mylan Institutional LLC* (No. 2016-115, -1259, 1/26/17) (Moore, Reyna, Taranto)**

January 26, 2017 1:12 PM

Taranto, J. Affirming decision that patent relating to acetylcysteine compositions is not invalid. The Court rejected defendant's derivation argument. "We have held that derivation is not proved by showing conception and communication of an idea different from the claimed invention even where that idea would make the claimed idea obvious."

A full version of the text is [available in PDF form](#).

***Tinnus Enterprises, LLC v. Telebrands Corporation* (No. 2016-1410, 1/24/17) (Moore, Wallach, Stoll)**

January 24, 2017 10:18 AM

Stoll, J. Affirming grant of preliminary injunction. After the district court granted patent owner's motion for preliminary injunction, the PTAB instituted review of a PGR and subsequently canceled the claims. "We are aware that the PTAB issued a Final Written Decision ... concluding that the [claims] are indefinite. The PTAB's decision is not binding on this court, and based on the record before us and the applicable standard of review, it does not persuade us that the district court abused its discretion in granting the preliminary injunction. The parties are, of course, free to ask the district court to reconsider its preliminary injunction in light of the PTAB's Decision." The Court also rejected defendant's obviousness arguments. "Because [defendant] did not object to the factual findings and legal conclusions in the [Magistrate's report and recommendation] relating to obviousness, we review the district court's obviousness analysis for plain error." Also, regarding infringement, the Court stated, "[we] are aware of no case law prohibiting a court from relying on product instructions to find direct infringement."

A full version of the text is [available in PDF form](#).

***Wi-Fi One, LLC v. Broadcom Corporation [En banc order consolidating cases for briefing and argument] (No. 2015-1944, -1946, 1/18/17) (Per Curiam)***

January 18, 2017 3:48 PM

Per Curiam. Order limiting parties to a single brief.

A full version of the text is [available in PDF form](#).

***Eli Lilly and Company v. Teva Parenteral Medicines (No. 2015-2067, 1/12/17) (Prost, Newman, Dyk)***

January 12, 2017 4:32 PM

Prost, C. J. Affirming judgment of induced infringement by an ANDA and no invalidity for indefiniteness, obviousness, or obviousness—type double patenting. “Depending on the clarity of the [proposed drug label] instructions, the decision to continue seeking FDA approval of those instructions may be sufficient evidence of specific intent to induce infringement. ...Conversely, ‘vague’ instructions that require one to ‘look outside the label to understand the alleged implicit encouragement’ do not, without more, induce infringement.” “[E]vidence that the product labeling that Defendants seek would inevitably lead some physicians to infringe [the method claims] establishes the requisite intent for inducement.”

A full version of the text is [available in PDF form](#).

***Phigenix, Inc. v. Immunogen, Inc. (No. 2016-1544, 1/9/17) (Dyk, Wallach, Hughes)***

January 9, 2017 1:50 PM

Wallach, J. Dismissing appeal from a PTAB decision in an inter partes review (IPR) that claims were nonobvious where the IPR petitioner/appellant did not establish that it had suffered an injury in fact from the PTAB decision and therefore lacked Article III standing in an appeal. “[N]ot every party will have Article III standing in an appeal from a PTAB final written decision.” 35 U.S.C. § 141(c), which provides that “[a] party to an inter partes review . . . who is dissatisfied with the final written decision of the [PTAB] . . . may appeal the [PTAB]’s decision” to the Federal Circuit, “does not necessarily establish that [the party] possesses Article III standing.” “Phigenix cannot base its injury in fact upon a violation of § 141(c) because it has been permitted to file its appeal, and the exercise of its right to appeal does not necessarily establish that it possesses Article III standing.” In this case, the IPR petitioner/appellant “does not contend that it faces risk of infringing the ‘856 patent, that it is an actual or prospective licensee of the patent, or that it otherwise plans to take any action that would implicate the patent,” and its assertions of increased competition and potential loss of licensing revenue as a result of the patent were not sufficiently established in the record to prove an injury in fact to support Article III standing.

A full version of the text is [available in PDF form](#).

***Walker v. Health International Corp. (No. 2015-1676, 1/6/17) (Reyna, Hughes, Stoll)***

January 6, 2017 9:40 AM

Reyna, J. Affirming award of sanctions against the plaintiff/appellant for vexatiously continuing to litigate after the parties settled all claims. Also finding the appeal frivolous as filed and argued and awarding sanctions on appeal against plaintiff/appellant and his counsel.

A full version of the text is [available in PDF form](#).

***Sonix Technology Co., Ltd. v. Publications International (No. 2016-1449, 1/5/17) (Lourie, O'Malley, Taranto)***

January 5, 2017 3:15 PM

Lourie, J. Reversing summary judgment of invalidity for indefiniteness. The claim term “visually negligible” did not render the claims indefinite. “The question whether something is 'visually negligible' or whether it interferes with a user's perception ... involves what can be seen by the normal human eye. This provides an objective baseline through which to interpret the claims. ... Thus, although the term may be a term of degree, it is not 'purely subjective'.” “The prosecution history ... supports that conclusion. No one involved in either the first or the second reexamination had any apparent difficulty in determining the scope of 'visually negligible.' During the first reexamination, SunPlus repeatedly argued that the prior art disclosed visually negligible graphical indicators without any apparent uncertainty as to the meaning or scope of the term, and no apparent difficulty applying it to the references at issue. ... During the second reexamination, the examiner was able to understand and apply the term in performing a search for prior art and make an initial rejection.” “Although ... application by the examiner and an expert do not, on their own, establish an objective standard, they nevertheless provide evidence that a skilled artisan did understand the scope of this invention with reasonable certainty.” “Appellees apparently understood the meaning of 'visually negligible' from the beginning of the litigation. Their initial invalidity contentions did not argue that the 'visually negligible' was indefinite, and neither did their final contentions. ... They initially argued for a specific construction of the term, but later abandoned their attempt in favor of an ordinary-meaning construction.”

A full version of the text is [available in PDF form](#).

***WI-FI One, LLC v. Broadcom Corporation (No. 2015-1944, 1/4/17) (en banc)***

January 4, 2017 9:27 AM

Per Curiam. Precedential order granting rehearing en banc to address the question of: “Should this court overrule *Achates Reference*

*Publishing, Inc. v. Apple Inc.*, 803 F.3d 652 (Fed. Cir. 2015) and hold that judicial review is available for a patent owner to challenge the PTO's determination that the petitioner satisfied the timeliness requirement of 35 U.S.C. § 315(b) governing the filing of petitions for inter partes review?”

WilmerHale represented the appellee Broadcom.

A full version of the text is [available in PDF form](#).

***In Re: Van OS (No. 2015-1975, 1/3/17) (Newman, Moore, Wallach)***

January 3, 2017 11:33 AM

Moore, J. Vacating PTAB affirmance of examiner's rejection of application claims and remanding. "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.' Such a conclusory assertion with no explanation is inadequate to support a finding that there would have been a motivation to combine." Newman, J., concurred in part and dissented in part.

A full version of the text is [available in PDF form](#).

***In Re: Ethicon, Inc. (No. 2015-1696, 1/3/17) (Newman, Lourie, Dyk)***

January 3, 2017 9:19 AM

Lourie, J. Affirming PTAB conclusion of obviousness in an inter partes reexamination. "The normal desire of artisans to improve upon what is already generally known can provide the motivation to optimize variables such as the percentage of a known polymer for use in a known device." Newman, J., dissented.

A full version of the text is [available in PDF form](#).