WI-FI One, LLC v. BROADCOM CORP., Appeal No. 2015-1944-46 (Fed. Cir. January 8, 2018) (*en banc*, 8-4, Reyna). Appealed from the U.S. Patent and Trademark Office.

Background:

Broadcom filed three *inter partes* reviews (IPRs) against three patents owned by Ericson, which subsequently transferred ownership to Wi-Fi One. Prior to the IPR filings, Ericson was involved in an infringement litigation involving the three patents. During the IPRs, Wi-Fi One argued that the IPRs were time-barred under 35 U.S.C. §315(b) because Ericson had already asserted the patents against defendants who were in privy with Broadcom more than one year prior to filing the petitions in the IPRs. The Board disagreed and instituted the IPRs.

Under §315(b), "an *inter partes* review may not be instituted if the petition requesting the proceeding is filed more than 1 year after the date on which the petitioner, real party in interest, or privy of the petitioner is served with a complaint alleging infringement of the patent." In *Achates Reference Publishing, Inc. v. Apple Inc.*, 803 F.3d 652 (Fed. Cir. 2015), the Federal Circuit held that a §315(b) time-bar determination is final and nonappealable under 35 U.S.C. §314(d).

Subsequent to the Federal Circuit's decision in *Achates*, the Supreme Court decided *Cuozzo Speed Technologies, LLC v. Lee*, 136 S. Ct. 2131 (2016), in which the Court held that §314(d) bars judicial review of a Board determination that an IPR petition sufficiently pleaded the grounds of unpatentability with particularity. The Court acknowledged that case precedent favors a strong presumption in favor of judicial review of agency decisions, but that such a presumption could be overcome by clear and convincing indications of Congress's intent to bar judicial review. The Court held that Congress clearly intended to bar judicial review of the Board's determination of the particularity of an IPR petition.

In light of the holdings of *Achates* and *Cuozzo*, the Federal Circuit denied Wi-Fi One's appeal of the Board's decision that the IPRs were not time-barred under §315(b). Wi-Fi One petitioned for rehearing *en banc*, which was granted.

Issue/Holding:

Is the Board's decision that an IPR is not time-barred under §315(b) subject to judicial review? - Yes, reversed and remanded.

Discussion:

The Federal Circuit held that time-bar determinations by the Board under §315(b) are subject to judicial review because there is no clear and convincing indication by Congress to bar judicial review. The Federal Circuit, quoting the Supreme Court's *Cuozzo* decision, emphasized that judicial review should only be abdicated when Congress provides a clear and convincing indication that Congress intends to prohibit review.

The Federal Circuit reviewed and analyzed the specific statutory language in the AIA, the specific legislative history of the AIA, and the statutory scheme of the AIA as a whole. The Federal Circuit found that the Congress did not provide a clear and convincing indication that judicial review of §315(b)'s time-bar determination is prohibited. Unlike the requirement of particularity in an IPR petition, which was clearly indicated to be barred from judicial review, §315(b)'s timeliness requirement is a statutory limit on the Patent Office's authority and is the type of issue that has been historically subject to judicial review.