

Precedential Patent Case Decisions During March 2018

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I. Introduction

This paper abstracts what I believe to be the significant new points of law from the precedential decisions in patent cases this month. Cases captions relating to the PTAB are in red text. Case captions of extraordinary importance are in blue text.

II. Abstracts of New Points of Law

DSS Technology Management, Inc. v. Apple Inc., 2016-2523, 2016-2524 (Fed. Cir. 3/23/2018).

This is a decision on appeals from PTAB cases IPR2015-00369, IPR2015-00373. DSS appealed. The Federal Circuit reversed.

Legal issue, 35 USC 103, obviousness, reliance on common sense to provide a motivation to combine. Here, the Federal Circuit found that the PTAB's reliance upon common sense, was conclusory, and not supported by any evidence of record.

As we observed in *Arendi*, “common sense and common knowledge have their proper place in the obviousness inquiry,” at least “if explained with sufficient reasoning.” 832 F.3d at 1361 (quoting *Perfect Web Techs., Inc. v. InfoUSA, Inc.*, 587 F.3d 1324, 1328 (Fed. Cir. 2009)). “But,” we cautioned, “there are at least three caveats to note in applying ‘common sense’ in an obviousness analysis.” *Id.* “First, common sense is typically invoked to provide a known motivation to combine, not to supply a missing claim limitation.” *Id.* at 1361–62 (citing *DyStar Textilfarben GmbH & Co. Deutschland KG v. C.H. Patrick Co.*, 464 F.3d 1356, 1360, 1368, 1371 (Fed. Cir. 2006), and *Randall Mfg. v. Rea*, 733 F.3d 1355, 1356, 1363 (Fed. Cir. 2013)). Second, we have invoked common sense to fill in a missing limitation only when “the limitation in question was unusually simple and the technology particularly straightforward.” *Id.* at 1362 (citing *Perfect Web*, 587 F.3d at 1326). “Third, our cases repeatedly warn that references to ‘common sense’—whether to supply a motivation to combine or a missing limitation—cannot be used as a wholesale substitute for reasoned analysis and evidentiary support, especially when dealing with a limitation missing from the prior art references specified.” *Id.* [*DSS Technology Management, Inc. v. Apple Inc.*, 2016-2523, 2016-2524 (Fed. Cir. 3/23/2018).]

The Board’s invocation of “ordinary creativity” is no different from the reference to “common sense” that we considered in *Arendi*. *See id.* at 1361 (noting that the obviousness analysis should take into account “the knowledge, creativity, and common sense that an ordinarily skilled artisan would have brought to bear when considering combinations or modifications” (quoting

Randall, 733 F.3d at 1362)). Here, the Board relied on a gap-filler—“ordinary creativity” instead of “commonsense”—to supply a missing claim limitation. *Id.* at 1361. “In cases in which ‘common sense’ is used to supply a missing limitation, as distinct from a motivation to combine, . . . our search for a reasoned basis for resort to common sense must be searching.” *Id.* at 1363. The Board’s reliance on “ordinary creativity” calls for the same “searching” inquiry. [DSS Technology Management, Inc. v. Apple Inc., 2016-2523, 2016-2524 (Fed. Cir. 3/23/2018).]

With these precepts in mind, we find that the Board’s decisions do not satisfy the standard set forth in *Arendi*. The full extent of the Board’s analysis is contained in a single paragraph. *Apple I*, 2016 WL 3382361, at *15. After acknowledging that Natarajan does not disclose a base unit transmitter that uses the same power conservation technique, the Board concluded that a person of ordinary skill would have been motivated to modify Natarajan to incorporate such a technique into a base unit transmitter and that such a modification would have been within the skill of the ordinarily skilled artisan. *Id.* In reaching these conclusions, the Board made no further citation to the record. *Id.* It referred instead to the “ordinary creativity” of the skilled artisan. *Id.* (quoting *KSR*, 550 U.S. at 420–21). This is not enough to satisfy the *Arendi* standard. [DSS Technology Management, Inc. v. Apple Inc., 2016-2523, 2016-2524 (Fed. Cir. 3/23/2018).]

We also find “that this is not a case where a more reasoned explanation than that provided by the Board can be gleaned from the record.” *Id.* Dr. Hu’s testimony suffers from the serious deficiencies that we have discussed above, and Apple suggests no other evidence that might remedy those defects. Apple failed to meet its burden of establishing that the challenged claims of the ’290 patent were obvious. We therefore reverse the Board’s finding of unpatentability. [DSS Technology Management, Inc. v. Apple Inc., 2016-2523, 2016-2524 (Fed. Cir. 3/23/2018).]

Dell Inc. v. Accelaron, LLC, 2017-1101 (Fed. Cir. 3/19/2019).

This is a decision on an appeal from PTAB case IPR2013-00440. Dell appealed the PTAB’s remand determination not consider Dell’s new arguments, after remand from the Federal Circuit. The Federal Circuit affirmed.

Legal Issue, 5 USC 706, agency compliance with its rules. Here, Dell argued that the PTAB should have, on remand, considered its new argument first presented at oral hearing. One determinative fact was that such consideration would have been contrary to the PTAB’s rules, and therefore an APA violation.

The issue before the Board on remand was whether Hippi discloses “caddies” and therefore anticipates claim 3. Dell argues that the Board erred on remand because it should have considered its new “slides” argument and provided Accelaron an opportunity to address the argument. [Footnote 2 omitted.] Dell

reasons that the Board's failure to consider the "slides" argument was contrary to this court's precedent ... We disagree. *** The Board was obligated to dismiss Dell's untimely argument given that the untimely argument in this case was raised for the first time during oral argument. *See, e.g., Wagner v. United States*, 365 F.3d 1358, 1361 (Fed. Cir. 2004) (citing *Service v. Dulles*, 354 U.S. 363, 388 (1957)) ("[A]n agency is bound by its regulations."); *Crediford v. Shulkin*, 877 F.3d 1040, 1047 (Fed. Cir. 2017) (same). [*Dell Inc. v. Acceleron, LLC*, 2017-1101 (Fed. Cir. 3/19/2019).]

Hologic, Inc. v. Smith & Nephew, Inc., 2017-1389 (Fed. Cir. 3/14/2018).

This is a decision on an appeal from PTAB case 95/002,058. The PTAB found that Smith & Nephew's (S&N's) claim not obvious. Hologic appealed. The Federal Circuit affirmed.

S&N filed a division of a parent application. During prosecution of the division, S&N amended the specification by adding the underlined text in the following sentence. "A connection 8 for a light source is also present, for connection to a light guide, such as a fibre optics bundle which provides for lighting at the end of lens 13." Otherwise the two disclosures were substantively identical. The relevant claim language reads "the endoscope including ... elongated member defining discrete first and second channels...the first channel having a light guide permanently affixed therein."

Legal issue, 35 USC 112/120, written description support in a parent application. In analyzing the facts, the Federal Circuit explained the following principles for written description.

First, when "field of ...[the] invention is a predictable art, ... a lower level of detail is required to satisfy the written description requirement than for unpredictable arts. *See id.* at *13; *Ariad*, 598 F.3d at 1351."

Second, that when a claim term ("light guide") is generic to the disclosed species ("fibre optic bundle") and various other species were well known in the art, the disclosure provides written description support for a claim to the genus.

Third, that written description does not require that every claimed element be illustrated in the figures, particularly in predictable arts and where the element not depicted is conventional and not necessary for the understanding of the subject matter sought to be patented.

We must also address Hologic's argument that Figure 1a, which it alleges does not show illumination components, evidences that the inventor was not in possession of a "first channel having a light guide permanently affixed therein" at the relevant time. We disagree with Hologic's contention for at least two reasons. First, that the viewing channel does not depict a light guide or fibre optics is not dispositive. The written description does not require that every claimed element be illustrated in the figures, particularly in predictable arts and where the element not depicted is conventional and not "necessary for the understanding of the subject matter sought to be patented." 35 U.S.C. § 113 (requiring only that the "applicant shall furnish a drawing where necessary for the understanding of the subject matter sought to be patented"); see also 37 C.F.R. § 1.81(a) ("The applicant for a patent is required to furnish a drawing of the invention where

necessary for the understanding of the subject matter sought to be patented.”); *In re Hayes Microcomputer Prods., Inc. Patent Litig.*, 982 F.2d 1527, 1536 (Fed. Cir. 1992) (concluding substantial evidence supports the finding that a “microprocessor” illustrated in a figure was sufficient written description support for claimed timing means and other claim elements not depicted in figures). Moreover, the lack of an illumination component in Figure 1a does not undermine the strong evidence noted above that supports the Board’s finding that Emanuel PCT discloses a light guide in channel 6. [*Hologic, Inc. v. Smith & Nephew, Inc.*, 2017-1389 (Fed. Cir. 3/14/2018).]

Fourth, that express disclosure in the specification that some parts of an assembly have a property (not being "permanently affixed", that is being removable), coupled with no disclosure in the specification that a particular part has that property, supports a conclusion that the specification conveys that the particular part has that property (aka being "permanently affixed").

Finally, Hologic argues that the Board’s finding that Emanuel PCT reasonably conveys to a person of ordinary skill that the inventor had possession of a “permanently affixed” light guide lacks the support of substantial evidence. We disagree. Figure 1 of Emanuel PCT illustrates a cutting device 1 that may be assembled from multiple parts. Emanuel PCT at 4:15–16 (“Fig. 1 shows the endoscopic cutting device according to the invention in the assembled state.”) Specifically, cutting device 1 is assembled from three primary parts: (a) viewing/receiving part 3 (illustrated in Figure 2), (b) cutting part 2 (illustrated in Figures 4 and 5), and (c) insertion mandrel 40 (illustrated in Figure 6). *Id.* at 4:17–29. Emanuel PCT explains that cutting part 2 is removable. *Id.* at 8:3–8 (“Surgical endoscopic cutting device (1) . . . provided with a receiving part (5) . . . for receiving cutting means (2) . . .”). Similarly, insertion mandrel 40 is removable. *Id.* at 5:38–6:1 (“Mandrel 42 is then removed. . .”). Nowhere, however, does Emanuel PCT suggest that the fibre optics bundle of viewing/receiving part 3 is removable. [*Hologic, Inc. v. Smith & Nephew, Inc.*, 2017-1389 (Fed. Cir. 3/14/2018).]

[Nestle USA, Inc. v. Steuben Foods, Inc., 2017-1193 \(Fed. Cir. 3/13/2018\).](#)

This is a decision on an appeal from PTAB case IPR2015-00249. The PTAB found claim 9 nonobvious. Nestle appealed. The Federal Circuit vacated and remanded.

Legal issue, collateral estoppel, claim construction, related patents.

The Federal Circuit concluded that the issue of the construction of the word "aseptic" was the same as the issue of construction of "aseptic" that the Federal Circuit had decided in a prior case on a related patent. Since the PTAB's construction in the present appeal differed from the Federal Circuit's construction in the prior case, the Federal Circuit concluded that collateral estoppel applied to bar the new PTAB construction.

“Collateral estoppel protects a party from having to litigate issues that have been fully and fairly tried in a previous action and adversely resolved

against a party opponent.” *Ohio Willow Wood Co. v. Alps S., LLC*, 735F.3d 1333, 1342 (Fed. Cir. 2013). We apply our precedent on collateral estoppel when claim construction is involved. *Id.* “It is well established that collateral estoppel, also known as issue preclusion, applies in the administrative context.” *Maxlinear, Inc. v. CF CRESPE LLC*, 880 F.3d1373, 1376 (Fed. Cir. 2018). It is undisputed that the claims at issue in the two appeals use the term “aseptic” (or its related variation “aseptically disinfecting”) in a similar fashion. *** Neither party has pointed to any material difference between the two patents or their prosecution histories that would give rise to claim construction issues in this appeal different from those raised in the prior appeal. Accordingly, Steuben Foods has had a full and fair opportunity to litigate the issue of claim construction during the prior appeal. [*Nestle USA, Inc. v. Steuben Foods, Inc.*, 2017-1193 (Fed. Cir. 3/13/2018).]

The Federal Circuit stressed that it was identity of issues, not of patents, that was relevant.

It follows, therefore, that collateral estoppel protects Nestlé and obviates the need to revisit an issue that was already resolved against Steuben Foods. Importantly, our precedent makes clear that collateral estoppel is not limited “to patent claims that are identical. Rather, it is the identity of the issues that were litigated that determines whether collateral estoppel should apply.” *Ohio Willow Wood*, 735 F.3d at 1342; *see also Maxlinear*, 880F.3d at 1377. [*Nestle USA, Inc. v. Steuben Foods, Inc.*, 2017-1193 (Fed. Cir. 3/13/2018).]

[Steuben Foods, Inc. v. Nestle USA, Inc., 2017-1290 \(Fed. Cir. 3/13/2018\).](#)

This is a decision on an appeal from PTAB case IPR2015-00195. The PTAB found claims unpatentable for obviousness. Steuben appealed. The Federal Circuit affirmed.

Legal issue, 35 USC 112, claim construction. This is another case showing the deleterious (for the patent owner) impact of a poorly drafted claims. The beneficial invention appears to have been variation in gaseous concentrations of sterilant in chambers of an apparatus for aseptic packaging in which the concentrations of sterilant between the chambers was at least about 5 to 1. A fatal problem, at least for the claims on appeal, was that the claims did not specify gaseous. The relevant claim limitation is "the sterilant concentration levels in the plurality of zones are maintained at a ratio of at least about 5 to 1." The Federal Circuit agreed with the Board that the claims were not limited to determining the sterilant concentration in the gaseous medium.

Steuben Foods contends that the Board construed the term “sterilant concentration levels” so broadly as to read on the concentration of sterilant “at any point” within the sterilization zone, including the concentration of a random droplet on a container. Instead, Steuben Foods contends, the Board should have construed the term as “the amount of sterilant in the volume of pressurized gas within the zone.” [*Steuben Foods, Inc. v. Nestle USA, Inc.*, 2017-1290 (Fed. Cir.

3/13/2018).]

Steuben Foods' proposed construction, however, impermissibly restricts the claim term to a specific embodiment disclosed in the specification. While the specification refers to zones with "different concentration levels of gas laden sterilant (e.g., hydrogen peroxide in air)," '435 patent, col. 9 ll. 51–53, the specification also refers to residual concentration of hydrogen peroxide on the lids on the bottles, see, e.g., *id.* at col. 12 ll. 44–47, and on the surface of the bottles, see, e.g., *id.* at col. 11 ll. 15–17. Steuben Foods fails to point to any language in the claims or disclosure in the specification that supports its position that the claims are limited to the former but specifically excludes the latter. See also J.A. 14 (the Board finding that "neither the claims nor the specification limit how or where . . . the sterilant concentration levels should be assessed"). The broadest reasonable construction of "sterilant concentration levels" must, therefore, encompass both the "gas laden" (or "in air") sterilant levels as well as the residual sterilant levels on the lids of the bottles and the bottle surface, all of which are indisputably "in the plurality of zones" recited in the challenged claims. Accordingly, the Board's construction is not erroneous. [Steuben Foods, Inc. v. Nestle USA, Inc., 2017-1290 (Fed. Cir. 3/13/2018).]

Simpleair, Inc. v. Google LLC, 2016-2738 (Fed. Cir. 3/12/2018).

This is a decision on an appeal from the E.D. Tex district court case 2:16-cv-00488-JRG. Google moved to dismiss under FRCP 12(b)(6). The district court granted the motion. Simpleair appealed. The Federal Circuit vacated and remanded.

Legal issue, claim preclusion requirement of "the same cause of action." The Federal Circuit held that "where different patents are asserted in a first and second suit, a judgment in the first suit will trigger claim preclusion only if the scope of the asserted patent claims in the two suits is essentially the same."

The district court dismissed both complaints under Rule 12(b)(6) as barred by claim preclusion *** The only element of claim preclusion in dispute was whether the present case and the previous cases involved the same claim or cause of action. The district court held that they did because the '838 and '048 patents shared the same title and specification with the previously adjudicated continuation patents, and the filing of a terminal disclaimer to overcome the PTO's obviousness-type double patenting rejections indicated that the PTO believed the content of the patents in suit to be patentably indistinct from the earlier patents. *** In its order, the district court never compared the claims of the '838 and '048 patents to those of the previously adjudicated patents. *Id.* [Simpleair, Inc. v. Google LLC, 2016-2738 (Fed. Cir. 3/12/2018).]

"[W]hether a particular cause of action in a patent case is the same as or different from another cause of action has special application to patent cases, and we therefore apply our own law to that issue." *Senju*, 746 F.3d at 1348. Our cases

generally follow the Restatement (Second) of Judgments (1982) (hereinafter Restatement), which defines a cause of action based on the transactional facts from which it arises. *Senju*, 746 F.3d at 1349; *Acumed LLC v. Stryker Corp.*, 525 F.3d 1319, 1323–24 (Fed. Cir. 2008) (citing Restatement § 24); *see also Houston Prof'l Towing Ass'n v. City of Houston*, 812 F.3d 443, 447 (5th Cir. 2016) (also applying the Restatement's transactional test). In a patent suit, essential transactional facts include both the asserted patents and the accused activity. *Senju*, 746 F.3d at 1349; *Acumed*, 525 F.3d at 1324. If the overlap between the transactional facts of the suits is substantial, the later action should ordinarily be precluded. *See* Restatement § 24 cmt. b. However, what facts make up a transaction in a given case “is not capable of a mathematically precise definition.” *Id.* [*Simpleair, Inc. v. Google LLC*, 2016-2738 (Fed. Cir. 3/12/2018).]

As the accused activity between two cases must be “essentially the same” for claim preclusion to apply, *see Acumed*, 525 F.3d at 1324, we adopt that standard for comparison of the claims between asserted patents as well. Thus, where different patents are asserted in a first and second suit, a judgment in the first suit will trigger claim preclusion only if the scope of the asserted patent claims in the two suits is essentially the same. In applying that standard to the particular context here, we conclude that claims which are patentably indistinct are essentially the same. [*Simpleair, Inc. v. Google LLC*, 2016-2738 (Fed. Cir. 3/12/2018).]

Because the '838 and '048 patents issued after SimpleAir filed its complaints in *SimpleAir II* and *SimpleAir III*, SimpleAir contends that claim preclusion cannot bar SimpleAir from initiating a new suit based on those patents. But as discussed above...whether the '838 and '048 continuation patents present the same cause of action as previously litigated depends on the scope of their claims, not on their dates of issuance. [*Simpleair, Inc. v. Google LLC*, 2016-2738 (Fed. Cir. 3/12/2018).]

Comment: The Federal Circuit concluded above that in the "particular context" of this case, "essentially the same" meant "patentably indistinct." However, the Federal Circuit did not clearly define what this "particular context" was. That is, for example, whether the context was the district court's presumption that a terminal disclaimer meant that claims were patentably indistinct, or whether the context applied generally to patents related by continuation filings.

Snyders Heart Valve LLC v. St. Jude Medical S.C., Inc., 4:16-cv-00812-ALM-KPJ (E.D. Tex. 3/7/2018)(Magistrate Johnson).

St. Jude moved for summary judgement of improper venue. The magistrate recommended granting the motion.

Legal issue, 35 USC 1400(b), second prong, acts of infringement in the judicial district. The magistrate judge concluded that plaintiff had not met plaintiff's burden to show that facts adduced on discovery supported infringement within the judicial district. Therefore, the

magistrate recommended granting defendant's motion to dismiss. The kicker here is that the discovery showed that plaintiff's activity within the judicial district was activity covered by the 35 USC 271(a) safe harbor and therefore not infringing activity.

As previously explained, venue is proper under the second prong of § 1400(b) “where the defendant has committed acts of infringement and has a regular and established place of business.” Defendants argue that any sales of accused products that occurred in the District are subject to the safe harbor provision of 35 U.S.C. § 271(e)(1): *** Plaintiff has not alleged any facts showing activities in this District other than those statutorily exempted from infringement by § 271(e)(1). *** Based on the foregoing, the Court finds all acts of infringement in the Eastern District of Texas are solely clinical, and therefore, the § 271(e)(1) safe harbor applies despite purported non-exempt activity in Minnesota. *** For the foregoing reasons, the Court recommends that Defendants’ Motion for Summary Judgment of Improper Venue (Dkt. 178) be GRANTED. Because this recommendation renders venue in this District deficient, the Court would have no authority to transfer the case to the District of Minnesota. Therefore, the Court recommends the case be DISMISSED. [Snyders Heart Valve LLC v. St. Jude Medical S.C., Inc., 4:16-cv-00812-ALM-KPJ (E.D. Tex. 3/7/2018)(Magistrate Johnson).]

Chikezie Ottah v. Fiat Chrysler, 2017-1842 (Fed. Cir. 3/7/2018).

This is a decision on appeal from the S.D. NY case 1:15-cv-02465-LTS. The district court granted summary judgment of non-infringement for some defendants. The district court dismissed the complaint with prejudice as to several defendants. Ottah appealed. The Federal Circuit affirmed.

This decision would like have been decided a rule 36 affirmance, but for the fact that the plaintiff was pro se. The Federal Circuit explained that even pro se plaintiffs must make a plausible argument to survive summary judgement. In this case, that facts showed that the plaintiffs argument were far from plausible.

Ottah is a pro se plaintiff. *Pro se* complaints are “to be liberally construed, and . . . held to less stringent standards than formal pleadings drafted by lawyers.” *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (internal quotation marks and citation omitted). However, a *pro se* plaintiff must still meet minimal standards to avoid dismissal under Rule 12(b)(6). *See Walker v. Schult*, 717 F.3d 119, 124 (2d Cir. 2013) (“Where, as here, the complaint was filed *pro se*, it must be construed liberally to raise the strongest arguments it suggests. Nonetheless, a *pro se* complaint must state a plausible claim for relief.”) (internal citations, brackets, and quotation omitted); *see also Anderson v. Kimberly-Clark Corp.*, 570 F. App’x 927, 931–32 (Fed. Cir. 2014). [Chikezie Ottah v. Fiat Chrysler, 2017-1842 (Fed. Cir. 3/7/2018).]

But the Federal Circuit found that Ottah's arguments were not plausible, given the facts.

Ottah argues that the district court erred, and that the MTD Defendants' "back up camera" infringes claim 1. Ottah Reply Br. at 5. Ottah's only support for this argument are the general statements from the specification, quoted ante, that the book holder can hold items other than books, whereby cameras should be deemed the equivalent of books. However, claim 1 is explicitly limited to books, although Ottah states, and the specification supports, that other items may be supported by the book platform. The record suggests that the limitation of claim 1 to books served to limit the scope of examination to prior art book holders, as reflected in the prosecution history. Thus, the record negates access to equivalency of cameras and books. See *Johnson & Johnston Assocs. Inc. v. R.E. Serv. Co.*, 285 F.3d 1046, 1054 (Fed. Cir. 2002) (en banc) ("[A] patentee cannot narrowly claim an invention to avoid prosecution scrutiny by the PTO, and then, after patent issuance, use the doctrine of equivalents to establish infringement because the specification discloses equivalents."). The district court correctly found that the "book holder" cannot plausibly be construed to include or be the equivalent of a camera holder, in view of the specification and the prosecution history. [*Chikezie Ottah v. Fiat Chrysler*, 2017-1842 (Fed. Cir. 3/7/2018).]

Knowles Electronics LLC v. Cirrus Logic, 2016-2010 (Fed. Cir. 3/1/2018).

This is a decision on appeal from PTAB inter partes reexamination cases 95/000,509, 95/001,251, 95/001,363. The PTAB affirmed rejection of claims 1-4 for anticipation, and proposed claims 23-27 for lack of written descriptive support. Knowles appealed. The Federal Circuit affirmed. However, the opinion regarding anticipation and written description provides no new guiding principles.

Legal issue, waiver, contesting real party in interest. Two of the three reexamination requesters dropped out of the proceeding before the PTAB. The PTAB's replaced the third original petitioner Wolfson, with Cirrus. Before the Federal Circuit, Knowles moved under Federal Circuit Rule 27(e) to strike materials submitted by Cirrus. This motion depended upon Knowles argument that Knowles "was not allowed to contest" the entrance of Cirrus into the PTAB proceeding. The Federal Circuit noted that Knowles presented no evidence to support that contention, and therefore found that Knowles had waived the argument.

...Before the PTAB, Knowles only contested the Cirrus entities' participation at the oral hearing, not the decision to add the Cirrus entities to the inter partes reexamination. *** Although Knowles now argues that it was not allowed to contest the entry of appearance below, *id.* at 18:23-52, Knowles offers no evidence to support this statement. Only after the PTAB issued its decision on appeal and denial of a request for rehearing, and Knowles appealed to this court, did Knowles challenge the entry of the Cirrus entities as proper parties to the case. *** As such, we find this argument waived. [*Knowles Electronics LLC v. Cirrus Logic*, 2016-2010 (Fed. Cir. 3/1/2018).]

The moral of this story is to speak up and contest something the PTAB does, even when there is no clear rule based mechanism to do so.

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