

High Court TransUnion Ruling May Enhance PTAB Autonomy

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Although the U.S. Supreme Court's decision in *TransUnion LLC v. Ramirez*^[1] is not related to either patent or administrative law, its effects on constitutional standing are broad-reaching and may insulate the Patent Trial and Appeal Board against challenges to its autonomy or bolster its existing autonomy, independent of any potential changes to Chevron deference.

In *TransUnion*, a class of 8,185 plaintiffs sued *TransUnion* for including false information in their credit reports and not properly reporting that addition to them, as required by statute. Of those 8,185 plaintiffs, only 1,853 had credit reports with the incorrect information disclosed to a third party; the remaining 6,332 plaintiffs presented no evidence that anyone had requested or seen the incorrect reports.^[2]

A majority of the Supreme Court^[3] held that only the plaintiffs whose credit reports had been disclosed had constitutional standing under Article III of the U.S. Constitution.^[4] The court explained that, even though Congress made inclusion of false information by a credit reporting agency redressable by legal action, the plaintiffs still had to show a concrete injury in the context of the statutory violation.^[5]

The court emphasized that, while Congress may create a statutory cause of action, it may not “simply enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is”^[6] and that “the mere existence of inaccurate information in a database is not sufficient to confer Article III standing.”^[7]

TransUnion further defined “concrete injury” as those injuries that have a “‘close relationship’ to a harm ‘traditionally’ recognized as providing a basis for a lawsuit in American Courts.”^[8] These harms include monetary and physical harms, harms specified in the Constitution itself, and certain intangible harms, such as reputational harms, disclosure of private information, and intrusion upon seclusion.^[9]

While the future of Chevron deference may be unclear,^[10] *TransUnion* could ensure the PTAB's autonomy. Because challengers to its discretionary decisions lack standing to sue in Article III courts, the PTAB's decision making cannot be challenged, affording the PTAB extreme independence from judicial interference for certain types of actions.

While Title 35 of the U.S. Code establishes the right to petition the PTAB for various types of post-grant review, it does not establish a right to institution of that review. Nor does American common law recognize deprivation of post-grant review as a harm or injury because the traditional manner for avoiding liability for infringement — i.e., litigating invalidity, noninfringement and other defenses in the federal court system — remains readily available to accused infringers if post-grant review institution is denied.

This standing issue is likely to arise in upcoming challenges to the PTAB's pair of precedential decisions in *NHK Spring Co. Ltd v. Intri-Plex Technologies Inc.* in 2018^[11] and *Apple Inc. v. Fintiv Inc.* in 2020,^[12] as well as appeals of denial of institution by the PTAB based on those decisions. These cases set out six nondispositive factors for PTAB panels to weigh when deciding whether to institute inter partes review if a district court or the U.S. International Trade Commission is evaluating the same patents in parallel litigation.^[13]

Under *TransUnion*, a district court considering a challenge to the PTAB's denial based on the *Fintiv* factors could find that there is no constitutional, or even statutory,^[14] right to inter partes review and thus that a party whose petition is denied has no concrete injury. A court could also find that there is no common law right to an alternative to district court or International Trade Commission litigation.

And, because inter partes review petitioners subject to *Fintiv* denials can still raise invalidity arguments in the parallel litigation — albeit applying a different evidentiary standard^[15] — they are not denied their rights to defend against patent infringement.

As another application, a court could rely on *TransUnion* to find that any harm from denial of institution of inter partes review is too speculative to establish standing. While Congress created inter partes review as an efficient alternative to district court or International Trade Commission litigation,^[16] there is no guarantee that the petitioner will be successful in invalidating challenged patents.

Patent litigants are already looking to *TransUnion* in district court litigation. In *Apple v. Hirshfeld*, the director of the U.S. Patent and Trademark Office recently raised *TransUnion* to support its motion to dismiss Apple's challenge to *Fintiv* in the U.S. District Court for the Northern District of California.^[17]

In that case, Apple sued the director, arguing that he lacked authority to designate *NHK* and *Fintiv* as precedential, that the *Fintiv* factors are arbitrary and capricious, and that the *Fintiv* factors are invalid because the director could have enacted them through notice and comment rulemaking.

The director briefly explained that Apple had not shown a concrete injury as required by *TransUnion* and that it alleged an injury that is too speculative to qualify as concrete harm.^[18] The district court has not yet ruled on the director's motion to dismiss.

Apple also recently filed a petition for writ of certiorari with the Supreme Court seeking review of the U.S. Court of Appeals for the Federal Circuit's pre-*TransUnion* dismissal for lack of an appeal seeking review of a *Fintiv* denial of institution in *Apple v. Optis Cellular Technology*.^[19] A response from the patent owner is due on Sept. 27.

These cases are worth watching for more than just their impact on inter partes review institution, as they could set up a new paradigm for challenges to PTAB procedures under *TransUnion* more generally.

[1] *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021).

[2] *TransUnion*, 141 S. Ct. at 2212.

[3] Justices Roberts, Alito, Gorsuch, Kavanaugh, and Barrett, with Justices Thomas, Breyer, Sotomayor, and Kagan dissenting.

[4] *TransUnion*, 141 S. Ct. at 2205.

[5] *Id.* (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340-41 (2016)).

[6] *TransUnion*, 141 S.Ct. at 2205 (citing *Hagy v. Demers & Adams*, 882 F.3d 616, 622 (6th Cir. 2018) (citing *Spokeo*, 578 U.S. at 341)).

[7] *TransUnion*, 141 S. Ct. at 2209 (citing *Braitberg v. Charter Comm'cns, Inc.*, 836 F.3d 925, 930 (8th Cir. 2016); *Gubala v. Time Warner Cable, Inc.*, 846 F.3d 909, 912 (7th Cir. 2017)).

[8] *Id.* at 2204.

[9] *Id.*

[10] Chevron deference is the doctrine under which courts defer to agency interpretation of statutes where Congress did not speak directly on the issue and the agency's interpretation is not unreasonable. A number of the current Supreme Court Justices have expressed skepticism toward the doctrine or its application or called for its reconsideration. See, e.g., *Michigan v. Environmental Protection Agency*, 576 U.S. 743, 761 (2015) (Thomas, J., concurring); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1148 (10th Cir. 2016) (Gorsuch, J.); Kristin Hickman, Aaron L. Nielson, Narrowing Chevron's Domain, 70 Duke L. J. 931 (Feb. 2021).

[11] No. IPR2018-00752 (Paper 8) (PTAB Sept. 12, 2018).

[12] IPR2020-00019 (Paper 11) (PTAB Mar. 20, 2020).

[13] See Fintiv, Paper 11 at *8, 11.

[14] see 35 U.S.C. § 314(d).

[15] 35 U.S.C. § 316(e).

[16] (see H. Rep. 112-98, Part 1 at 48 (2011); 157 Cong. Rec. S592 (daily ed. Feb. 28, 2011) (statement of Sen. Chuck Grassley)).

[17] *Apple, Inc. v. Hirshfeld*, No. 5:20-cv-06128-EJD, Dkt. 118 (N. D. Cal. June 25, 2021).

[18] *Id.* at *2-3.

[19] *Apple, Inc. v. Optis Cellular Tech., LLC*, No. 21-1043, Petition (Jan. 26, 2021).

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