

# Direct Appeals to the Federal Circuit: The Exclusive Avenue for Challenging the Final Written Decision of an Inter Partes Review

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In a recent ruling in [\*Personal Audio, LLC v. CBS Corp.\*](#), the Federal Circuit affirmed the District Court's final judgment, which reversed a prior \$1.3 Million jury verdict in Plaintiff's favor. It found Personal Audio's constitutional arguments raised in its appeal to the Federal Circuit were barred by its prior appeal of the US Patent and Trial Appeal Board's ("the Board") final written decision finding the asserted claims invalid.

As background, Personal Audio asserted US Patent No. 8,112,504 ("the '504 patent") against CBS Corporation in the District Court for the Eastern District of Texas in 2013. In October 2013, a third party, Electronic Frontier Foundation ("EFF"), petitioned for *inter partes* review (IPR) of claims 31–35 of the '504 patent. The Board instituted a review in April 2014. During the pendency of the IPR, the District Court tried the case and in September 2014, a jury found CBS had infringed claims 31-34 and rejected arguments from CBS that such claims were invalid. The jury further awarded Personal Audio \$1.3 million in damages.

Several months after the Jury's verdict, the Board issued a final written decision ("Decision"), on April 10, 2015. This Decision found claims 31-35 to be unpatentable. Personal Audio requested a re-hearing with the Board, to challenge the Decision on several constitutional grounds.

The Board denied Panel Audio's request. The parties to the litigation agreed to stay the District Court proceedings while Personal Audio appealed the Board's decision to the Federal Circuit, arguing that the Board's Decision violated the Seventh Amendment, which provides that:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

The Federal Circuit affirmed the Board's Decision on August 7, 2017, and the Supreme Court refused Panel Audio's request to review the Federal Circuit's decision.

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In December 2017, Personal Audio agreed to judgment against it in the District Court because it conceded that “current authority supports rendering a judgment in favor of the Defendant CBS.” Accordingly, the District Court entered judgment for CBS Corp on July 11, 2018. A week later, the US Patent and Trademark Office issued a certificate cancelling claims 31-35 of the ’504 patent.

Personal Audio then appealed the District Court’s decision to the Federal Circuit, presenting constitutional arguments that were not raised in its prior 2017 appeal to the Federal Circuit. Personal Audio argued that the Decision violated:

the Reexamination Clause of the Seventh Amendment, the Ex Post Facto Clause of Article I, the Takings Clause of the Fifth Amendment, and the Due Process Clause of the Fifth Amendment.

In response, the Federal Circuit noted that

[t]he exclusive vehicle for bringing such challenges is a direct appeal to this court from the final written decision.

The Federal Circuit further noted that

Congress’s affirmative grant of an exclusive, direct-review procedure for final written decisions deprives the district court of jurisdiction to hear Personal Audio’s collateral attack on the final written decision in this case.

Personal Audio also attempted to dress up its new constructional arguments as a challenge to the District Court’s final ruling based on the Board’s Decision.

In response, the Federal Circuit stated that

[t]he panel lacks authority to reconsider the precedent that Personal Audio agrees was adverse and controlling. Only the *en banc* court may reconsider this precedent within this court.

In addition, the Federal Circuit noted that Personal Audio “forfeited any argument that our existing precedent is not determinative against it” because it agreed that “current authority supports rendering a judgment in favor of the Defendant CBS” and that “there is no current precedent for doing otherwise at this time.” Thus, Personal Audio could not challenge the District Court’s ruling.

This case reminds practitioners that the Federal Circuit remains the exclusive venue for challenging an adverse final written IPR decisions by the Board and all properly preserved challenges to such decisions must be adjudicated by a direct appeal of to the Federal Circuit. Challenges to or collateral attacks of the adverse final written IPR decisions from the Board in a District Court will be futile and so will an appellate review of such District Court decisions.

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