

No. 18-916

**In The
Supreme Court of the United States**

—◆—
DEX MEDIA, INC.,

Petitioner,

v.

CLICK-TO-CALL TECHNOLOGIES, LP, et al.,

Respondents.

—◆—
**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit**

—◆—
**BRIEF OF FRONTIER COMMUNICATIONS
CORPORATION AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER**

—◆—
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**BRIEF OF FRONTIER COMMUNICATIONS
CORPORATION AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER**



INTEREST OF THE *AMICUS CURIAE*¹

Frontier Communications Corporation (Frontier), through its operating subsidiaries, is a leading provider of business and residential communications services—data, internet, video, voice, network—with over 4.5 million customers, 3.5 million broadband subscribers, and 21,000 employees in 29 states. Frontier was incorporated in 1935 and is publicly traded.

Frontier participates in patent litigation as both a plaintiff and a defendant, as a patent holder and an accused infringer. Frontier thus has a strong interest in the correct interpretation of the patent laws, and in ensuring that those laws strike a proper balance between promoting innovation and protecting competition. As a defendant, Frontier is often the target of non-practicing entities who sue on the hopes of extracting nuisance settlements based on patents that should have never been granted in the first place. *Inter partes* review (IPR) is an efficient and valuable tool to weed

¹ Frontier certifies under Supreme Court Rule 37.2(b) that counsel for both petitioner and respondents received timely notice of Frontier's intent to file an *amicus curiae* brief, and all granted consent. No counsel for a party wrote this brief in whole or in part, and no person other than the *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund its preparation or submission.

out bad patents more quickly and cost-effectively than litigation.

Issue two in the petition for a writ of certiorari presents the important and recurring question of whether the one-year time bar under 35 U.S.C. §315(b) means just what it says: that an IPR “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.” Here, in 2012 petitioner was “served with a complaint alleging infringement of the patent.” Not more than one year after the date of service of that complaint—“*a* complaint”—petitioner filed an IPR request. That should be the beginning and the end of the inquiry. The fact that an earlier complaint was served and voluntarily dismissed without prejudice is immaterial.

The majority, concurrence, and dissent below, as well as the Patent Trial and Appeal Board (PTAB) and the parties—including in the petition for a writ of certiorari—missed the mark on this straightforward resolution. This Court need not “look further” than the words of §315(b), nor does the Patent Office’s interpretation of that provision require deference. Petition (Pet.) 21-23. The bottom line is, a second complaint is “a complaint,” and an IPR request made not more than one year after service of that complaint should be deemed timely under the plain language of §315(b).

If unreviewed by this Court, *Click-to-Call* will be a call-to-arms for patent trolls to game the system, using what Justice Scalia described as their “in terrorem power.” The dissent below highlighted that likelihood, noting that the Federal Circuit’s incorrect holding allows patent plaintiffs “to manipulate the filing of infringement actions in order to bar a future IPR challenge,” defeating the purposes of §315(b). Petition Appendix (Pet. App.) 105a. IPR is supposed to be a shield to protect the public against erroneously granted patent monopolies, not a sword for patent trolls to manipulate the system. Frontier therefore files this brief to offer its views, as an experienced patent litigant, on an important mechanism for ensuring a reliable and fair patent system.



SUMMARY OF ARGUMENT

With a seemingly modest footnote, the en banc Federal Circuit, over two dissenters, dropkicked the plain language of 35 U.S.C. §315(b) out of the jurisprudential stadium. That action epitomizes Professor Mellinkoff’s observation that “law that one hesitates to flaunt above the line sneaks into the footnote.” David Mellinkoff, *Legal Writing: Sense And Nonsense* 94 (1982).

In 2012, petitioner was “served with a complaint” alleging infringement of a patent. Not more than one year later, petitioner did exactly what §315(b) allows: it requested an IPR. Nothing more, nothing less.

The Federal Circuit nevertheless held petitioner’s IPR request was untimely. Focusing on the words “served” and “complaint,” and without discussing the meaning or effect of the word “a,” the court concluded that an IPR request made within one year of service of a complaint was barred because a complaint on the same patent against petitioner’s predecessor had been served and voluntarily dismissed without prejudice many years earlier. That is, the Federal Circuit held that the IPR request was barred because it was made more than one year after service of *the first* complaint. But an IPR request indisputably was made not more than one year after service of *the second* complaint—“*a* complaint.” The plain and unambiguous language of §315(b) required nothing more.

This case presents the best and earliest opportunity for this Court to head IPR manipulation off at the pass. The Federal Circuit’s erroneous interpretation of §315(b) is a recipe for mischief, to put it mildly, giving perverse incentives to both patent owners and accused infringers, and harming the public. Under the ruling below, patent trolls are strongly incentivized to manipulate the filing of complaints to bar future IPRs, while accused companies are forced to choose between filing costly IPR petitions even after the immediate threat of litigation has subsided, or run the risk that wily plaintiffs will resurface in a year when an IPR is no longer available. And since the Federal Circuit has exclusive appellate jurisdiction over such matters, 28 U.S.C. §1295, and because it decided this issue en banc, litigants have no avenue of relief other than to this

Court. Immediate intervention by this Court is needed to protect the integrity of the IPR system.

◆

ARGUMENT

The full Federal Circuit’s flawed footnote has, in the words of the late Judge Abner Mikva, “acquired its full capacity for mischief.” Abner Mikva, *Goodbye to Footnotes*, 56 COLO. L. REV. 647, 648 (1985). It mistakenly framed the issue as follows:

“The en banc court formed of PROST, *Chief Judge*, NEWMAN, LOURIE, DYK, MOORE, O’MALLEY, REYNA, WALLACH, TARANTO, CHEN, HUGHES, and STOLL, *Circuit Judges*, considered whether 35 U.S.C. §315(b)’s time bar applies to bar institution when an IPR petition was served with a complaint for patent infringement more than one year before filing its petition, but the district court action in which the petitioner was so served was voluntarily dismissed without prejudice. The en banc court holds that §315(b)’s time bar applies in such a scenario.”

Pet. App. 43a n.3. Petitioner likewise incorrectly frames the question by focusing on the *first* complaint, and whether an IPR request was made more than one year after service of *it*. Pet. at i (“Whether 35 U.S.C. §315(b) bars institution of an inter partes review when the previously served patent infringement complaint, filed more than one year before the IPR petition, had been dismissed without prejudice.”). Section 315(b) merely asks, however, if an IPR request was made

more than one year after service of “a complaint”—in this case, a second complaint.

I. “A COMPLAINT” MEANS “A COMPLAINT”

1. Title 35 U.S.C. §315(b) provides that an IPR “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.” Here, petitioner’s IPR request was *not* made more than one year after being “served with a complaint” alleging infringement of the patent in 2012. Pet. App. 37a. The Federal Circuit mistakenly focused on the words “served” and “complaint,” which it deemed “the operative terms,” and did not discuss the meaning or effect of the word “a.” *See* Pet. App. 47a (“The ordinary, contemporary, common meaning[s] of the operative terms ‘served’ and ‘complaint’ support the understanding that it is wholly irrelevant to the §315(b) inquiry whether the civil action in which the complaint was filed is later voluntarily dismissed without prejudice.”). The court misapprehended the text of §315(b), “conclud[ing] that a defendant served with a complaint as part of a civil action that is voluntarily dismissed without prejudice remains ‘served’ with *the* ‘complaint.’” Pet. App. 60a (emphasis added).

But §315(b) does not say that an IPR request must be made not more than one year after service of “*the original* complaint” or “*the* complaint”; rather, it says “*a* complaint.” *Compare* FED. R. CIV. P. 3

“A civil action is commenced by filing *a* complaint with the court.” (emphasis added), *with* FED. R. CIV. P. 5(a)(1)(B) (“In General. Unless these rules provide otherwise, each of the following papers must be served on every party . . . (B) a pleading filed after *the original* complaint. . . .”) (emphasis added). “A” as used in §315(b) is an indefinite article, which means “not any particular or certain one of a class or group.” www.dictionary.com/browse/a. As Strunk and White point out, “[t]he definite article *the* refers to a particular item: *the* report. The indefinite articles *a* and *an* refer to a general item or one not already mentioned: *an* apple.” William Strunk, Jr. & E.B. White, *ELEMENTS OF STYLE*, 90, 4th ed., Pearson (1999) (glossary).

A second complaint, it should go without saying, is “a complaint” too. “Served with a complaint” in §315(b) thus cannot be cabined to a first complaint that has been voluntarily dismissed. Accordingly, if a plaintiff chooses to dismiss an original complaint without prejudice and serve a new complaint at a later point in time, §315(b) dictates that the IPR clock should start again, and that the accused infringer has one year from service of that new complaint—“a complaint”—to request an IPR.

2. The distinction Congress drew between 35 U.S.C. §§315(a) and 315(b), both enacted at the same time, supports the reading Frontier advances. Under §315(a), a party forfeits any right to an IPR if it initiates its own lawsuit challenging the patent’s validity (such as an action for declaratory relief under 28 U.S.C. §2201) before petitioning for an IPR. Section 315(a)

provides: “An inter partes review may not be instituted if, before the date on which the petition for such a review is filed, the petitioner or real party in interest filed a civil action challenging the validity of a claim of the patent.” 35 U.S.C. §315(a). Congress determined that, having made a strategic choice to initiate litigation to test the validity of a threatened patent in court, a party ought not have a second bite at the validity apple in an IPR. Section 315(a) thus has no one-year (or other) time bar; rather, if at any point prior to requesting an IPR an accused infringer files a declaratory judgment civil action challenging the patent’s validity, it forever foregoes the right to an IPR.

The one-year time bar of §315(b) reflects that Congress struck a different balance in protecting the interests of both the accused infringer and the patent owner. Unlike §315(a), which looks to the *past* and to the *alleged infringer’s* choice to initiate litigation, §315(b) looks *forward* and focuses on the *patent owner’s* decision to file and serve a complaint. Under §315(b), then, an IPR request is barred if it is made more than one year after the service of “a complaint,” the timing of which is controlled by the patent holder. That important point bears emphasis: it is the plaintiff’s choice—not the accused infringer’s—whether and when to file and serve a complaint, just as it is a plaintiff’s unilateral decision and right to dismiss its complaint without prejudice before a defendant has answered or moved for summary judgment. *See* FED. R. CIV. P. 41(a)(1)(A)(i) & 41(a)(1)(B).

The majority below rightly noted that “the core function of service is to supply notice of the pendency of legal action, in a manner and at a time that affords the defendant a fair opportunity to answer the complaint and present defenses and objections.” Pet. App. 50a-51a (quoting *Henderson v. United States*, 517 U.S. 654, 672 (1996) (Federal Circuit’s emphasis deleted)). Once a complaint is dismissed, however, no legal action is pending, and there is no existing opportunity or need to answer the charges or present defenses.

Similarly, after the dismissal of a complaint, the need for a one-year time period within which to evaluate a patent’s validity and to prepare an IPR request is obviated because the imminent threat of litigation has been alleviated. Section 315(b) cannot be fairly construed in effect to *require* a threatened infringer to petition for IPR within one year of service of a dismissed complaint and in the absence of pending litigation. Above and beyond being incorrect, such a construction would be equal parts unfair and inefficient, forcing a company to expend significant resources on a hypothetical dispute and burdening the Patent Office with IPR requests that otherwise likely would not be filed in the absence of pending litigation. The data shows that “[m]ost patents challenged at the PTAB are also in Article III litigation—PTAB petitions on patents that are not being litigated by an entity in an Article III court are relatively rare.” Saurabh Vishnubhakat, Arti K. Rai & Jay P. Kesan, *Strategic Decision Making in Dual PTAB and District Court*

Proceedings, 31 BERKELEY TECH. L.J. 45, 84 (2016); see also *id.* at 108 (Fig. 15b).

After a patent owner has chosen to dismiss its own complaint, moreover, the one-year time bar is no longer necessary to protect *it* from the perpetual uncertainty of an IPR request after suing. That is, the balance Congress reached in §315(b) by providing certainty to a patent owner—that after one year its lawsuit will proceed without the risk of a stay due to an IPR—is no longer at issue if the plaintiff has dismissed its complaint. See generally Joel Sayres & Julie Wahlstrand, *To Stay or Not to Stay Pending IPR? That Should be a Simpler Question*, 17 Chi. -Kent J. Intell. Prop. | PTAB Bar Assoc. 52 (2018) (discussing the variation and inconsistency in application of the stay factors).

At bottom, Congress did not intend in §315(b) to bestow a get-out-of-IPR-jail-free card on a patent plaintiff who has made the voluntary and strategic decision to dismiss its own complaint without prejudice. There is no good reason to give a patent owner the benefit of §315(b)'s one-year time bar in such a circumstance, leaving a potentially bad patent on the books to the detriment of the public.

II. CLICK-TO-CALL IS A CALL-TO-ARMS FOR PATENT TROLLS TO GAME THE SYSTEM

1. While in the original Norwegian folktale the danger was to be eaten by a goblin, the real-life threat patent trolls pose is no myth, consuming hard-earned revenues from law-abiding companies. See Peter

Christen Ashbjørnsen and Jørgen Moe, “The Three Billy Goats Gruff” (1859) (De tre bukkene Bruse som skulle gå til seters og gjøre seg fete) translated by Sir George Dasent (1859), adapted by Elizabeth Hastings, RANDOM HOUSE LTD. (1992). “This Court is well aware that an ‘industry has developed in which firms use patents not as a basis for producing and selling goods but, instead, primarily for obtaining licensing fees.’” *Commil USA, LLC v. Cisco Systems, Inc.*, 135 S. Ct. 1920, 1930 (2015) (quoting *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 396 (2006) (Kennedy, J., concurring)); see also *id.* at 1932 (Scalia, J., dissenting) (discussing “the in terrorem power of patent trolls”).

If unreviewed by this Court, *Click-to-Call* is sure to be a call-to-arms for patent trolls to game the system. As the dissent below explained, the Federal Circuit’s holding gives patent owners “an incentive to file suits alleging infringement and subsequently voluntarily dismiss these suits without prejudice after service of a complaint.” Pet. App. 105a (Dyk, Circuit Judge, dissenting). “[T]he purposes of 315(b) will be defeated,” the dissent observed, “if the patentee plaintiff is allowed to manipulate the filing of infringement actions in order to bar a future IPR challenge.” *Id.* IPR is not supposed to be a sword for patent trolls to abuse the system, but rather a shield to protect the public against erroneously granted patent monopolies by allowing a second administrative look at them. *Oil States Energy Services, LLC v. Greene’s Energy Group, LLC*, 138 S. Ct. 1365, 1374 (2018); *Cuozzo Speed Technologies, LLC v. Lee*, 136 S. Ct. 2131, 2144 (2016).

The Federal Circuit’s erroneous interpretation of §315(b) further incentivizes trolls to exact unfair tolls on companies who seek nothing other than legitimate passage over the bridge of everyday commerce. An accused company must now balance the risk that a patent troll might resurface a year after serving and then dismissing its complaint without prejudice—when under the Federal Circuit’s reasoning an IPR is no longer available—against the substantial cost of initiating an IPR even though the immediate danger of litigation has been alleviated. In a business environment in which budgets are tight and future risks (even if real) are understandably discounted, patent trolls will assuredly engage in still more devious pay-me-now-or-pay-me-later behavior. Congress could not have intended—and did not intend—for §315(b) to be a tool for trolls to play the system in this way, holding accused companies in IPR purgatory for a year and thereafter allowing improvidently granted patents to be used as a weapon against them.

2. For even the weakest claim of patent infringement, accused companies face a choice: fight the case in court at an average cost of millions of dollars in legal fees; seek to invalidate the patent with an IPR petition, which is faster and cheaper than litigation but which soup to nuts still costs hundreds of thousands of dollars, www.rpxcorp.com/intelligence/blog/iprs-balancing-effectiveness-vs-cost/; or pay a nuisance amount to settle the case, which may prove economical in the short run but encourages other trolls (or the same troll later, with another patent portfolio) to go after the perceived “easy target.” Sometimes, a troll will simply go away

forever if a quick and easy payoff seems unlikely, particularly if it knows the patent is vulnerable to an IPR challenge.

No longer. After *Click-to-Call*, no patent troll worth its salt will walk away forever knowing that its chances for extracting a nuisance settlement will increase one year later when the threat of an IPR has been removed.

Exacerbating the problem is the fact that trolls buy and sell patents on a lively secondary market. In fact, websites dedicated to such activity exist. *See, e.g.*, <https://www.patentauction.com>. The patent in this case exchanged hands several times over the course of a decade through various corporate acquisitions, only to be sold as an asset to respondent, who then sued petitioner in Texas. *See* Pet. App. 35a-37a. A market for IPR-immune Super Patents could now emerge, no doubt fetching a higher price and attracting even more unsavory and litigious outfits.

3. As of the filing of this brief, the Federal Circuit has already applied its incorrect construction of §315(b) at least twice. *See Luminara Worldwide LLC v. Iancu*, 899 F.3d 1303 (Fed. Cir. 2018); *Bennett Regulator Guards, Inc. v. Atlanta Gas Light Co.*, 905 F.3d 1311 (Fed. Cir. 2018) (noting that the prior complaint was involuntarily dismissed without prejudice, but finding “no reason to distinguish *Click-to-Call* on that basis”). (In one other case, a plaintiff voluntarily dismissed an earlier suit on a patent it did not even own and thus by definition had no standing to assert, but the Federal

Circuit declined to reach the §315(b) issue because the patent owner did not cross-appeal on that basis. *Hamilton Beach Brands, Inc. v. f'real! Foods, LLC*, 908 F.3d 1328, 1336-37 (Fed. Cir. 2018.)

Constrained to follow the decision below, since August 2018 the PTAB has terminated, dismissed, or denied at least six otherwise timely preexisting IPR petitions under §315(b) because earlier served complaints had been voluntarily dismissed without prejudice more than one year before the IPR requests were made. See *Baker Hughes Oilfield Operations, Inc. v. Smith International, Inc.*, IPR2016-01440 (PTAB Oct. 4, 2018) (paper 42 at 4-5); *Baker Hughes Oilfield Operations, Inc. v. Smith International, Inc.*, IPR2016-01452 (PTAB Oct. 4, 2018) (paper 42 at 4-5); *Shenzhien Liown Electronics Co., Ltd. v. Disney Enterprises, Inc.*, IPR2015-01656 (PTAB Oct. 18, 2018) (paper 54 at 3); *Flir Systems, Inc., et al. v. Garmin Corp.*, IPR 2018-01490 (PTAB Oct. 22, 2018) (paper 7 at 3-4); *Cree, Inc. v. Document Security Systems, Inc.*, IPR2018-01221 (PTAB Nov. 14, 2018) (paper 9 at 3-4); *Cree, Inc. v. Document Security Systems, Inc.*, IPR2018-01222 (PTAB Nov. 14, 2018) (paper 11 at 3-4); see also *Infiltrator Water Technologies, LLC v. Presby Patent Trust*, IPR2018-00224 (PTAB Oct. 1, 2018) (paper 18 at 4-5) (noting that, like *Bennett Regulator Guards*, the prior dismissal without prejudice was due to a lack of personal jurisdiction), all available at www.uspto.gov/patents-application-process/patent-trial-and-appeal-board/decisions (AIA related cases). Before the decision at issue here, the PTAB treated complaints

dismissed without prejudice as if the earlier actions had never been filed for purposes of §315(b). *See, e.g., Oracle Corp., et al. v. Click-to-Call Technologies LP*, IPR2013-00312 (PTAB Oct. 30, 2013) (paper 26 at 17) (Pet. App. 161a-162a).

The prevalence of such §315(b) rulings concerning IPR requests made prior to August 2018 demonstrates that the voluntary dismissal without prejudice of patent complaints was not uncommon even before the decision below. Armed with a new tool to manipulate the system, that maneuver will undoubtedly increase among crafty plaintiffs.



CONCLUSION

The Court should grant the petition for a writ of certiorari.

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