

No. 17-558

In the Supreme Court of the United States

LINKGINE, INC., PETITIONER

v.

VIGLINK, INC., ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT*

BRIEF FOR THE FEDERAL RESPONDENT

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QUESTION PRESENTED

Whether post-grant review of covered business method patents comports with Article III and the Seventh Amendment.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1-2) is not reported in the Federal Reporter but is available at 689 Fed. Appx. 965. The final decisions of the Patent Trial and Appeal Board (Pet. App. 3-32, 33-69) are not reported in the United States Patents Quarterly.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1-2) was entered on May 11, 2017. A petition for rehearing was denied on June 12, 2017 (Pet. App. 70-71). On September 8, 2017, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including October 11, 2017. The petition was filed on October 10, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress has created several mechanisms that allow the United States Patent and Trademark Office (USPTO) “to reexamine—and perhaps cancel—a patent claim that it had previously allowed.” *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2137 (2016). In 1980, Congress created *ex parte* reexamination, under which any person may request reexamination of a United States patent on the basis of qualifying prior art. 35 U.S.C. 301, 302; see Act of Dec. 12, 1980, Pub. L. No. 96-517, 94 Stat. 3015 (35 U.S.C. Ch. 30). If the Director of the USPTO finds that such a request raises a “substantial new question of patentability affecting any claim,” a patent examiner reexamines the patent “according to the procedures established for initial examination.” 35 U.S.C. 303(a), 305; see 35 U.S.C. 304.

Congress later created “another, similar procedure, known as ‘*inter partes reexamination*.’” *Cuozzo*, 136 S. Ct. at 2137; see 35 U.S.C. 311-318 (2000). The USPTO could institute an *inter partes* reexamination based on a third party’s petition that raised “a substantial new question of patentability” regarding an existing patent. 35 U.S.C. 312(a) (2000); see 35 U.S.C. 313 (2000). *Inter partes* reexamination differed from *ex parte* reexamination in that the third-party petitioner could participate in the *inter partes* proceeding and, after 2002, in any subsequent appeal. See *Cuozzo*, 136 S. Ct. at 2137; *Cooper Techs. Co. v. Dudas*, 536 F.3d 1330, 1332 (Fed. Cir. 2008).

In 2011, Congress enacted the Leahy-Smith America Invents Act (AIA), Pub. L. No. 112-29, 125 Stat. 284, which created several new mechanisms for post-issuance patent review. The AIA replaced *inter partes* reexamination with *inter partes* review, see *Cuozzo*, 136 S. Ct. 2137. Under the AIA, third parties may seek *inter*

partes review of any patent more than nine months after the patent's issuance on the ground that the patent is invalid based on lack of novelty or obviousness. 35 U.S.C. 311(b). The Director of the USPTO may institute an inter partes review if he determines that "there is a reasonable likelihood that the petitioner would prevail" with respect to at least one of its challenges to patent validity, 35 U.S.C. 314(a), and if no other provision of the AIA bars institution under the circumstances.

The AIA created another review mechanism, known as post-grant review, for challenges brought within nine months of patent issuance. 35 U.S.C. 321(e). Any person other than the patent owner may petition for post-grant review, which the Director may institute if he determines that the petition "demonstrate[s] that it is more likely than not that at least 1 of the claims challenged in the petition is unpatentable," or that the "petition raises a novel or unsettled legal question that is important to other patents or patent applications." 35 U.S.C. 324(a)-(b). The petitioner in a post-grant review proceeding may challenge a patent on any ground of invalidity. See 35 U.S.C. 321(b).

In addition, in an uncodified portion of the AIA, Congress created a "transitional post-grant review proceeding for review of the validity of covered business method patents," known as covered business method (CBM) review. AIA § 18, 125 Stat. 329. Only a person who has "been sued for infringement of the patent or has been charged with infringement under that patent" may petition to institute a CBM review. § 18(a)(1)(B), 125 Stat. 330. The Director may institute a CBM review at any time during the term of the patent. See § 18(a)(1)(B), (E), and (d), 125 Stat. 330-331. In other respects, the

CBM procedure is to “be regarded as, and shall employ the standards and procedures of, a post-grant review.” § 18(a)(1), 125 Stat. 329. The CBM review program is set to expire in 2020—eight years after the Director issued regulations implementing the process. See § 18(a)(3)(A), 125 Stat. 330.

2. Petitioner owns U.S. Patent Nos. 7,818,214 (the ’214 patent) and 8,027,883 (the ’883 patent), which relate to a method for offering financial incentives to third parties who drive purchasers to commercial websites. Pet. App. 5-8, 35-38. In May 2014, petitioner sued respondents VigLink, Inc., Skimlinks, Inc., and Skimbit, Ltd., for infringement of both patents. See *Linkgine, Inc. v. VigLink, Inc.*, No. 14-cv-570 (E.D. Va. filed May 16, 2014); *Linkgine, Inc. v. Skimlinks, Inc.*, No. 14-cv-571 (E.D. Va. filed May 16, 2014). Those three respondents petitioned for CBM review of the patents, and the Patent Trial and Appeal Board (PTAB) instituted CBM reviews. Pet. App. 4, 34.

The PTAB issued two final written decisions canceling the challenged patent claims. Pet. App. 3-32, 33-69. The PTAB concluded that the challenged claims were directed to the abstract idea of allocating commissions, *id.* at 16-17, 46-47, and that the patents were therefore directed to unpatentable subject matter under 35 U.S.C. 101, Pet. App. 20, 50. The PTAB further concluded that the challenged claims were anticipated by prior art, and were therefore also unpatentable under 35 U.S.C. 102. Pet. App. 20-30, 51-68.

Petitioner appealed to the Federal Circuit, challenging the Board’s patentability determinations and alleging that CBM review violates Article III and the Seventh Amendment. Following oral argument, the Federal Circuit affirmed. Pet. App. 1-2.

DISCUSSION

Petitioner contends (Pet. 9-35) that CBM review violates Article III and the Seventh Amendment. On June 12, 2017, this Court granted a petition for a writ of certiorari in *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, No. 16-712 (argued Nov. 27, 2017), to decide whether inter partes review violates Article III or the Seventh Amendment. In the present case, the USPTO invalidated claims in the '214 and '883 patents through CBM review, not inter partes review, but this Court's decision in *Oil States* could inform the resolution of any Article III or Seventh Amendment challenge to CBM review. Accordingly, the Court should hold the petition in this case pending the decision in *Oil States* and then dispose of the petition as appropriate in light of that decision.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, No. 16-712, and then disposed of as appropriate in light of that decision.

Respectfully submitted.

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