***Thryv, Inc. v. Click-to-Call Techs.*, No. 18-916**

Today, the Supreme Court made it more difficult to challenge decisions of the U.S. Patent and Trademark Office (PTO) to institute inter partes review (IPR) proceedings. IPR allows challengers to have the PTO reexamine the validity of a holder's patents. Institution of IPR is subject to a one-year time bar under 35 U.S.C. § 315(b). The Supreme Court held, in a 7-2 decision, that a decision by the Patent Trial and Appeal Board (PTAB) that the institution of IPR proceedings is timely is "final and unappealable." 35 U.S.C. § 314(d).

Background: In 2013, Thryv sought IPR to challenge several of Click-to-Call's patents. The PTAB rejected Click-to-Call's argument that a 2001 infringement claim filed by another party rendered the IPR untimely because, the PTAB reasoned, that infringement claim had been dismissed with prejudice.

Click-to-Call appealed. The Federal Circuit initially dismissed for lack of jurisdiction, agreeing with Thryv and the PTO (which had intervened) that Section 314(d) precludes judicial review of the decision to institute IPR proceedings even on time-bar grounds. But after the en banc Federal Circuit held in *Wi-Fi One, LLC v. Broadcom Corp*. (2018) that time-bar challenges *are* subject to judicial review, the panel granted rehearing and held that the IPR to reconsider Click-to-Call's patents was untimely.

Issue: Whether the PTAB's decision to institute IPR proceedings based on a finding that the one-year statutory time bar is inapplicable is subject to judicial review.

Court's holding: In an opinion written by Justice Ginsburg, the Court held that parties cannot seek judicial review of the PTO's decision to institute IPR proceedings based on a timeliness objection. Section 314(d) provides that "the determination by the [PTO] Director whether to institute an inter partes review under this section" is "final and unappealable." And a challenge based on the one-year time bar in Section 315(b) is a decision "to institute an inter partes review."

The Court relied extensively on its 2016 decision in *Cuozzo Speed Technologies, LLC v. Lee*, No. 15-446. In *Cuozzo Speed*, the Court held that Section 314(d) precludes courts from considering whether the PTO correctly instituted IPR proceedings on grounds not raised by the patent challenger. According to *Cuozzo Speed*, Section 314(d) precludes judicial review for any matters "closely tied to the application and interpretation of statutes related to" the decision to institute IPR proceedings.

The Court reasoned that Section 315(b) "easily meets" the *Cuozzo Speed* standard. Because a decision on the applicability of the statutory time bar is closely tied to the decision whether to institute IPR, the Court held, PTAB decisions on the time-bar issue cannot be challenged in court. The Court noted, in a footnote, that it did not rule out mandamus "in an extraordinary case."

Justices Thomas and Alito joined all but a short section discussing the "purpose and design" of the statute.

Justice Gorsuch dissented. Along with Justice Sotomayor, he would have held that the text of Section 314(d) did not clearly preclude judicial review. And dissenting separately, he expressed concern about handing over judicial powers to executive agencies.