Podcast Transcript

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

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Lee: The patent landscape for 2026 looks nothing like it did just a year ago. Sweeping changes at the U.S. Patent and Trademark Office throughout 2025 have reshaped how patents are challenged and enforced, dramatically elevating their strategic importance. In BakerHostetler's third annual IP Perspectives thought leadership piece, BHIPP, the Intellectual Property Practice Group highlights myriad IP-related topics that are at the forefront of industry developments and current challenges and trends. I'm Leeann Lee, and you're listening to BakerHosts.

Today's episode focuses on The Great Patent Pivot, a fundamental shift in the balance of power between patent challengers and patent owners and what it means for businesses today. To explore these changes, we turn to Jason Hoffman, a partner in BakerHostetler's Intellectual Property Group and a member of the Patent Litigation team. Jason is also known for his annual program, One Year of Patent Law in 60 Minutes, where he distills the most consequential patent law developments of the year. Here is Jason with his perspective on The Great Patent Pivot.

Hoffman: Something fundamental has changed with U.S. patents. Over the past year, the patent system has shifted in real time, driven by policy decisions at the United States Patent and Trademark Office. The result is a landscape that feels very different from what companies grew used to over the last decade. To understand how significant this shift is, it helps to start with how the system operated not very long ago.

The Patent Trial and Appeal Board, known as the PTAB, functioned as a safety valve in patent litigation. If you were sued for patent infringement, there was a familiar playbook. You challenged the patent at the patent office through an inter partes review or a post-grant review. These proceedings were designed to be faster and less expensive than district court litigation. And over time, they became a standard feature of how patent cases were managed. Institution rates for these proceedings routinely sat well above 60%. And if you had strong prior art, you could reasonably expect that the patent office would at least hear the challenge on the merits. As a result, these proceedings weren't just about invalidity. They shaped leverage from the outset. The PTAB was where patents went to be tested and very often, where they were weakened or eliminated.

That world is gone. This is The Great Patent Pivot, a shift in how patents are challenged, enforced, and valued across the system. What caused this shift? A new policy direction at the patent office under Director Squires. The starting point for this policy shift is the idea that patents should be born strong. Under Director Squires, the patent office has emphasized rigorous examination on the front end and greater stability once a patent is granted. The objective is to reduce the number of weak patents in the system, limit late-stage or duplicative challenges, and reinforce settled expectations around issued patents. In short, patents are meant to issue with greater confidence and durability.

But the policy does not stop there. A system that produces stronger patents only works if that strength carries real meaning. On the remedy side, the patent office has taken the position that patents that survive this process should have real economic and legal consequences. By supporting the availability of injunctions and exclusion orders, the office has made clear that patents are intended to function as enforceable property rights, not merely avenues to obtain royalties. These two ideas, patents that are born strong and patents whose strength matters, define the policy framework for everything that has followed.

Under prior practice, when an IPR or PGR was filed, the initial decision whether to institute review was effectively made by the PTAB. That changed with the current policy shift. The patent statute actually vests that authority to decide whether to institute a post-grant proceeding with the director and not the PTAB. By law, that determination is discretionary and not appealable. Once the director decides not to institute review, the proceeding ends. There is no merits appeal and no opportunity for a court to second guess how the discretion was exercised. As a result, control over access to patent challenges now sits squarely at the institution stage, and in many cases, review ends before the merits are ever reached.

The numbers reflect that shift. Looking across roughly 1,000 inter partes review and post-grant review petitions that have been filed since the shift, only about 23% have been instituted. Just last year, that figure routinely exceeded 60%.

Most of those denials are not based on the strength of the prior art. They reflect discretionary considerations applied before the PTAB ever evaluates validity. That means the patent office is often not reaching the question people expect, whether a patent is actually valid, because many challenges end at that threshold.

Two features of how discretionary denials operate are especially important. First, discretionary denials are exactly that. The statute gives the director broad authority to decide whether to institute review. Second, while the statute requires notice of the decision, it does not require a detailed explanation. Institution can therefore be denied without a full, reasoned opinion. Since October, many denials have arrived with little or no explanation, leaving parties to infer how discretion is being exercised.

Before institution decisions became more opaque, the patent office offered some insight into how it was exercising discretion. Earlier in 2025, decisions issued by the acting director showed the factors the office was weighing at the institution stage. If a patent had been enforced for several years without challenge, the office was often reluctant to institute review, citing concerns about settled expectations. Similarly, if a district court or the International Trade Commission was likely to address validity before the patent office could issue a final decision, institution was frequently denied as inefficient or duplicative.

The office also made clear that it wanted fewer serial challenges to the same patent and more one-and-done outcomes. The policy aim is to limit repeated attempts to invalidate a single patent across multiple forums and proceedings. Once a patent has been tested, whether in court, at the PTAB, or through another administrative process, the patent office has signaled that challengers should not expect additional opportunities to relitigate validity, even based on new prior art.

Since then, discretion has continued to expand. More recently, institution decisions have turned not just on timing or efficiency, but on who is behind the petition. In one recent decision, the patent office denied institution because a foreign sovereign held a minority ownership stake in the petitioner. A 10% ownership interest was enough to put real party in interest status in dispute. And when the petitioner failed to rebut potential foreign control with evidence, review was denied. This example underscores how far institution analysis has moved from a pure merits inquiry.

The same discretionary lens is also being applied to broader economic and industrial considerations. The director has expanded discretionary analysis into areas that look much more like industrial policy. In March of 2026, the patent office issued guidance stating that the director will consider manufacturing activity and small business status when deciding whether to institute review. Under that guidance, the director considers where accused products are manufactured, whether competing products tied to the patent owner are made in the United States, and whether the challenger is a small business that has been sued for infringement. In practical terms, where you build and who you are can influence whether your challenge is even heard.

Parties have tested whether courts would step in to curb this newfound discretion. The Federal Circuit has now had more than 10 opportunities to review these institution practices through petitions seeking extraordinary relief. To date, it has not told the patent office that it is overstepping.

Predictably, parties have adjusted their behavior in response to the shift in how IPRs and PGRs are instituted. The filing trends reflect that shift. IPR and PGR challenges dropped sharply toward the end of 2025. Over that same period, requests for ex parte reexamination, an older review process, rose steadily and eventually overtook IPR and PGRs. That does not mean reexamination became a better tool, it simply remained available when other options became less predictable.

But as ex parte reexamination filings have increased, the patent office recently moved to strengthen the director’s gatekeeping role there as well. In April of 2026, the office announced a change allowing patent owners to submit briefing before the threshold decision on whether a reexamination request raises a substantial new question of patentability. This structure is familiar, a front-loaded decision on institution that is controlled by the director. And as with discretionary denials for IPRs and PGRs, a refusal to institute a reexamination is final and not subject to appellate review. What remains to be seen is how this change will play out in practice, but the direction is clear. By introducing an earlier, more developed threshold record, the office appears focused on limiting the number of reexamination requests that are instituted.

The patent office’s policy shift is also visible on the enforcement side of patents. Over the past year, the patent office, joined by the Department of Justice’s Antitrust Division, has intervened in two district court cases to address injunctive relief. Both interventions were in cases brought by non-practicing entities, and both occurred in the Eastern District of Texas, currently the epicenter of U.S. patent litigation. Those choices matter. The government was not intervening at a random or at the margins of patent practice but in the form where injunction doctrine is being applied most actively and in cases that directly test whether non-practicing entities should be categorically disfavored when seeking equitable relief.

The first intervention involved a motion for a preliminary injunction. The government used that opportunity to challenge prevailing assumptions about irreparable harm, particularly the notion that an entity that licenses its patents, rather than manufactures products, is necessarily limited to monetary remedies. The plaintiff in the case ended up withdrawing its motion for preliminary injunction. The second intervention came after trial, where a jury had found infringement and awarded substantial damages. The question before the court is whether to grant a permanent injunction. There, the government made its position explicit. Patents are property rights, and property rights include the right to exclude. The government argued that irreparable harm is not confined to injuries that can be neatly reduced to money and that ongoing infringement can impose harms that are difficult to quantify, even when the patent owner does not directly compete in the marketplace.

Taken together, these two interventions reflect a clear policy position. Injunctive relief should remain meaningfully available, including for non-practicing entities, and patent rights are not diminished simply because they are enforced through licensing rather than manufacturing. Whether courts ultimately adopt that reasoning remains to be seen, but the signal is clear. This is now a repeated intervention in the same district on the same issue, reflecting a broader effort to ultimately increase the power and value of patents.

The Great Patent Pivot has real consequences for both sides of a patent dispute. For alleged infringers, The Great Patent Pivot fundamentally changes risk assessment. The assumption that a patent office challenge will serve as a reliable backstop is no longer safe. Patent office review is harder to access, more discretionary, and often ends before the merits are ever reached. That reality shifts pressure earlier in a dispute into pre-suit diligence, early case strategy, and forum selection and raises the cost of getting those decisions wrong.

For patent owners, the response has already begun. In 2025, patent infringement filings increased by 19%, with more than 4,500 new cases filed. That increase is not happening in a vacuum. It reflects a recognition that patents are more durable, enforcement tools are more meaningful, and the balance of leverage has shifted. Patent owners are signaling that they believe their rights are stronger and that the system is more receptive to enforcement than it was just a few years ago. The result is a litigation environment that looks very different from the one many companies planned around. Patents are harder to challenge, more consequential when asserted, and more influential in shaping outcomes. This is The Great Patent Pivot.

Lee: Thank you to Jason Hoffman for sharing his perspective. If you have any questions for Jason, his contact information is in the show notes. As always, thanks for listening to BakerHosts.