2026

BakerHostetler

IP PERSPECTIVES

BHIPP v.3.0

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BHIPP v3.0

Table of Contents

On the Horizon

The Future of IP? Expect the Unexpected

In the intellectual property world, one thing is certain: change is inevitable and often unpredictable. This year, the IP community has seen shattered precedents, shifting court procedures and new agency guidance that have kept rights holders scrambling and attorneys on high alert.

Why Clients Choose BakerHostetler

Our award-winning IP Practice Group doesn't just react to change — we anticipate it. Clients trust us for strategic insight, deep experience and forward-thinking analysis that helps them navigate uncertainty with confidence. With BakerHostetler IP Perspectives, we aim to provide a taste of that clarity and foresight needed to stay ahead of the curve.

Ready to See What's Next?

Explore the latest issue of IP Perspectives and discover how BakerHostetler helps you glimpse the future of IP and move forward with confidence.

Best regards,

Mark Tidman, Chair, Intellectual Property Practice Group

Innovation Under Lock: Protecting IP Assets

IP Strategy and Business Strategy Alignment

Intellectual property is one of the – if not the – greatest assets a business can own. Innovative companies need to carefully identify and protect their IP assets in order to maximize their value over their terms of protection. Savvy business owners will build this protection element into their overall business plan, ensuring that the IP strategy is not an afterthought but a key proactive driver of the company's growth. The alignment between the two is critical and ensures that both strategies support the overall goals of the business.

Building Multifaceted Plans

Too often, the process of determining which IP assets warrant protection is given insufficient attention, but it needs to be a critical element of any strategy. Once an IP asset – from a unique product name to a sweeping technological innovation – is identified, there should be steps put in place to protect it. BakerHostetler can construct a multifaceted plan, including offensive and defensive strategies, opinions and implementation, to protect each asset. Our deep bench of attorneys with scientific and technical knowledge across a wide array of industries enables us to develop and manage internal and external policies, practices, processes and procedures throughout the entire IP life cycle. These plans are reviewed on a regular basis and adjusted as needed.

Comprehensive Services

We provide a combination of IP, legal and business consultation services to help clients develop comprehensive strategies for their IP to ensure it remains a strategic asset of the company. In addition to acquisition, protection, extraction of value and management of IP assets, we also factor in and review strategies associated with the overall IP life cycle to ensure that innovation on the front end continues to add to and maintain value on the back end.

"Too often, the process of determining which IP assets warrant protection is given insufficient attention, but it needs to be a critical element of any strategy."

#StolenContent: Copyright Infringement in Social Media

> “A frequent misconception is that if a sound or image is available on a social media platform, it’s free to use.”

As social media becomes an increasingly powerful tool for brand engagement, it also presents a growing legal minefield – particularly in the realm of copyright infringement. In recent years, intellectual property litigation has surged in the digital space, with a sharp uptick in disputes involving unauthorized use of copyrighted content on platforms such as Instagram, Facebook and others.

The Rise of Copyright Enforcement in Social Media

One of the primary drivers of this litigation wave is the aggressive enforcement of copyrights by music and photography rights holders. Brands and influencers often use popular songs or striking visuals to enhance their posts, unaware that these assets may fall outside the scope of the platform’s commercial use libraries. While platforms offer curated collections – such as Meta’s Sound Collection – many trending sounds and original audio clips are not covered, leaving users vulnerable to infringement claims. Such claims come at a high cost, as rights holders may seek statutory damages of up to $150,000 per musical work used plus attorneys’ fees, resulting in significant exposure for brands.

Common Pitfalls

A frequent misconception is that if a sound or image is available on a social media platform, it’s free to use. This assumption can lead to costly mistakes. Reposting influencer content without proper vetting and reposting across different social media platforms without checking each respective commercial music library are other common errors. Even background music in a video can trigger a claim if it has not been cleared for commercial use. These oversights can expose brands to legal action, reputational harm and financial penalties.

Proactive Risk Mitigation Strategies

To help clients navigate these risks, BakerHostetler has developed a new tool, the Sounding Board™, that scans social media content for copyrighted music and cross-references it with approved libraries. This tool, combined with legal analysis and takedown recommendations, forms the backbone of a proactive compliance strategy. By auditing existing posts and establishing clear guidelines for future content, companies can significantly reduce their exposure to future claims over copyright infringement.

Staying Compliant in a Rapidly Evolving Landscape

Compliance starts with education. Any company making social media posts should ensure that their internal teams and external partners understand the rules around content usage. Regular audits of social media posts – especially those involving music or third-party visuals – are essential. Additionally, implementing a policy to monitor influencer content and reposts tied to the brand’s handle can provide an extra layer of protection. When in doubt, consulting legal counsel can help companies assess risks and avoid potential litigation.

When Creativity Meets Code: Copyright and Trademark Troubles with AI-Generated Material

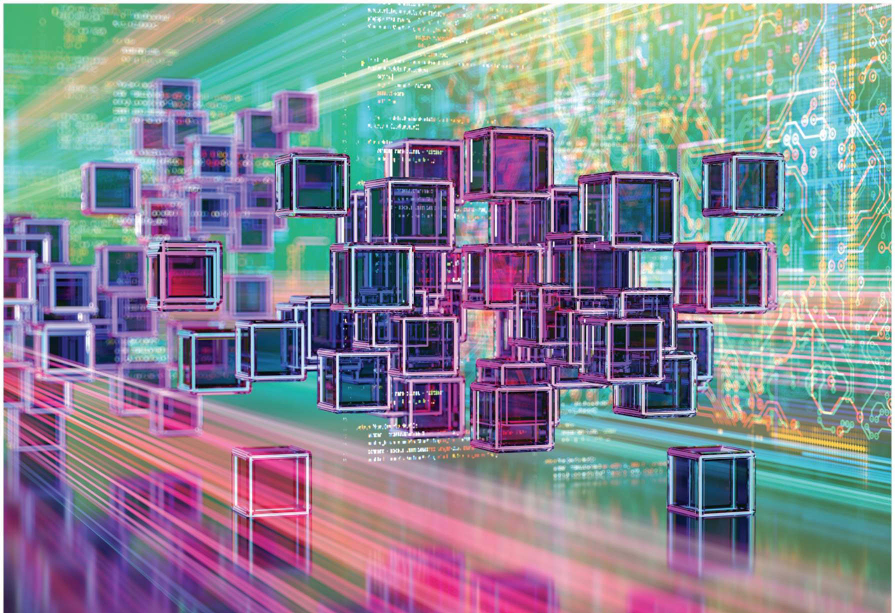
As businesses increasingly turn to generative artificial intelligence (GenAI) tools to develop brand and marketing assets – such as names, logos and product designs – they face novel legal questions, including who owns the copyright or trademark rights when GenAI contributes to the creation process.

Copyright Requires Human Authorship and Human Creative Control

Whether a work created using an AI tool will be copyrightable depends on how AI was used in the process, with the degree of human creative control being the decisive factor. Multiple decisions from the U.S. Copyright Office (USCO) have determined that images or content created solely by AI is not protected. The USCO's January 2025 report states that works made by human authors who use GenAI **may** be copyrightable **if a human contributes sufficient creativity**. Applicants must disclose AI-created elements, and those elements are excluded from the copyright claim.

The D.C. Circuit recently reaffirmed in *Thaler v. Perlmutter* (March 18, 2025) that copyright can only vest in human-created original works. The court ruled that an AI system, the Creativity Machine, could not be listed as the author of a work, upholding the USCO's decision to deny a copyright registration for an image created by AI. AI cannot be an "author" under current copyright law.

The extent of human involvement in the creative process is key. At one end of the spectrum, works created using GenAI with no to minimal human involvement (including hundreds of text prompts, curation and editing) will not be protectable by copyright. Copyright protection may be available when AI is used merely as a tool and a human creator contributes sufficient creative control to the final expressive elements. The selection, coordination and arrangement of AI-generated images are copyrightable as human creative choices.



Trademark Implications

U.S. trademark law does not require the identification of a human creator. Businesses can adopt and effectively own a name or logo created using GenAI, just as they could with any internally developed or agency-created branding. Businesses must still ensure that names or logos created using GenAI are not confusingly similar to someone else's mark used for similar goods or services.

Practical Tips

- **Vet and Review GenAI Agreements and Terms of Service.** Ensure that the GenAI tool doesn't assert ownership, restrict commercial use of generated content, or require attribution.
- **Implement – and Enforce – GenAI Policies.** Make sure employees know which GenAI tools are and are not permissible and for what purposes.
- **Use a Human Touch if Copyright Is Important.** If you want to be able to prevent others from using or copying your work, humans must be sufficiently involved in the work's creation. Modifying the GenAI output may provide some protectability, but a better approach is to use GenAI output as inspiration that a human finalizes. Keep records of human involvement to bolster copyright claims.
- **Trademark Clearance Remains Critical.** Whether or not GenAI is used, conduct trademark clearance searches to confirm availability and assess risk. Do not assume that AI generation guarantees the ability to use a work without infringing someone else's rights.

AI-generated branding opens new doors for creativity and efficiency, but it also introduces complex legal considerations. BakerHostetler attorneys are well equipped to guide clients through these challenges, helping them harness GenAI's potential while securing and enforcing their intellectual property rights.

Guardian at the Gate: AI's Role in Trademark Enforcement

AI's Sword and Shield: Forecasting Trademark Disputes and Trends with AI-Powered Brand Monitoring

In today's digital economy, where brand identity is both a strategic asset and a frequent target of infringement, artificial intelligence (AI) is rapidly becoming indispensable in trademark enforcement. Serving as both sword and shield, AI is transforming how legal professionals anticipate disputes, monitor brand usage and enforce intellectual property rights across complex digital environments.

Forecasting Trademark Disputes and Branding Trends

AI's predictive capabilities are shifting trademark strategy from reactive enforcement and litigation to proactive risk management. Sophisticated algorithms now analyze expansive datasets – including trademark registries, social media discourse and market signals – to identify potential conflicts before they materialize. Legal technology platforms such as Corsearch's NameCheck employ natural language processing and computer vision to detect phonetic, visual and conceptual similarities between marks, enabling attorneys to advise clients more effectively during the clearance and registration phases.

Moreover, AI tools can evaluate a dataset of prior outcomes, such as historical case law and administrative decisions, to forecast probable outcomes in opposition proceedings or infringement litigation based on the likelihood of confusion factors such as the similarity of marks and goods and services. This data-driven approach enhances strategic decision-making by initially saving hours of research time and helps counsel mitigate exposure to costly disputes.

AI-Powered Brand Monitoring and Enforcement

Traditional enforcement mechanisms – manual searches, periodic audits and consumer reports – are increasingly inadequate in a digital landscape characterized by rapid content generation and global e-commerce. AI-powered monitoring systems now conduct real-time surveillance across online marketplaces, social media platforms and advertising channels, flagging unauthorized uses of protected marks.

Brands and their legal teams are leveraging platforms such as Red Points, which uses AI to detect counterfeit listings and misleading product descriptions, and Tracer, whose technology maps entire networks of infringing activity. These tools offer scalable enforcement solutions, enabling counsel to act swiftly and decisively against infringers.

Early detection not only preserves brand equity but also reinforces a culture of compliance. By automating infringement identification and response protocols, AI empowers legal departments to maintain consistent enforcement, thereby deterring future violations and minimizing reputational and financial harm.

Real-World Impact

Recent implementations illustrate AI's growing utility in trademark enforcement. Large global brands are employing third-party vendors such as Vrai AI to detect counterfeit products through the microstructure analysis of logos. This technology enables precise authentication and supports legal action against counterfeiters.

AI systems have also proven effective on large e-commerce platforms with thousands of third-party sellers, where infringers often deploy deceptive logos and product descriptions. By analyzing embedded imagery and metadata, AI tools can identify unauthorized uses that might elude manual review, strengthening evidentiary support for enforcement actions.

Conclusion

AI is no longer a theoretical innovation in trademark enforcement and brand protection – it is a practical necessity. By forecasting disputes, identifying infringement and streamlining enforcement, AI equips legal professionals with powerful tools to safeguard brand identity in an increasingly digital and decentralized marketplace. As these technologies evolve, so too must the legal frameworks and professional practices that govern their use. For brand owners and their counsel, integrating AI into trademark strategy is not merely advantageous – it is imperative.

AI Meets USPTO: The United States Patent and Trademark Office's Evolution in the Digital Era

> "[R]ecent developments at the USPTO signal a shift away from treating AI technology as categorically patent-ineligible and toward recognizing AI as a subject of patent protection and a tool for modernizing the patent examination process."

Artificial intelligence (AI) has become nearly ubiquitous in everyday life, and given AI's widespread use across industries, it is no surprise that the United States Patent and Trademark Office (USPTO) has taken a keen interest in AI, issuing guidance on how AI should be treated and used by USPTO personnel and patent practitioners alike.

Examiner Guidance and PTAB Decisions

AI's momentum at the USPTO is evident in the guidance the USPTO released Aug. 4, 2025. In that guidance, the USPTO's deputy commissioner for patents reminded examiners to exercise care when rejecting AI and machine learning technologies based on subject matter eligibility, in particular that "[c]laim limitations that encompass AI in a way that cannot be practically performed in the human mind do not fall within this grouping." The guidance also emphasized consideration of whether a claim that includes a judicial exception to eligibility – such as an abstract idea – still integrates that exception into a practical application: "[E]xaminers can conclude that claims are eligible … by finding that a claim reflects an improvement to the functioning of a computer or to another technology or technical field, integrating a recited judicial exception into a practical application of the exception."

Just weeks later, AI again took center stage in the Sept. 26, 2025, Appeal Review Panel decision in *Ex parte Desjardins*, authored by the USPTO's new director, John A. Squires. In *Desjardins*, the Patent Trial and Appeal Board (PTAB) had rejected claims related to training machine learning models on multiple tasks, allowing the models to be used for each task individually. This approach enabled systems using those models to "us[e] less of their storage capacity and hav[e] reduced system complexity." Squires vacated the PTAB's rejection, explaining that even if the claims included an abstract idea, the claims nonetheless recited an improvement to the operation of the machine learning model. At a policy level, Squires cautioned that "[c]ategorically excluding AI innovations from patent protection in the United States jeopardizes America's leadership in this critical emerging technology" and warned against "equating any machine learning with an unpatentable 'algorithm' and the remaining additional elements as 'generic computer components' without adequate explanation." The effect of the guidance and Desjardins is yet to be determined, but applicants and examiners alike now have new motivation to consider how a given claim may integrate a judicial exception into a practical application.

USPTO Use of AI

The USPTO has also expanded its own use of AI in processing and examining applications. In October 2025, the USPTO launched the Automated Search Pilot Program, which uses an AI tool to conduct prior art searches and compile results into an Automated Search Results Notice (ASRN) identifying up to 10 relevant prior art documents. The ASRN is shared with applicants before substantive examination begins, allowing them to make informed decisions about amendments or even abandonment early in the process. The USPTO is also using the DesignVision AI tool, which enables examiners to search dozens of databases using image-based queries. Although the presence of AI tools may or may not change how applicants draft their initial claims, early evaluations could offer strategic advantages and prosecution efficiencies.

Practitioner Use of AI

The USPTO has also issued guidance for patent practitioners using AI tools in drafting or prosecution. Practitioners are reminded that all filings must be reviewed and signed by a human. The guidance reiterates the duty of candor and disclosure, especially when AI tools are used to draft specifications or populate information disclosure statements.

Conclusion

While the future of AI in everyday life continues to evolve, recent developments at the USPTO signal a shift away from treating AI technology as categorically patent-ineligible and toward recognizing AI as a subject of patent protection and a tool for modernizing the patent examination process.

> The IP specialist must also be comfortable working cross-practice and with other firms and entities involved in the deal, and must understand how to represent their client properly in all contexts.

The Power Play of IP: The Strength of Strategists in Transactions

If you made it this far in BHIPP, you don't need to be convinced of the importance of intellectual property (IP) in transactions. The spectrum of IP inheres assets and liabilities that dealmakers ignore at their own peril. So how do parties in a transaction make sure they are getting what they want while avoiding pitfalls?

The Role of the IP Specialist

An effective IP strategy demands specialists who understand both IP law and deal mechanics. The IP specialist must be able to identify assets, assess chain of title, flag risks and ensure that contracts, licenses and disclosures align with the transaction's structure. Like all specialists drawn from practice areas outside the core M&A team, they must also understand the impact of deal structure, purpose and entities on their analysis. The IP specialist must also be comfortable working cross-practice and with other firms and entities involved in the deal, and must understand how to represent their client properly in all contexts.

Key Areas of Focus

- Scoping and Diligence: Early review of the definitive agreement, analysis of the target line of business and identification of the relevant jurisdictions help tailor diligence requests and avoid wasted effort. An understanding of materiality thresholds, timeline and bargaining power are all important to bringing an appropriate amount of effort and pressure to this knotty area of law.
- Patents: In addition to checking ownership and status, expired patents should be reviewed to determine whether they are in fact expired. Even if they are, damages may nonetheless be available for infringement. Marking compliance, multinational portfolios and many other issues can add further complexity.
- Trademarks: Consent or coexistence agreements can potentially circumscribe scope in a way that could impact the parties' intended trajectory for the target after closing. Trademark agreements are also fraught with intricacies, such as the need to recite goodwill, avoidance of naked licensing and excluding intent-to-use applications from assignments – particularly as collateral in deals involving debt financing. And are there common law trademarks or other unregistered brand assets that need diligence?
- Copyrights: Ensuring ownership of material company copyrights, whether registered or unregistered, is trickier than it may appear at first blush. Sometimes, whether for the

employee or the contractor, no written agreement exists, and sometimes applicable terms must be pieced together from multiple documents.

- Software and Artificial Intelligence (AI): Custom code, third-party and open-source components, and AI systems introduce complex ownership and licensing issues that must be carefully navigated. For anything other than off-the-shelf components, all the dependencies must be understood to ensure the business's ordinary course can continue after closing. IP specialists should be prepared to craft deal-specific representations and warranties to fit the sometimes incomplete or inconsistent information available regarding custom software contributors and components.
- Assignments and Ownership: Unassigned or improperly assigned IP should be expected, and the IP specialist should come with proposals for correcting chain of title. Agreements governing co-ownership of IP assets should be reviewed in detail.
- Contractual Terms: Agreements with employees, contractors, vendors and customers often contain IP provisions that affect post-closing rights and obligations. Watch out for agreements with target customers that have outsized negotiating power, as they may have demanded IP rights as part of their purchase. And review change of control and assignment clauses to ensure necessary IP can remain in use – ideally without paying a penalty.
- Infringement and Opinions: IP disputes are expensive, but those doing diligence around all but the largest deals rarely have the time or budget to conduct independent opinion work. If the parties are exchanging previously prepared opinions as part of the diligence process, consider the possibility that circulating those documents could result in challenges to any attached attorney-client privilege. Carefully attending to representations and warranties and understanding indemnities – and their limits – are critical here.
- Closing and Ancillary Agreements: In many deals, IP actions are part of closing and post-closing checklist items. The IP specialist must be able to handle short-form assignments and their proper recording, license agreements, and potentially transition services agreements or other ancillary documents.

Beyond the Deal Table

The IP specialist should possess some knowledge of representation and warranty insurance and debt finance and be comfortable communicating with underwriters and lender's counsel. They may at times need to work directly with the other party's lawyers or executives, technical consultants or diligence vendors, foreign counsel, or any number of other involved entities.

Takeaway for Deal Teams

To protect value and mitigate risk, deal teams must integrate IP specialists, ideally as early as possible in the deal cycle. This means going beyond boilerplate provisions and ensuring that IP diligence is thorough, strategic and aligned with the transaction's goals.

> "An effective IP strategy demands specialists who understand both IP law and deal mechanics."

The Great Patent Pivot: How Recent USPTO Policy Shifts Made Challenging Patents Harder – and Enforcing Them Easier

> "The institution rate has plunged from more than 65 percent to now around 10 percent. Institution has become the exception, not the rule."

The patent landscape for 2026 looks nothing like it did a year ago. The U.S. Patent and Trademark Office's (USPTO) sweeping changes throughout 2025 have dramatically reshaped the litigation landscape and elevated the strategic value of patents. Inter partes review (IPR) at the Patent Trial and Appeal Board (PTAB), once a tool companies relied on to challenge patents quickly and cost-effectively, has become far more difficult to access. The cumulative effect: Patents are back in the spotlight as both a risk and a competitive advantage.

The Overhaul of PTAB Practice: How Institution Became the Exception

The most profound shift in 2025 was the USPTO's overhaul of PTAB practice. Institution decisions for IPRs and post-grant reviews (PGRs) are now centralized with the director, who typically issues summary notices without explanation on whether to institute. This change, effective October 20, 2025, capped a year of reforms that steadily narrowed the path to institution.

The director's discretion is "unreviewable," a point the Federal Circuit reinforced in November 2025 when it confirmed that Congress intended institution decisions to be final and unappealable. And the numbers tell the story; since Director John Squires began reviewing all petitions, the institution rate has plunged from more than 65 percent to now around 10 percent. Institution has become the exception, not the rule.

Factors that Drive Decisions to Deny Institution

Today's denials often arrive without explanation, as 35 U.S.C. § 314(c) only requires that the director "notify the petitioner and patent owner, in writing, of the Director's determination."

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“For petitioners, the message is clear: Plan early, choose your forum wisely and expect that the USPTO will reject second bites at the invalidity apple.”

However, earlier in the year, before Squires' Senate confirmation, the public gained insight into the USPTO's thinking through more than 400 decisions issued by then acting Director Coke Morgan Stewart. Those decisions revealed the factors driving discretionary denials and foreshadowed the current landscape.

The USPTO often declined to institute review of patents that had been granted years before an IPR's filing date, on the basis that the patent owner had settled expectations that its patent no longer would be challenged. Further, the presence of parallel litigation that would reach a final disposition before the expected date of an IPR's final written decision weighed heavily against institution because it was deemed inefficient to institute a USPTO proceeding against a patent that would be evaluated in a district court trial or an International Trade Commission (ITC) investigation.

One-and-Done and the End of Serial Challenges

In October 2025, the USPTO proposed rules for institution that would make IPRs and PGRs a "one-and-done" process. When effective, these rules would provide additional reasons to deny institution of IPRs and PGRs under the following scenarios:

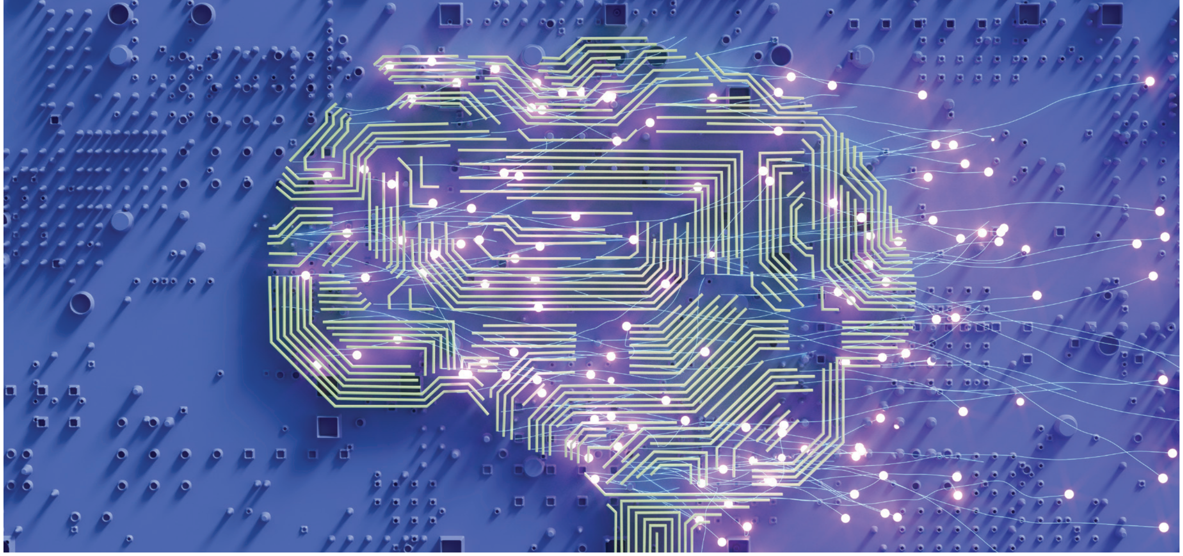
1. A challenged claim has already been tested and found not invalid in litigation, at the Federal Circuit, at the ITC, in a prior PTAB proceeding or via ex parte reexamination.
2. Parallel proceedings involving a challenged patent likely will resolve before a requested IPR.
3. A petitioner fails to stipulate that it will not raise prior art invalidity challenges in present or future proceedings.

Notably, the scope of the required petitioner stipulation is broader than statutory estoppel, and the proposed rules reinforce the presumption of validity that underpins investment in innovation.

For petitioners, the message is clear: Plan early, choose your forum wisely and expect that the USPTO will reject second bites at the invalidity apple. For patent owners, the proposed rules promise greater certainty and fewer duplicative challenges.

Real-Party-in-Interest Disclosures

The USPTO announced another major policy change in October 2025 with the restoration of strict real-party-in-interest (RPI) disclosure requirements for IPRs and PGRs. Petitioners must now identify all RPIs before institution, a move aimed at preventing misuse of these proceedings and protecting the integrity of the patent system from opaque investment structures and foreign manipulation. As Squires emphasized in his October memorandum, "[t]he integrity of PTAB proceedings depends on knowing who is behind a petition—who funds it, directs it, and/or benefits from it. Any opacity in that chain of control invites exploitation and undermines public confidence in the patent system." This renewed



“Patents have reclaimed their place at the center of competitive strategy and risk management.”

focus on transparency reflects not just statutory fidelity but also a national security imperative, given increasing attempts by foreign state-backed actors to manipulate PTAB proceedings through complex ownership structures.

A Countertrend: Voluntary Search Disclosure Declarations

Amid these tightening rules, Squires’ November 2025 memorandum on voluntary search disclosure declarations offers petitioners a rare opportunity to strengthen their case for institution. By disclosing how prior art was found, petitioners can gain a favorable discretionary factor, though this is a narrow exception in an otherwise restrictive environment. As Squires explained, the USPTO wants to benchmark discoverability and search efficiency: If petitioners show that critical prior art was easy to find using common tools, it may suggest the USPTO missed something during examination; if it required specialized analytics, that insight can inform future training and resource allocation. Either way, the USPTO gains actionable intelligence and petitioners gain a discretionary factor in their favor. This move reflects Squires’ broader philosophy that patents should be “born strong” and that transparency in prior art searches benefits all stakeholders.

The USPTO’s Patent Interventions: Injunctions and Exclusion Orders

The USPTO and the Department of Justice’s Antitrust Division have taken the unusual step of intervening in both district court and ITC cases to advocate for stronger patent enforcement. In district court, the agencies argued that even nonpracticing entities can suffer irreparable harm and that preliminary injunctions should be more attainable. This marks a shift toward a more expansive view of injunctive relief, potentially restoring leverage to patent holders. At the ITC, the agencies urged that exclusion orders should be the default remedy, with public interest exceptions applied only after a full determination of infringement and validity. This stance signals that patents should be robustly enforced and that the value and power of patents are on the rise, whether in federal court or before the ITC.

Conclusion: Patents Reclaimed as Strategic Assets

The cumulative impact of these reforms is unmistakable: Patents have reclaimed their place at the center of competitive strategy and risk management. By tightening access to PTAB challenges and arguing for the availability of injunctions and exclusion orders, the USPTO has shifted the balance of power toward patent owners. For innovators and litigants, the takeaway for 2026 is simple: Patents matter. And with these changes, expect an uptick in enforcement efforts as patent holders leverage their strengthened position.

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