

Is the One Year Time Bar for Filing an IPR Subject to Appellate Review'

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PRACTICES Patent Office Trials, Intellectual Property

On May 4, 2017, the en banc Federal Circuit heard oral arguments in *Wi-Fi One, LLC v. Broadcom Corp.*, Appeal 2015-1944 (Fed. Cir. Sept. 16, 2016) to consider whether the findings of the Patent Trial & Appeals Board (“PTAB”) regarding 35 U.S.C. § 315(b), which governs the timeliness of filing a petition for *inter partes* review (“IPR”), are subject to judicial review on appeal. Specifically, the Federal Circuit is considering whether it should overrule its panel decision in *Achates Reference Publishing Inc. v. Apple Inc.* 803 F.3d, 652 (Fed. Cir. 2015), cert. dismissed, 136 S. Ct. 998 (2016) that judicial review is unavailable to challenge a determination by the PTAB that the petitioner satisfied the requirement of 35 U.S.C. § 315(b). Whether *Achates* is upheld or overruled will hinge on how broadly the Court construes the scope of 35 U.S.C. § 314(d).

Achates

In *Achates*, the Court held that it lacked jurisdiction to review a PTAB decision that a petition to institute an IPR was not time barred because such decisions “are final and nonappealable under 35 U.S.C. § 314(d).” *Achates* at 653. In particular, the Court held that, similar to their holding in *In re Cuozzo Speed Techs., LLC*, 793 F.3d 1268 (Fed. Cir. 2015), judicial review was precluded because “the § 315(b) time bar does not impact the Board’s authority to invalidate a patent claim — it only bars particular petitioners from challenging the claim.” *Achates* at 657. According to the Court, the time bar is also not a “‘defining characteristic’ of the Board’s ‘authority to invalidate’ a patent.” *Id.* The Court further held that 35 U.S.C. § 314(d) is properly construed as not limiting preclusion of judicial review to determinations “under this section,” but as extending the preclusion to 35 U.S.C. § 315(b), and that review is precluded even if the determination is reconsidered during the merits phase and restated in the final written decision. *Id.* at 658.

To read the full alert, click on the PDF linked below.

[Is-the-One-Year-Time-Bar-for-Filing-an-IPR-Subject-to-Appellate-Review.PDF](#)