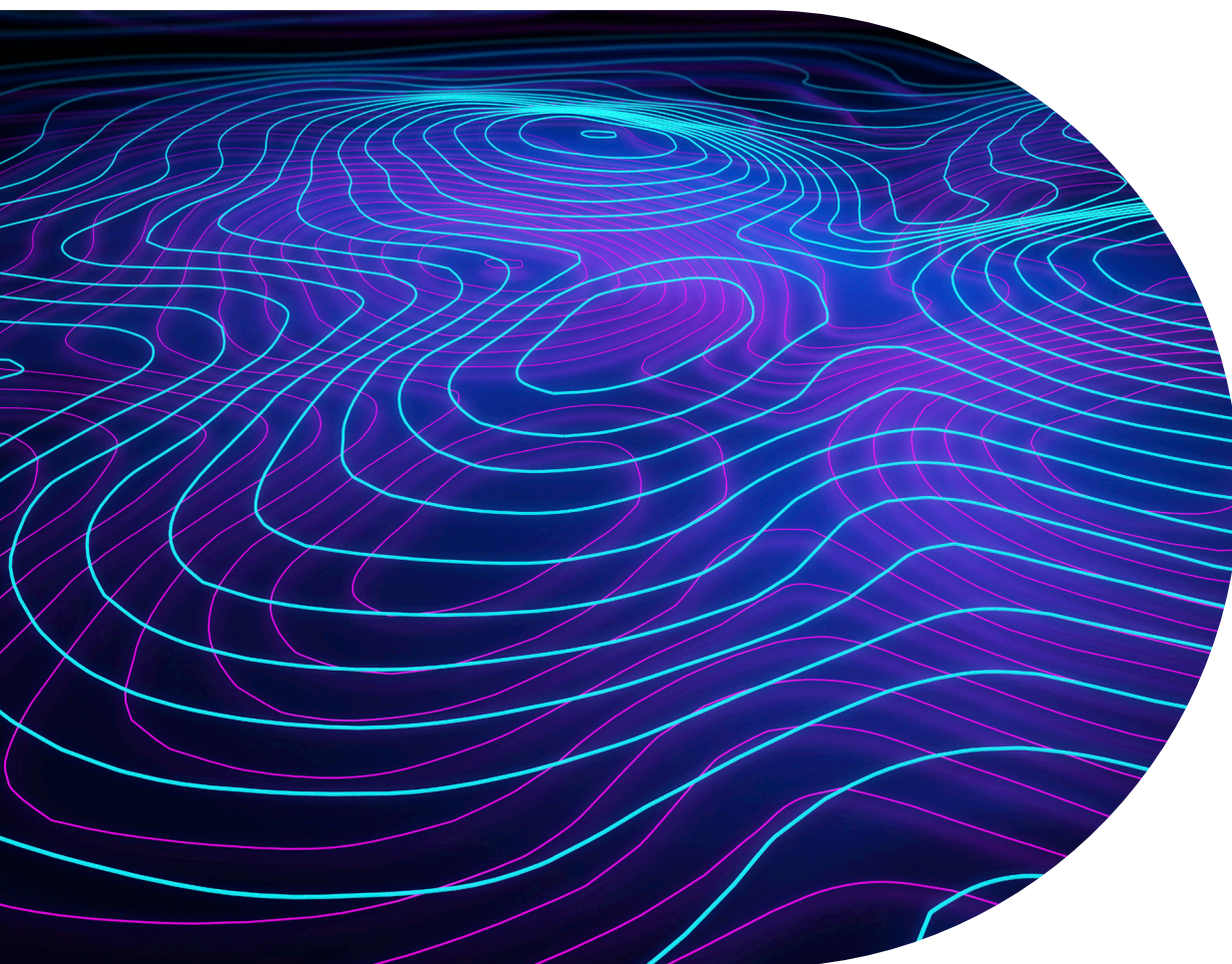


IPR » IRL

A brief guide to the essentials of inter partes reviews in real life



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Inter Partes Reviews

When the U.S. Patent and Trademark Office Takes Another Look

In 2011, Congress passed the America Invents Act, which replaced the inter partes reexamination process with *inter partes* review (IPR). The IPR procedure was intended to streamline disputes by, among other things, shortening the timeline for challenging patents. Further, IPRs put a patent's fate in the hands of three administrative judges from the USPTO's Patent Trial and Appeal Board (PTAB). Many of those judges are technically trained, making them different from the average layperson on a federal jury. The U.S. Supreme Court has upheld the constitutionality of the IPR process, though it is currently considering the constitutionality of the appointment of judges who decide IPRs.

Because IPR proceedings provide a faster and cheaper alternative to district court litigation, the process has become a popular means for challenging issued patent claims. This summary breaks down the IPR process and identifies some basic strategic considerations for challengers and patent owners.

The U.S. Supreme Court has upheld the constitutionality of the IPR process.

Overview

In a nutshell, IPR proceedings involve challenges to the validity of patents before the PTAB under a lower burden of proof than in district court.

The proceedings are limited in scope—challenges can only be based on obviousness or anticipation tied to patents and printed publications. The default timeline for IPR proceedings is 18 months, including a six-month petition phase, and, if the PTAB decides to institute review of a patent, a twelve-month trial phase resulting in a final written decision on the patentability of the reviewed claims.

The final written decision usually issues after an oral hearing where the parties—the petitioner and the patent owner—appear before a three-member panel of the PTAB for an hour or two to sum up their arguments and answer questions.

During IPR proceedings, both before and after institution, the parties submit evidence, including from experts, and may conduct some limited discovery. The trial phase may involve proposed amendments to the patent claims.

Key Considerations

As petitioners consider whether to file an IPR petition and as both parties determine how to litigate an IPR proceeding, they must keep several key considerations in mind.

ALL-OR-NOTHING INSTITUTION. Under Supreme Court precedent and by rule, the PTAB must institute trial for all of the challenged claims or none of them, which affects how petitioners draft their petitions and how patents owners respond.

CLAIM INTERPRETATION. The same legal standard for claim construction applies in an IPR and in a district court case. Claim construction positions taken during IPR proceedings may be used against a party in corresponding district court litigation, suggesting that both parties exercise caution. Moreover, the PTAB will consider claim construction determinations and statements made by parties about claim construction in other proceedings relating to patents challenged in an IPR.

STAYS OF PARALLEL LITIGATION. Whether a district court will stay litigation pending the resolution of an IPR will depend largely on whether the IPR has been instituted and how likely the IPR is to simplify the litigation.

ESTOPPEL. After a final written decision, petitioners (and their privies and “real parties-in-interest”) are estopped from challenging a claim in court or before the USPTO on “any ground that the petitioner raised or reasonably could have raised” during the IPR proceeding.^[1]

CLAIM AMENDMENTS DURING IPR PROCEEDINGS. On March 15, 2019, the PTAB revamped the process for filing motions to amend, which has increased the likelihood that a patent owner will succeed in seeking to amend the claims.

In an IPR, parties submit evidence and may conduct limited discovery.

SETTLEMENT. Parties can settle an IPR proceeding but should do so early as the PTAB may refuse to terminate if the proceeding is near completion.

REHEARING AND APPEALS. Parties may seek review of IPR decisions in requests for rehearing at the PTAB (which are generally heard by the original panel) or on appeal at the Federal Circuit, but such efforts are usually unsuccessful.

It is now more likely that a patent owner will succeed in amending claims during an IPR.

IPR Basics

The IPR Process: From Requesting Review to Final Written Decision

Requesting an IPR

To request an IPR, the challenging party (petitioner) submits a petition to the PTAB laying out specific grounds to support cancellation of issued claims. A petitioner can only challenge a patent based on written prior art references (patents and printed publications) that show the claims are:

1. anticipated—meaning a single reference discloses all elements of the claim; or
2. obvious—meaning one reference or two or more references in combination disclose or suggest the claim elements and a person of skill in the art would have modified a reference or combined multiple references' teachings in the manner claimed.

A petitioner may not file its petition until at least nine months after a patent has issued and must pay a filing fee of at least \$41,500.^[2] The petition can include supporting evidence, such as prior art references and an expert declaration. If a petitioner has been served with a patent infringement complaint in federal court, the petitioner must file its IPR challenge within one year of service of the complaint, even if that complaint was voluntarily dismissed or deficient.^[3]

IPRs Compared With The Federal Court Process

IPR proceedings differ from federal court patent cases in several ways. To prevail, an IPR petitioner need only prove that the claims are anticipated or obvious by a preponderance of the evidence. That is a lower burden than the clear and convincing evidence standard that applies in federal court. The rules governing IPRs allow for limited discovery, including expert depositions, while the rules that control federal court cases allow much more extensive discovery. In general, these differences make challenging patent claims in IPR proceedings easier and less costly than in the federal courts.

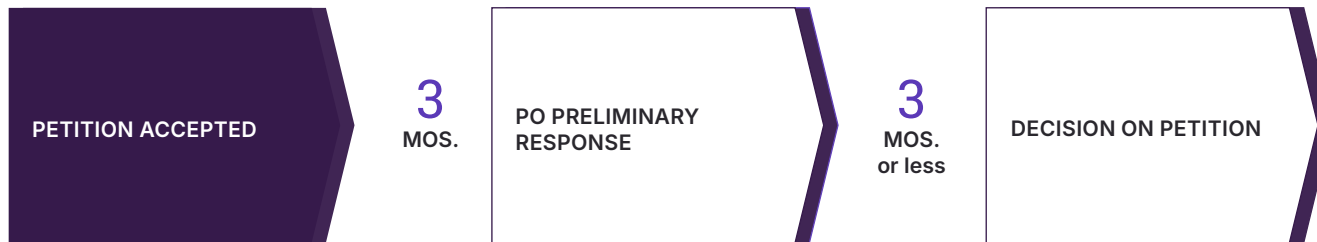
Claim terms in IPR proceedings are construed using the same claim construction standard used in district court, i.e., "in accordance with the ordinary and customary meaning of such claim as understood by one of ordinary skill in the art and the prosecution history pertaining to the patent."^[4]

To prevail, an IPR petitioner need only prove that the claims are anticipated or obvious by a preponderance of the evidence.

Trial Proceeding Timeline

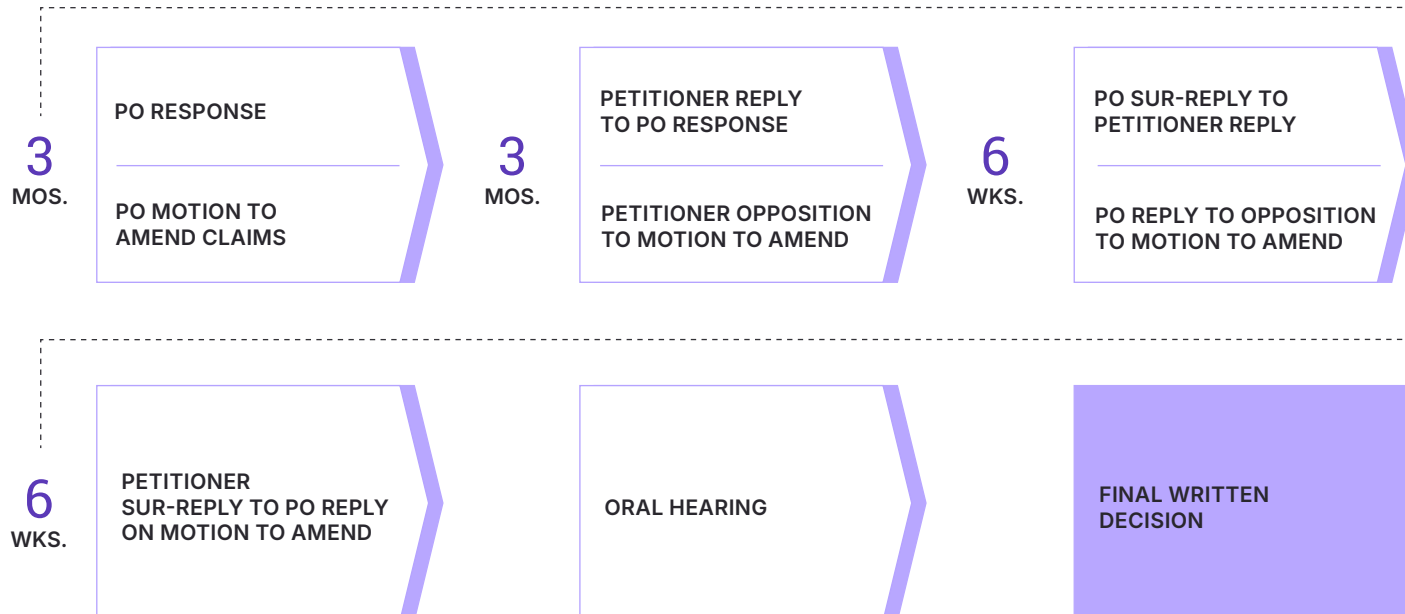
The usual timeline for an IPR proceeding is relatively short—18 months from when the patent office accepts the petition filing to a final written determination. Deadlines for motion to amend briefing differ if the patent owner (PO) files a revised motion to amend. The trial phase can take longer than the usual 12 months when another petitioner moves to join an instituted IPR.^[5] In that case, if the PTAB approves joinder, the trial phase may be extended for six months or longer.^[6]

Petition Phase



Trial Phase

GENERALLY NO MORE THAN 12 MONTHS



A few weeks after a petition is filed, the PTAB issues a notice assigning the petition a filing date. A patent owner may file a preliminary response within three months of that notice. After the deadline for filing a preliminary response, the PTAB has three months to decide whether to “institute” or initiate a review of the patent at issue.

If the PTAB denies all the grounds in a petition, the proceeding is over. If the PTAB decides to institute review, a patent owner then has three months from the institution date to file its response. Three months later, a petitioner can file a reply. The patent owner then has six weeks to file a sur-reply. As part of the post-institution briefing, the parties can depose each other’s experts and may move to seek additional limited discovery. A patent owner may also file a motion to amend in addition to or in lieu of its post-institution response. The motion to amend process is described in further detail below.

If requested, the PTAB will hold an oral hearing in which the parties present their arguments to a panel of judges. Usually, the PTAB issues a final written decision on whether to cancel the patent claims within 12 months of the institution date.^[7] As noted above, joinder is an exception.

The USPTO limits IPR petitions and responses to 14,000 words and replies and sur-replies to 5,600 words. The parties may prepare demonstrative exhibits to present to the PTAB at the oral hearing. Unlike a federal court trial, an IPR hearing usually does not involve presenting live witnesses. The parties rely instead on exhibits, testimony, and other evidence submitted to the PTAB before the oral argument. A party may, however, file a motion with the PTAB to request live testimony (although in practice the PTAB has rarely permitted live testimony).^[8]

Institution

The PTAB’s initial decision on whether to institute an IPR is “final and nonappealable.”^[9] Thus, the petition stage of an IPR proceeding is important for both parties. If the PTAB denies institution, a petitioner has no further recourse (except to ask for “rehearing,” i.e., reconsideration). But if the PTAB institutes review, a patent owner cannot appeal, and the process runs its course through final written decision unless the parties settle.

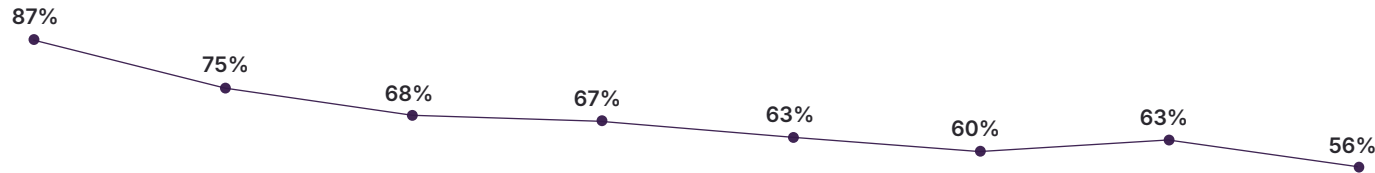
Since Congress created the IPR process, the number of IPR filings initially increased over time but has decreased in recent years, while the percentage of institutions has declined. The chart on the right shows these trends and is based on USPTO data through the end of September 2020.^[10]

In April 2018, the Supreme Court held in *SAS Institute Inc. v. Iancu* that if the PTAB institutes review based on an IPR petition, it must do so for every claim challenged in the petition.^[11] Prior to that decision, the PTAB often instituted review on some claims while denying review on others. That approach is no longer an option. Since the Supreme Court’s decision, the PTAB has often instituted on all claims while signaling to a petitioner that some of its arguments are flawed and unlikely to prevail at the end of the proceeding. In December 2020, the PTAB expressly incorporated the holding from *SAS Institute* into the regulations that govern IPRs.^[12]

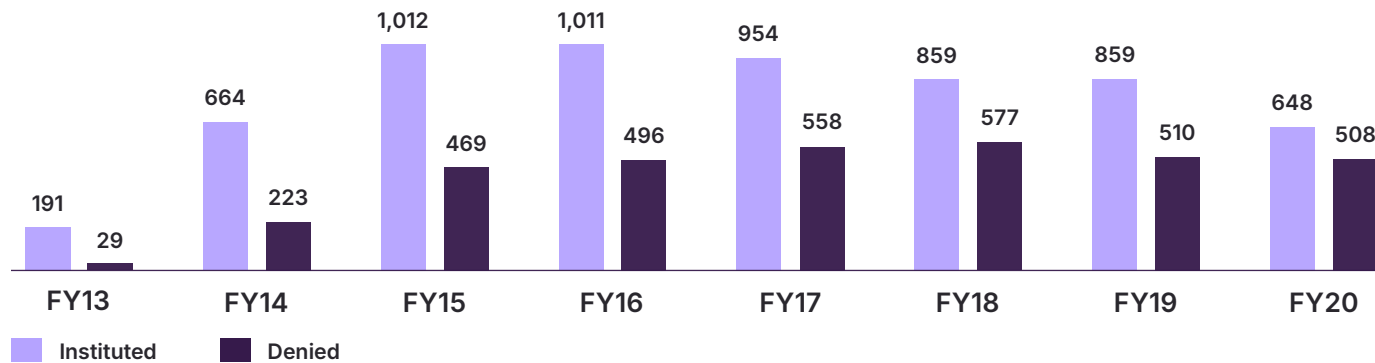
Institution Rates

FISCAL YEAR 2013 TO FISCAL YEAR 2020 – OCT. 1, 2012 TO SEPT. 30, 2020

PERCENTAGE OF PETITIONS INSTITUTED



NUMBER OF PETITIONS INSTITUTED OR DENIED



Petition

For a petitioner, the petition is critical. After the petition is filed, a petitioner is limited to submitting evidence that is directly responsive to arguments raised by the patent owner in its response or motion to amend. A petitioner therefore cannot expand its arguments beyond those included in the petition. For these reasons, a petitioner must ensure that the petition includes and fully explains all the arguments it wants to make. A petitioner can propose constructions for claim terms or include a statement that claim terms do not require express construction.^[13]

The expert declaration accompanying a petition is also important. An expert must provide evidence that supports the arguments in the petition and explains how the prior art discloses the invention. An expert should not parrot attorney arguments from the petition or make conclusory statements. The PTAB will grant institution if the petition establishes a “reasonable likelihood” that a petitioner will prevail in the trial phase.

In general, a petitioner should file just one petition challenging a patent. Although it may be necessary for a petitioner to file multiple parallel petitions in some circumstances, those cases should be rare. If a petitioner files parallel petitions, it must explain to the PTAB why multiple petitions should be instituted and rank the petitions in the order it wishes the PTAB to consider them.^[14]

A petition must include and fully explain all the arguments a petitioner wants to make.

Preliminary Response

A patent owner may file a preliminary response within three months after the PTAB accords a filing date to a petition. Filing a preliminary response is optional, and in some circumstances there may be reasons not to do so.

A preliminary response previews a patent owner's arguments to a petitioner, giving the petitioner more time to prepare responses to those arguments if the PTAB institutes review. Further, before a patent owner can file a preliminary response, it must evaluate a petition for substantive and procedural defects, analyze claim construction, and consider whether to retain an expert and obtain a declaration to support the preliminary response. It can be difficult and costly to complete these tasks within a three-month period. Hastily prepared submissions can do more harm than good.

On the other hand, filing a preliminary response can be beneficial. A preliminary response allows a patent owner to tell the PTAB its side of the story before the institution decision. It also offers an opportunity for a patent owner

to address claim construction issues and raise concerns about a petitioner's prior art. Moreover, a patent owner can use a preliminary response to address other defenses, including:

- Whether a petition is time-barred.
- Whether a petitioner has failed to list real parties-in-interest.
- Whether a petition should be denied as unfair based on prior IPR challenges.^[15]
- Whether a petition should be denied as redundant based on prior art or arguments previously considered by the patent office.^[16]
- Whether a petition should be denied because of parallel litigation in the district courts or at the International Trade Commission (ITC).^[17]

A patent owner may file an expert declaration with a preliminary response but must weigh the benefits and costs of doing so. An expert can bolster strong substantive arguments. But if a patent owner includes a declaration and asserts its best substantive arguments, it may face an uphill battle if the PTAB decides to institute review.

Motions to Amend

After institution, a patent owner may file a motion to amend the patent at the same time its response to the petition is due. The motion must clearly show any changes to the claims and describe how disclosures in the original and priority applications for the challenged patent support the proposed amended claims. The PTAB has explained that a petitioner ordinarily bears the burden to show by a preponderance of the evidence that the proposed amended

Filing a preliminary response is optional for patent owners. In some circumstances, there may be reasons not to do so. Hastily prepared submissions can do more harm than good. However, a preliminary response allows a patent owner to tell the PTAB its side of the story before the institution decision.

claims are unpatentable. In response to a motion to amend, a petitioner may submit new evidence (e.g., additional prior art and new expert declarations) and may raise grounds of unpatentability other than anticipation and obviousness, such as whether the proposed amended claims are directed to patentable subject matter.^[18]

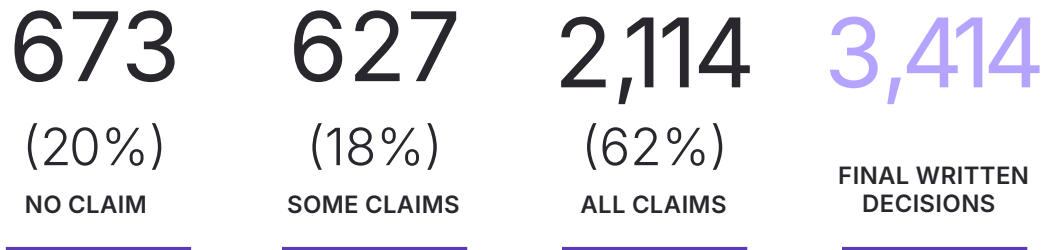
On March 15, 2019, the PTAB announced changes to the rules relating to motions to amend to provide patent owners with two previously unavailable options: (1) requesting “preliminary guidance” from the PTAB about the merits of a motion to amend when filing that motion; and (2) filing a revised motion. The PTAB also adjusted the motion to amend briefing schedule to provide more time between deadlines. When a patent owner chooses not to file a revised motion, the motion to amend briefing schedule tracks the parallel briefing schedule for the IPR petition. If the patent owner files a revised motion to amend, the two schedules diverge, with many of the later motion to amend briefing deadlines compressed just before the oral hearing, which occurs about a month later than usual.^[19]

Final Written Decision

If the PTAB institutes review, a petitioner is likely to prevail in canceling at least some patent claims. Since 2012, the PTAB has canceled claims in most instituted IPRs resulting in a final written decision. In 62% of those proceedings, the PTAB has found all instituted claims unpatentable; in 18%, the PTAB has found at least some claims unpatentable. By contrast, the PTAB has upheld all instituted patent claims only 20% of the time. A chart reflecting these data is on the right.^[20] Once the PTAB decides that a petitioner has shown a “reasonable likelihood” that a claim is unpatentable and institutes an IPR, the PTAB is also likely to conclude the petitioner has proven unpatentability by a preponderance of the evidence at trial.

Status of Petitions

INSTITUTED CLAIMS UNPATENTABLE | FROM SEPT. 16, 2012 TO SEPT. 30, 2020



Strategic Considerations

In determining whether to file an IPR petition—or in responding to one—practitioners should consider the following issues.

1. Institution

The Supreme Court's ruling in *SAS Institute* requiring all-or-nothing institution has not radically altered the institution landscape. There are examples where the PTAB has denied institution when several weaker arguments diluted stronger ones.^[21] For the most part, however, rather than denying a petition that includes weaker grounds, the PTAB simply institutes review on all grounds while noting the petitioner has not shown a "reasonable likelihood" of success on the weaker grounds. This approach is similar in practical effect to a partial denial, although a petitioner may be able to win over the PTAB on the weaker grounds before the PTAB issues a final written decision.

In addition, since *SAS Institute*, the PTAB has sometimes instituted review when finding a "reasonable likelihood" that the petitioner will prevail on a single claim or ground without analyzing the others addressed in the petition.^[22] But in most cases, the PTAB examines every ground in a petition and determines each ground's "reasonable likelihood" of success, instituting review if at least one ground meets that standard. Overall, including some weaker grounds in a petition does not appear to increase the likelihood of outright denial unless they drastically outnumber stronger grounds. Additional trends may appear as the PTAB continues to react to the *SAS Institute* decision.

2. Claim Construction

The PTAB and the courts encourage parties to take consistent positions on claim construction across multiple proceedings relating to the same patents. A patent owner's statements in an IPR proceeding might be used against it later. The U.S. Court of Appeals for the Federal Circuit has held that a patent owner can give up claim scope based on statements made during an IPR proceeding, even if the PTAB rejects the patent owner's arguments.^[23] Furthermore, the PTAB will consider claim construction determinations and statements made by the parties about claim construction in district court or International Trade Commission proceedings relating to patents at issue in an IPR. The PTAB instructs parties in an IPR to file any relevant claim construction determinations as soon as they become available.^[24]

3. Stays

A petitioner often files one or more IPR petitions after a patent owner has filed a lawsuit in federal court. Many petitioners then seek a stay of the lawsuit while the PTAB considers the petition(s). In contemplating a stay, district courts consider the stage of the litigation, whether a stay will simplify the issues in the case, and whether a stay will otherwise prejudice or disadvantage the patent owner.

The PTAB typically will institute review if at least one ground meets the standard of "reasonable likelihood" of success.

To increase the likelihood of a stay, a petitioner should file any IPR petitions as early as possible after being sued.

In general, a petitioner is much more likely to succeed if the PTAB has already instituted an IPR. A stay is also more likely if the litigation is still in its early stages. Given these trends, a petitioner should file any IPR petitions as early as possible after being sued. For a patent owner, defeating a petition at the institution stage avoids the stay issue altogether or can prompt a court to lift a pre-institution stay.

4. Estoppel

Once a written decision has issued in an IPR proceeding, a petitioner, its privies and “real parties-in-interest” cannot later challenge a claim at the USPTO or in the courts based on “any ground that the petitioner raised or reasonably could have raised” during the IPR proceeding.^[25]

The Federal Circuit has held this provision does not apply to grounds on which the PTAB declined to institute review and suggested it may not apply to grounds the PTAB never considered.^[26] That interpretation creates tension with the plain language of the statute, and district courts have struggled to define the proper scope of IPR-based estoppel.

Although SAS Institute mooted any questions about whether estoppel attaches to arguments rejected in a partial institution, several estoppel-related questions linger, such as the meaning of the statutory phrase “reasonably could have raised.”

IPR estoppel does not apply to prior art based on products developed before the date of the invention; it applies only to prior art patents and publications. Thus, even where a petitioner faces an unfavorable IPR written decision, it may still be able to challenge patent claims in federal court based on product art. That said, if the PTAB has canceled claims based on related patents or publications, the product art may have little impact in a court case.

5. Motions to Amend

The PTAB’s adjustments to the motion to amend process, which allow a patent owner to seek PTAB preliminary guidance on the merits of its motion and file a revised motion, have improved the chances of amendments. This may cause petitioners to hesitate before challenging patents using the IPR process.

There are ways, however, that a petitioner might benefit from motion to amend practice. For example, a petitioner could use the possibility of amendment as an argument in favor of staying corresponding district court litigation. If the claims might change, it makes little sense to litigate them. On the patent owner’s side, careful consideration should be given to whether to request PTAB preliminary guidance. Negative feedback on proposed amendments might provide the petitioner with leverage, but it would also give the patent owner a roadmap for revising its motion.

In general, a petitioner is much more likely to succeed in obtaining a stay if the PTAB has already instituted an IPR. A stay is also more likely if the litigation is still in its early stages.

Several estoppel-related questions linger, such as the meaning of the statutory phrase “reasonably could have raised.”

Patent owners should carefully consider whether to request PTAB preliminary guidance after filing a motion to amend.

Settlement

Parties can settle an IPR proceeding. They must file any settlement agreement with the PTAB and may do so under seal. From a petitioner's perspective, settlement is advantageous because IPR estoppel does not apply to any arguments raised in a settled proceeding. Settling early is key. If an IPR proceeding nears completion, the PTAB may refuse to terminate and issue a final written decision regardless of the parties' desire to settle.

Requests for Rehearing

Any party can file a request for rehearing within 14 days of a non-final decision or a decision to institute IPR. A party can file a rehearing request within 30 days of a final decision or decision not to institute trial.^[27] Requests for rehearing are unlikely to succeed. A party should keep that in mind before filing one.

Appeals

A party in an IPR proceeding may appeal a final written decision to the Federal Circuit.^[28] The Federal Circuit reviews the PTAB's conclusions of law de novo and its findings of fact for substantial evidence. IPR claim constructions are generally reviewed de novo. To date, the Federal Circuit has affirmed the PTAB on all issues about three-quarters of the time in IPR appeals.

While the IPR process may seem daunting at first, knowing the governing rules and key issues goes a long way toward mastering this important type of patent proceeding.

If an IPR proceeding nears completion, the PTAB may refuse to terminate and issue a final written decision regardless of the parties' desire to settle.

The Federal Circuit has affirmed the PTAB on all issues about 75% of the time in IPR appeals.

Inter Partes Review

At-a-Glance

WHEN AVAILABLE

9 months after patent's issue date
OR

Within 12 months of assertion
in litigation

UNAVAILABLE IF petitioner
has filed declaratory judgment
challenging validity of patent

WHO MAY SEEK?

Anyone other than patent owner

LEGAL STANDARD

Reasonable likelihood that
requestor will prevail on one claim
challenged in the request

PRIOR ART CONSIDERED

Limited to patents and printed
publication prior art

BASIS FOR INVALIDITY

35 U.S.C. § 102
35 U.S.C. § 103

DISCOVERY

Deposition of witnesses submitting
declarations or affidavits, or
otherwise necessary in the interest
of justice

APPEAL

Both parties may appeal PTAB
decision to Federal Circuit

ESTOPPEL

Extends to grounds that are raised or
reasonably could have been raised
Triggered by a final decision of the PTAB
Applies to other proceedings before the
PTO, district courts or ITC

ANONYMITY

Petitioner must disclose
real-parties-in-interest

TIME TO COMPLETE

12-18 months

REVIEW UNIT

PTAB

CITATIONS

^[1] 35 U.S.C. § 315(e).

^[2] 35 U.S.C. § 311(c); 37 C.F.R. § 42.15.

^[3] *Cisco Sys., Inc. v. Chromar Sys., Inc.*, IPR2018-01511, Paper 11 at 5 n.1 (PTAB Jan. 31, 2019) (voluntarily dismissed complaint triggers one-year clock); *GoPro, Inc. v. 360Heros, Inc.*, IPR2018-01754, Paper 38 (PTAB Aug. 23, 2019) (service of deficient complaint triggers one-year clock).

^[4] 37 C.F.R. § 42.100(b).

^[5] 37 C.F.R. § 42.122(b).

^[6] 35 U.S.C. § 316(a)(11); Consol. Trial Prac. Guide, at 77-78 (Nov. 21, 2019), <https://www.uspto.gov/sites/default/files/documents/tpgnov.pdf?MURL=>. The USPTO published the Trial Practice Guide in 2012. That guide provides additional information about the IPR process. The USPTO issued updates to the guide in August 2018 and July 2019 that supplement, but do not replace, the trial guide. In November 2019, the USPTO published a consolidated version of the Trial Practice Guide that includes all content from the original guide and the two updates.

^[7] Consol. Trial Prac. Guide at 5-8, 73-74, 97.

^[8] *Id.* at 38-39, 85.

^[9] 35 U.S.C. § 314(d). Parties have argued, and continue to argue, that institution denials should be reviewable in certain circumstances, such as when denial is discretionary.

^[10] USPTO, Patent Trial & Appeal Board, Trial Statistics, IPR, PGR, CBM (Sept. 2019) (PTAB Trial Statistics) at 6, https://www.uspto.gov/sites/default/files/documents/Trial_Statistics_2019-09-30.pdf.

^[11] 138 S. Ct. 1348, 1354 (2018).

^[12] 37 CFR § 42.108(a).

^[13] Consol. Trial Prac. Guide at 44.

^[14] *Id.* at 59-60.

^[15] See *General Plastic Indus. Co., Ltd. v. Canon Kabushiki Kaisha*, IPR2016-01357, Paper 19 at 15-16 (PTAB Sept. 6, 2017) (listing factors for discretionary denials under 35 U.S.C. § 314(a) because of previous IPR proceedings).

^[16] See *Advanced Bionics, LLC v. MED-EL Elektromedizinische Geräte GmbH*, IPR2019-01469, Paper 6 (Feb. 13, 2020) (describing factors for discretionary denials under 35 U.S.C. § 325(d) based on prior art or arguments previously considered by the patent office).

^[17] *Apple Inc. v. Fintiv, Inc.*, IPR2020-00019, Paper 11 at 5-6 (PTAB Mar. 20, 2020) (providing factors relating to discretionary denials based on co-pending district court or ITC litigation).

^[18] Consol. Trial Prac. Guide at 67-75.

^[19] Notice Regarding a New Pilot Program Concerning Motion To Amend Practice and Procedures in Trial Proceedings Under the America Invents Act Before the Patent Trial and Appeal Board, 84 Fed. Reg. 9,497 at 9,497-98, 9,506-07 (Mar. 15, 2019), <https://www.federalregister.gov/documents/2019/03/15/2019-04897/notice-regarding-a-new-pilot-program-concerning-motion-to-amend-practice-and-procedures-in-trial>.

^[20] PTAB Trial Statistics, at 10-11.

^[21] See, e.g., *Deeper, UAB v. Vexilar, Inc.*, IPR2018-01310, Paper 7 (PTAB Jan. 24, 2019) (denying institution where arguments for only two of 23 challenged claims met the “reasonable likelihood” standard); *Chevron Oronite Co. LLC v. Infineum USA L.P.*, IPR2018- 00923, Paper 9 (PTAB Nov. 7, 2018) (similar).

^[22] See, e.g., *Seoul Semiconductor Co., Ltd. v. Document Security Sys., Inc.*, IPR2018- 00265, Paper 8 (PTAB June 7, 2018).

^[23] *Aylus Networks, Inc. v. Apple Inc.*, 856 F.3d 1353, 1360-61 (Fed. Cir. 2017).

^[24] Consol. Trial Prac. Guide at 45-48.

^[25] 35 U.S.C. § 315(e).

^[26] *Shaw Indus. Grp., Inc. v. Automated Creel Sys., Inc.*, 817 F.3d 1293, 1300 (Fed. Cir. 2016).

^[27] 37 C.F.R. § 42.71(d)(1)-(2).

^[28] 35 U.S.C. § 141(c).

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