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Ann E. Motl

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Note

***Inter Partes* Review: Ensuring Effective Patent Litigation Through Estoppel**

*Ann E. Motl**

“We have identified your company as one that appears to be using [our] patented technology, and we are contacting you to initiate discussions regarding your need for a license.”¹ An increasing number of companies and individual consumers have received such infringement letters,² which typically conclude with a demand for a license specially calculated to persuade potential defendants to enter into a license.³ Because of the exorbitant expenses associated with patent litigation and the potential for a devastating adverse judgment,⁴ many companies have been coerced into entering a license, whether or not they believe they actually infringe a valid patent.⁵ Taking

* J.D. Candidate 2015, University of Minnesota Law School; B.S.M.E. 2012, University of St. Thomas. I would like to thank Michael T. Hawkins for introducing me to this topic. I also thank Professor Ruth Okediji for her advice and comments during the drafting of this Note. Thanks to the members of *Minnesota Law Review* who helped with the publication of my Note and thank you to all of my *Law Review* friends for making the past two years so enjoyable. Finally, thank you to my family for their continuing support in law school and life. Copyright © 2015 by Ann E. Motl.

1. Joe Mullin, *Patent Trolls Want \$1,000—for Using Scanners*, ARSTECHNICA (Jan. 2, 2013, 7:30 AM), <http://arstechnica.com/tech-policy/2013/01/patent-trolls-want-1000-for-using-scanners>.

2. In 2012, the number of patent infringement filings was the highest ever recorded. See *PricewaterhouseCoopers’s Patent Litigation Study Reveals 2012 Was a Colossal Year with Patents Granted and Litigations Filed Significantly Increasing*, PWC (June 18, 2013), <http://www.pwc.com/us/en/press-releases/2013/pwcs-patent-litigation-study.jhtml> [hereinafter *PricewaterhouseCooper’s Patent Litigation*].

3. See Jeffrey C. Morgan, *Do Patent Trolls Have a Future?*, FED. LAW., Oct./Nov. 2013, at 46, 48.

4. High-stakes patent suits cost on average \$5.5 million. Irfan A. Lateef & Marko R. Zoretic, *The U.S. Patent Litigation Process*, KNOBBE MARTENS (Dec. 2010), <http://knobbe.com/pdf/2010-December-The-US-Patent-Litigation-Process.pdf>. In 2012, plaintiffs won more than \$1 billion in damages in three cases. *PricewaterhouseCoopers’s Patent Litigation*, *supra* note 2. Before 2012, plaintiffs had won more than \$1 billion in damages in only three cases total. *Id.*

5. Patents are legal documents; similar to regular contracts, a party

note of such problems with traditional federal patent litigation, Congress passed the America Invents Act in 2011.⁶ The America Invents Act created *inter partes* review (IPR), an alternative to federal litigation in which a party seeks to invalidate a patent in a streamlined trial-like proceeding before the Patent and Trademark Office (PTO).⁷

IPR became available in September 2012.⁸ Since then, IPR has become so popular that it could essentially change patent litigation in the United States by creating separate forums for challenging the validity of a patent rather than its infringement.⁹ Such separate forums would parallel the structural methodology of other countries.¹⁰ Before the creation of IPR, patent litigation typically occurred in federal court, where a plaintiff accuses a defendant of infringing at least one of the claims of its patent.¹¹ In response, a defendant may argue both that it did not infringe the specific claims of the patent¹² and

cannot base liability on invalid patents. *See Patent Litigation*, EDWARDS WILDMAN (2012), <http://www.edwardswildman.com/files/uploads/Documents%5CFolios/US-PatentTradeSecretLit.pdf>. Defendants thus try to argue that patents are invalid and unenforceable to avoid infringement liability. *See id.* Defendants can prove invalidity by showing the patent did not meet the necessary statutory requirements at the time the patent was issued. *See id.* Such requirements, including novelty and nonobviousness, are described *infra* note 14. Courts find a surprising number of patents to be invalid, relieving the defendant of any infringement liability. *See infra* note 45.

6. Michael D. Stein, *Overview of the Leahy-Smith America Invents Act*, STEIN IP (June 2013), <http://www.smiplaw.com/presentations/Overview-of-the-Leahy-Smith-America-Invents-Act.pptx>.

7. *See* Patrick Doody, *Post-Grant Proceedings: The Year Behind and the Year Ahead*, LAW360 (Oct. 1, 2013, 2:10 PM), <http://www.law360.com/articles/475387/post-grant-proceedings-the-year-behind-and-the-year-ahead>.

8. *Id.*

9. *See Patent Trial and Appeal Board Statistics*, VENABLE (Apr. 23, 2014), <http://www.venable.com/patent-trial-and-appeal-board-statistics-04-23-2014> (noting the popularity of IPR petitions).

10. *E.g., Patent Invalidity Proceedings*, BARDEHLE (Apr. 2014), http://www.bardehle.com/fileadmin/contentdocuments/broschures/Patent_invalidity_proceedings.pdf (discussing Germany's bifurcated patent litigation system).

11. 28 U.S.C. § 1338 (2012) (stating that federal courts have jurisdiction over patent-based actions). Patent claims are "the portion of the patent document that defines the scope of the patentee's rights." *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 372 (1996). For example, a patent may have a claim for "[a] chair consisting of a back, a seat, and three legs." Jon Schuchardt, *Basic Patent Law: III. How To Read a Patent*, DILWORTH IP (Mar. 1, 2013), <http://www.dilworthip.com/basic-patent-law-iii-how-to-read-a-patent>. If someone other than the patent owner makes a chair with a back, a seat, and three legs, he or she has infringed the patent. *See id.* If the new chair has a back, a seat, and *four* legs, however, the individual has not infringed the patent. *Id.*

12. *See supra* note 11 for an example of noninfringement.

that the patent is actually invalid and thus cannot be infringed because the PTO should not have issued it due to a failure to meet the requirements for receiving a patent.¹³ For the PTO to issue a patent, it must be novel and nonobvious.¹⁴ These are nuanced legal doctrines, but they essentially limit patents to innovative inventions.¹⁵ The PTO determines if an invention is novel and nonobvious, and thus entitled to a patent, by examining prior art.¹⁶ Prior art is a legal term for references that disclose elements of the invention.¹⁷ During both traditional patent litigation and IPR, the party accused of infringement typically searches for prior art that the PTO may not have found, and the party then uses this prior art to argue patent invalidity.¹⁸ While Congress created IPR to shift some invalidity analysis away from federal courts, the United States does not have completely separate invalidity and infringement forums like other countries.¹⁹ IPR only addresses specific aspects of invalidity, and after IPR concludes, either a plaintiff or defendant may continue litigation in federal court.²⁰

13. See *supra* note 5. For an example of a case where the defendant argued both that it did not infringe the claims of the patent (its product was different than the patented invention) and that the patent was invalid (the PTO should not have issued it and it was unenforceable), see *SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC*, 767 F.3d 1339, 1339 (Fed. Cir. 2014), *reh'g en banc granted, opinion vacated*, No. 2013-1564, 2014 WL 7460970 (Fed. Cir. Dec. 30, 2014).

14. 35 U.S.C. §§ 102, 103 (2012). Continuing with the chair example from note 11, a basic chair today would clearly not be novel because all of its elements are publicly known. A publication or patent showing a device with a back, a seat, and three legs would prevent someone from receiving a patent on the chair. If an invention is not described exactly in these publications, it still may be unpatentable because it could be considered obvious. For example, assuming a cup holder in its exact form did not exist, the PTO could say that such an invention is obvious. The PTO would note that a chair and cup holder existed separately, and it would have been obvious to combine them. The PTO tries to reward inventions that promote progress, and inventions that are not novel or are obvious do not accomplish this goal. See *infra* note 15.

15. See generally U.S. CONST. art. I, § 8, cl. 8 (granting an intellectual property system for promoting science and the arts).

16. See *Patent FAQs*, U.S. PAT. & TRADEMARK OFF., <http://www.uspto.gov/help/patent-help> (last modified Dec. 13, 2014).

17. *Id.*

18. See *supra* note 13 and accompanying text; *infra* text accompanying note 69.

19. See *Patent Invalidity Proceedings*, *supra* note 10, at 4 (“According to Germany’s bifurcated patent litigation system, the infringement of a patent is dealt with by specialized District Courts, whereas the validity of a patent is reviewed in separate proceedings by a single federal court, the Federal Patent Court . . .”).

20. See Jennifer C. Bailey, *Lessons Learned from the First Year of Inter*

To prevent complete duplication of IPR, however, Congress drafted an estoppel provision. Per 35 U.S.C. § 315(e), after IPR, an IPR petitioner is estopped in a future forum from raising “any ground that [was] . . . raised or reasonably could have [been] raised” during the IPR proceeding.²¹ Unfortunately, this estoppel provision is ambiguous.²²

This Note addresses a question federal courts will likely have to consider: What is the appropriate estoppel burden on IPR petitioners that still effectuates Congress’s intent for IPR to be an efficient alternative to traditional federal litigation for nullifying invalid patents? Part I introduces IPR. Part II explains the two possible interpretations of IPR estoppel and discusses their tradeoffs. Part III argues it is fairest for judges to interpret IPR estoppel broadly, precluding nearly all evidence the petitioner could have used in IPR. Still, the broadest interpretation is disproportionately burdensome on petitioners, so this Note also provides recommendations for better integrating IPR into a fair and effective patent litigation system.

I. *INTER PARTES* REVIEW: THE NEW PREMIER PROCEEDING FOR INVALIDATING A PATENT

Since becoming available in September 2012, IPR has been more popular than expected.²³ By its definition, IPR is attractive to defendants in patent litigation and other parties seeking to invalidate low-quality and potentially threatening patents.²⁴

Partes Reviews, LANDSLIDE, Nov./Dec. 2013, at 12, 15, available at http://www.americanbar.org/publications/landslide/2013-14/november-december/lessons_learned_the_first_year_inter_partes_reviews.html.

21. 35 U.S.C. § 315(e) (2012).

22. Thomas King & Jeffrey A. Wolfson, *PTAB Rearranging the Face of Patent Litigation*, LANDSLIDE, Nov./Dec. 2013, at 18, 19–20, available at http://www.americanbar.org/publications/landslide/2013-14/november-december/ptab_rearranging_face_patent_litigation.html.

23. *Patent Trial and Appeal Board Statistics*, *supra* note 9.

24. See David Cavanaugh & Chip O’Neill, *A Practical Guide to Inter Partes Review*, WILMERHALE (June 20, 2013), http://www.wilmerhale.com/uploadedFiles/WilmerHale_Shared_Content/WilmerHale_Files/Events/WilmerHale-webinar-IPR1-20Jun13.pdf (noting “[m]ost IPRs have parallel litigation pending”); see also Ryan Davis, *5 Tips for Winning USPTO Review Under AIA*, LAW360 (Sept. 13, 2013, 7:40 PM), <http://www.law360.com/articles/472560/5-tips-for-winning-uspto-review-under-aia> (recommending that IPR petitioners who have been sued for infringement “focus only on the claims of the patent that are at issue in litigation”); H. Keeto Sabharwal et al., *Advantages of Inter Partes Review in Hatch-Waxman Cases*, LAW360 (Nov. 15, 2012, 1:11 PM), <http://www.law360.com/articles/392832/advantages-of-inter-partes-review-in-hatch-waxman-cases> (describing IPR as “an attractive strategic complement or alternative to abbreviated new drug application litiga-

IPR is a proceeding for a party to “request to cancel as unpatentable 1 or more claims of a patent . . . under section 102 or 103 and only on the basis of prior art²⁵ consisting of patents or printed publications.”²⁶ Practically, then, if IPR judges determine claims of a patent or the entire patent to be invalid, the patent owner can no longer sue for infringement of those claims.²⁷ IPR effectively allows a defendant to switch from a defensive position to an offensive one.

This Part gives an overview of the IPR process and explains why it will be an important component of patent litigation. Section A discusses the differences between IPR and its unpopular predecessor, *inter partes* reexamination (IPRex), and accompanying legislative history. Section B discusses the mechanics of IPR, including a judicially created and potentially troubling redundancy rule. Finally, Section C concludes the overview of IPR by discussing the estoppel standards of both proceedings.

A. INTER PARTES REVIEW COMPARED TO INTER PARTES REEXAMINATION

As noted, IPR has been incredibly popular to date, while its predecessor, IPRex was not nearly as successful due to its many flaws.²⁸ Congress sought to rectify these deficiencies when creating IPR.²⁹ IPR incorporates more adversarial aspects like oral argument and is the most trial-like proceeding that has ever existed for challenging patents before an administrative agency.³⁰ IPR occurs before the newly created Patent Trial

tion”).

25. See *supra* text accompanying notes 16–17. Prior art references can be patents, other printed publications, physical products, electronic sources, or any other type of reference which can convey the elements of the purported invention. See generally Gene Quinn, *What Is Prior Art?*, IPWATCHDOG (Oct. 2, 2010), <http://www.ipwatchdog.com/2010/10/02/what-is-prior-art> (discussing the sources and characteristics of prior art).

26. 35 U.S.C. § 311(b). Sections 102 and 103 require a patent be novel and nonobvious in order to be valid. *Id.* §§ 102, 103. Note that, unlike in federal litigation, Congress limited the types of prior art for invalidating patents in IPR to patents and printed publications. *Id.*

27. See *id.* § 311(b).

28. See Sabharwal et al., *supra* note 24.

29. H.R. REP. NO. 112-98, pt. 1, at 46–48 (2011). A typical patent case, consisting of validity and infringement issues, can take multiple years, but IPRex could still last longer. See *infra* text accompanying notes 34–35.

30. See Andrei Iancu et al., *Inter Partes Review Is the New Normal: What Has Been Lost? What Has Been Gained?*, 40 AM. INTELLECTUAL PROP. L. ASS'N Q.J. 539, 541–42, 559 (2012).

and Appeal Board (PTAB).³¹ The PTAB is an administrative court, comprised of judges familiar with scientific and patent issues.³² In contrast, three patent examiners completed each IPReX in a format similar to applying for a patent.³³ More important than procedural changes, however, Congress limited IPR's timeframe to twelve months because IPReX could take longer than a patent case in federal court.³⁴ In fact, IPReX took three years on average.³⁵ Congress intended IPR to be a "quick and cost effective alternative[] to litigation" in the civil courts.³⁶

Next, it is less likely for the PTO to authorize IPR than IPReX due to the new "heightened institution standard." Under the old standard, the PTO would authorize IPReX for any "substantial new question of patentability."³⁷ Under the IPR standard, a petitioner must show there is a "reasonable likelihood" it will succeed with respect to at least one challenged claim.³⁸ Legislators intended this new standard to be more difficult to meet, and one PTO representative explicitly stated that the new standard "allows for the exercise of discre-

31. 35 U.S.C. § 6 (establishing the PTAB).

32. *Id.* (requiring administrative patent judges to have "competent legal knowledge and scientific ability").

33. In IPReX, a patent owner worked with examiners to try to persuade them that the patent was still valid over new prior art. See Eric J. Rogers, *Ten Years of Inter Partes Patent Reexamination Appeals: An Empirical View*, 29 SANTA CLARA COMPUTER & HIGH TECH. L.J. 305, 312 (2013). The patent owner and examiners communicated back and forth to amend claims so as to prevent invalidation. See *id.* at 315. Senator Jon Kyl explained the change from IPReX to IPR as a shift from an examinational proceeding to an adjudicative proceeding. 157 CONG. REC. S1375-76 (daily ed. Mar. 8, 2011) (statement of Sen. Jon Kyl).

34. See Joe Matal, *A Guide to the Legislative History of the America Invents Act: Part II of II*, 21 FED. CIR. B.J. 539, 622 (2012) (providing Senator Kyl's comments on the undesirable length of IPReX and the viability of IPR's expedited, adjudicative model); Ryan Davis, *Fed. Circ. Puts Patent Re-Exams at Front of Attys' Playbooks*, LAW360 (July 8, 2013, 8:55 PM), <http://www.law360.com/articles/455531/fed-circ-puts-patent-re-exams-at-front-of-attys-playbooks> (discussing the use of patent reexamination to upset the final judgment of a lower court).

35. Bruce Y.C. Wu & Stephen B. Maebius, *Examining AIA's High-Speed Inter Partes Review System*, LAW360 (Nov. 15, 2011, 12:17 PM), <http://www.law360.com/articles/284072/examining-aia-s-high-speed-inter-partes-review-system>.

36. H.R. REP. NO. 112-98, pt. 1, at 48 (2011).

37. Arpita Bhattacharyya et al., *Inter Partes Review: Making Heads or Tails of the 'Reasonable Likelihood of Success' Standard*, FINNEGAN (Oct. 25, 2013), <http://www.finnegan.com/resources/articles/articlesdetail.aspx?news=258c4ae3-fb7f-4855-9c85-7a487589d9b1>.

38. *Id.*

tion but encompasses a 50/50 chance . . . of prevailing.”³⁹ Under the old standard, the PTO instituted approximately 95% of petitions.⁴⁰ Yet, even under the new standard, the PTO has instituted approximately 80% of petitions as of July 10, 2014.⁴¹ Still, the ultimate impact of the heightened institution standard remains to be seen.

B. THE MECHANICS OF *INTER PARTES* REVIEW

When a petitioner decides to file for IPR, it submits a petition to the PTO.⁴² The PTO has promulgated many rules for submitting a petition.⁴³ Petitions for IPR must identify each challenged claim and show how prior art including patents and printed publications invalidate the claims under 35 U.S.C. §§ 102 or 103 which require valid patents to be novel and non-obvious.⁴⁴ Challenges based on obviousness and novelty are important to patent owners because they are the top two reasons why claims are invalidated in litigation.⁴⁵

Petitioners must describe these challenges within the petition’s sixty-page limit.⁴⁶ The petition is incredibly important because the petitioner cannot advance different arguments later in the proceeding.⁴⁷ After the petitioner submits its petition for IPR, the patent owner has three months to respond and argue that the PTO should not grant an IPR.⁴⁸ The PTO must then decide whether to institute an IPR within three months after

39. *Id.*

40. Dennis Crouch, *Inter Partes Reexamination: Standard for Initiating Reexamination No Longer Requires “New” Issues*, PATENTLYO (Apr. 7, 2012), <http://www.patentlyo.com/patent/2012/04/inter-partes-reexamination-standard-for-initiating-reexamination-no-longer-requires-new-issues.html>.

41. Kyle Turley, *Lessons from Inter Partes Review Denials*, LAW360 (Aug. 7, 2014, 10:24 AM), <http://www.law360.com/articles/560759/lessons-from-inter-partes-review-denials>.

42. *Id.* (noting that only third parties, not patent owners themselves, may petition for IPR).

43. See 37 C.F.R. §§ 42.101–06 (2014).

44. *Id.* § 42.104.

45. See John R. Allison & Mark A. Lemley, *Empirical Evidence on the Validity of Litigated Patents*, 26 AM. INTELL. PROP. L. ASS’N Q.J. 185, 209 tbl.2 (1998) (noting that in federal cases where anticipation (no novelty) was an affirmative defense, courts invalidated 40.7% of patents, and where obviousness was an affirmative defense, courts invalidated 36.3% of patents).

46. 37 C.F.R. § 42.24(a)(i); Iancu et al., *supra* note 30, at 567 tbl.1.

47. See Ryan Davis, *4 Mistakes That Can Doom AIA Petitions*, LAW360 (Aug. 25, 2014, 5:49 PM), <http://www.law360.com/articles/570192/4-mistakes-that-can-doom-aia-petitions>.

48. 37 C.F.R. § 42.107 (“The patent owner *may* file a preliminary response to the petition.” (emphasis added)).

the patent owner responds or by the last day the patent owner may respond.⁴⁹ The PTO will only grant IPR on claims that it believes the challenger has a “reasonable likelihood” of invalidating.⁵⁰ Once the PTO makes its decision, the PTAB has twelve months to complete the IPR.⁵¹

When the PTAB begins IPR, the patent owner has three months to conduct discovery, including deposing any experts the petitioner used in preparing its petition.⁵² The patent owner then files its first substantive motion, arguing its claims are valid.⁵³ Next, the petitioner takes discovery and files counterarguments.⁵⁴ Discovery and arguments continue to alternate until the oral hearing.⁵⁵

IPR has been available for two years, and so far the PTO and PTAB have met their time constraints.⁵⁶ The PTAB has met its constraints by limiting discovery⁵⁷ and granting petitioners’ arguments for fewer than half of proposed claims.⁵⁸ While the PTAB will reject arguments on claims it believes do not meet the heightened institution standard, the PTAB has also begun rejecting arguments on “cumulative/redundancy” grounds.⁵⁹ In *Liberty Mutual Insurance Co. v. Progressive Casualty Insurance Co.*, the petitioner Liberty Mutual raised 422 grounds for rejection of the twenty claims of the patent based on ten prior art references.⁶⁰ The PTAB rejected many of these

49. 35 U.S.C. § 314(b) (2012).

50. *Id.* § 314(a).

51. *Id.* § 316(a)(11) (giving the Director of the PTO an additional six months for good cause).

52. Iancu et al., *supra* note 30, at 553.

53. *Id.* at 556.

54. *Id.*

55. *Id.* at 556–58.

56. *See* Doody, *supra* note 7 (noting the PTO has a maximum of six months to determine whether to initiate trial, and it has made this decision in 5.1 months on average). On November 13, 2013, the PTAB released its first IPR final decision on the merits, well ahead of the one-year deadline, which would have been January 9, 2014. *Garmin Int’l, Inc. v. Cuozzo Speed Techs. LLC*, No. IPR-2012-00001, 108 U.S.P.Q.2d 1852, 1854 (P.T.A.B. Nov. 13, 2013).

57. *See generally* Vic Souto, *How PTAB Applies ‘Interests of Justice’ Discovery Standard*, LAW360 (Sept. 9, 2013, 12:15 PM), <http://www.law360.com/articles/468183/how-ptab-applies-interests-of-justice-discovery-standard> (discussing the rules governing IPR proceedings that limit discovery).

58. *See* Doody, *supra* note 7 (finding that the PTO only grants trial for about 32.8% of claims).

59. *See, e.g.*, *Liberty Mut. Ins. Co. v. Progressive Cas. Ins. Co.*, No. CBM-2012-00003, 2012 WL 9494791, at *2 (P.T.A.B. Oct. 25, 2012).

60. *Id.* at *1.

grounds for being redundant.⁶¹ The PTAB identified two examples of redundancy: (1) where multiple prior art references show the same rejection; and (2) where a petitioner uses more prior art references than necessary in combination to show obviousness.⁶² The PTAB ordered Liberty Mutual to reduce its arguments for rejection, even though these arguments may have met the standard necessary to institute trial.⁶³ In other cases, however, the PTAB chose grounds for rejection itself when it determined arguments were redundant.⁶⁴ The PTAB argued that 37 C.F.R. § 42.1(b), which requires “the just, speedy, and inexpensive resolution of every proceeding,” gives it the authority to deny arguments on redundancy grounds.⁶⁵

At the end of IPR, the PTAB will issue a claim construction.⁶⁶ A claim construction defines the scope and meaning of a claim.⁶⁷ For example, in one IPR decision, the PTAB construed the claim language “engine off” to mean “engine not running.”⁶⁸ The petitioner argued for a slightly different definition because it believed it had prior art to show these claims were anticipated (not novel) and thus invalid under its proposed definition.⁶⁹ As with all types of patent litigation, claim construction is an important part of the process for determining if prior art invalidates a patent.

C. ESTOPPEL PROVISIONS OF *INTER PARTES* REVIEW AND *INTER PARTES* REEXAMINATION

Once the PTAB releases its claim construction, it then determines whether the patent’s claims are invalid.⁷⁰ If the PTAB determines none or only some of the claims are invalid, litiga-

61. *Id.* at *2.

62. *Id.*

63. *Id.* at *4, 6–9.

64. See *MicroStrategy, Inc. v. Zillow, Inc.*, No. IPR2013-00034, 2013 WL 5970155, at *7 (P.T.A.B. Apr. 2, 2013).

65. *Liberty Mut.*, 2012 WL 9494791, at *1 (quoting 37 C.F.R. § 42.1(b) (2014)).

66. See Scott A. McKeown, *Early PTAB Claim Construction—The Faster, Cheaper Markman Order*, PATENTS POST-GRANT (Oct. 2, 2013), <http://www.patentspostgrant.com/lang/en/2013/10/early-ptab-claim-construction-to-drive-litigation-settlements>.

67. *Renishaw PLC v. Marposs Societa' Per Azioni*, 158 F.3d 1243, 1247–48 (Fed. Cir. 1998).

68. *Idle Free Sys., Inc. v. Bergstrom, Inc.*, No. IPR2012-00027, 109 U.S.P.Q.2d 1443, 1447 (P.T.A.B. Jan. 7, 2014).

69. See *id.* at 1447–49.

70. See *id.* at 1448.

tion may continue in another forum.⁷¹ Petitioners thus have two opportunities for a court to declare a patent invalid.⁷² However, this opportunity is tempered by IPR's estoppel provision. This new provision, 35 U.S.C. § 315(e)(2), states:

The petitioner in an inter partes review . . . that results in a final written decision . . . may not assert either in a civil action . . . or in a proceeding before the International Trade Commission . . . that the claim is invalid on any ground that the petitioner *raised or reasonably could have raised* during that inter partes review.⁷³

In contrast, the previous estoppel provision for IPReX was:

A third-party requester whose request for an inter partes reexamination results in an order . . . is estopped from asserting at a later time, in any civil action . . . any ground which the third-party requester *raised or could have raised* This subsection does not prevent the assertion of invalidity based on newly discovered prior art unavailable to the third-party requester and the Patent and Trademark Office at the time of the inter partes reexamination proceedings.⁷⁴

A comparison of the two statutes shows a simultaneous strengthening and weakening of IPR's estoppel provisions. Specifically, IPR estoppel applies not only to federal court proceedings, but also proceedings before the International Trade Commission.⁷⁵ Furthermore, the estoppel provision of IPReX had an escape clause allowing parties to avoid estoppel upon the discovery of newly found prior art, while the IPR statute contains no such clause.⁷⁶ Still, Congress softened the effects of estoppel after IPR because the new statute replaces "could have raised" with "reasonably could have raised."⁷⁷

Indeed, Congress recognized the need to draft the estoppel provision to prevent parties from asserting duplicative and wasteful arguments in future forums, yet also the need to encourage parties to use IPR while maintaining rights for future litigation.⁷⁸ Early in the lengthy history of the America Invents Act, the IPR estoppel only applied to arguments actually

71. See *supra* Introduction.

72. See Bailey, *supra* note 20.

73. 35 U.S.C. § 315(e)(2) (2012) (emphasis added).

74. 35 U.S.C. § 315(c) (2002) (emphasis added) (current version at 35 U.S.C. § 315(e)(2) (2012)).

75. 35 U.S.C. § 315(e)(2) (2012).

76. Compare 35 U.S.C. § 315(e)(2) (2012), with 35 U.S.C. § 315(c) (2002) (current version at 35 U.S.C. § 315(e)(2) (2012)).

77. See 157 CONG. REC. S1375 (daily ed. Mar. 8, 2011) (statement of Sen. Jon Kyl); see also *infra* text accompanying notes 83–84.

78. *Patent Quality Improvement: Post-Grant Opposition: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary*, 108th Cong. 32 (2004) (statement of Michael K. Kirk, Executive Director, American Intellectual Property Law Association).

raised.⁷⁹ While businesses and professional patent law associations supported this provision,⁸⁰ patent owners and some congressmen instead argued for stronger estoppel provisions.⁸¹ Congress compromised and noted the importance of softening the “could have raised” provision.⁸² Senator Kyl noted courts could interpret the “could have raised” provision as estopping petitioners “from raising any issue that it would have been physically possible to raise . . . even if only a scorched-earth search around the world would have uncovered the prior art in question.”⁸³ He then defined the “reasonably could have raised” provision as preventing “only . . . that prior art which a skilled searcher conducting a diligent search reasonably could have been expected to discover.”⁸⁴

To date, practitioners have little guidance for determining what Senator Kyl considers prior art a skilled searcher should reasonably discover.⁸⁵ While the PTAB has issued over 100 IPR written decisions,⁸⁶ no federal litigation subsequent to IPR has addressed the question of estoppel.⁸⁷ Further, “the Federal Cir-

79. See Matal, *supra* note 34, at 618.

80. *Review of Recent Judicial Decisions on Patent Law: Hearing Before the Subcomm. on Intellectual Prop., Competition, and the Internet of the H. Comm. on the Judiciary*, 112th Cong. 58 (2011) (statement of Andrew J. Pincus, Mayer Brown LLP) (calling broad estoppel “treacherous”).

81. See *Patent Reform: The Future of American Innovation: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 210 (2007) (statement of Bruce G. Bernstein, Chief Intellectual Property and Licensing Officer, InterDigital Communications Corp.); 157 CONG. REC. S1326 (daily ed. Mar. 7, 2011) (statement of Sen. Jefferson Sessions) (noting the “reasonably could have raised” estoppel provisions “were long sought by inventors and patent owners”).

82. *America Invents Act: Hearing on H.R. 1249 Before the Subcomm. on Intellectual Prop., Competition, and the Internet of the H. Comm. on the Judiciary*, 112th Cong. 52 (2011) (statement of Rep. Zoe Lofgren, Member, Subcomm. on Intellectual Prop., Competition, and the Internet) (“[T]here is significant disincentive to bring an action because in the litigation, anything that could have been raised can’t be used.”).

83. 157 CONG. REC. S1375 (daily ed. Mar. 8, 2011) (statement of Sen. Jon Kyl).

84. *Id.*

85. See King & Wolfson, *supra* note 22.

86. Dorothy Whelan & Gwilym Attwell, *Challenging and Defending BioPharma Patents at the PTAB—What Practitioners Need To Know*, FISH & RICHARDSON 9 (Aug. 13, 2014), <http://fishpostgrant.com/wp-content/uploads/8-13-14-PG-Webinar-FINAL.pdf>.

87. *But see* Star Envirotech, Inc. v. Redline Detection, LLC, Case No. 8:12-cv-01861, slip op. (C.D. Cal. Jan. 29, 2015), available at <http://interpartesreviewblog.com/wp-content/uploads/2015/02/Star-EnviroTech-Inc-v-Redline-Detection-LLC-Case-No-8-12-cv-01861-slip-op-C-D-Cal-Jan-29-2015.pdf>. In a recent order, the district court addressed a simpler estoppel

cuit has . . . never addressed the scope of estoppel after an inter partes reexamination has . . . concluded.”⁸⁸ Thus, there is no guidance from the Federal Circuit, the patent appeals court, regarding the preclusive effect of the estoppel provision.

However, there are two reasons federal courts will soon need to address estoppel issues. First, IPR estoppel attaches immediately upon the PTAB’s written decision, whereas IPReX estoppel did not attach until all appeals were exhausted.⁸⁹ Because appeals from IPReX were typically not exhausted until federal litigation ended, federal courts rarely had the opportunity to address estoppel.⁹⁰ Since IPR is shorter and estoppel attaches immediately, federal courts will likely soon find themselves facing estoppel questions.⁹¹ Secondly, petitioners can advance far fewer arguments in IPR due to the sixty-page limit, the heightened institution standard, and the PTAB’s denial on redundant grounds.⁹² In cases where the PTAB invalidates none or only some of the claims, the petitioner will likely have many arguments it wishes to bring in federal courts, and what evidence and arguments are estopped will be a contentious issue.⁹³

II. THE OPEN QUESTION OF *INTER PARTES* REVIEW ESTOPPEL

When courts eventually interpret the IPR estoppel provision, they will need to effectuate the legislative intent by considering Congress’s ultimate goal of making IPR a speedy and inexpensive alternative to typical federal patent litigation.⁹⁴

question than this Note considers. There, litigation continued in district court after the PTAB found that the petitioner Redline failed to show the two challenged claims were invalid. *Id.* at 2. Defendant Redline attempted to introduce a physical machine to prove invalidity, but plaintiff Star Envirotech argued that Redline should be estopped from using this model. *Id.* at 3–4. Star Envirotech conceded that IPR rules limit prior art to patents and printed publications, but Star Envirotech nonetheless argued that Redline had the owner’s manual of the prior art machine in its possession at the time of IPR and thus could have submitted that. *Id.* The court disagreed, also noting that the physical machine disclosed more features than the owner’s manual disclosed, and Redline was thus not estopped from using the physical machine in its invalidity arguments. *Id.* at 4. The primary focus of this Note is to consider the more difficult estoppel issues, regarding only patents and printed publications.

88. King & Wolfson, *supra* note 22, at 2–3.

89. See Bailey, *supra* note 20, at 4.

90. *Id.*

91. See King & Wolfson, *supra* note 22, at 3.

92. See Bailey, *supra* note 20, at 2–4.

93. *Id.* at 4–5; King & Wolfson, *supra* note 22, at 2–3.

94. See H.R. REP. NO. 112-98, pt. 1, at 48 (2011).

The proper interpretation of IPR estoppel thus rests on balancing the burdens between the petitioner and patent owner to ensure the use of IPR. A proper interpretation will continue to encourage petitioners to use IPR without fear of undue repercussions from an imperfect proceeding, while simultaneously protecting patent owners' legitimate rights.

Before examining possible interpretations of the IPR estoppel statute, it is necessary to consider the benefits and burdens for parties in a typical IPR. Section A discusses these benefits and burdens. Section B introduces the two possible interpretations for the IPR estoppel provision: a broad and strict interpretation, and a narrower and more forgiving interpretation. Section B further examines the tradeoffs of both interpretations.

A. TYPICAL BENEFITS AND BURDENS FOR PARTIES IN *INTER PARTES* REVIEW

Subsection 1 describes the benefits and burdens IPR petitioners must consider before determining whether IPR is the appropriate forum for potential patent invalidation. Subsection 2 describes the risks and potential benefits for patent owners in IPR. The parties' respective benefits and burdens are important to take into account when determining the proper IPR estoppel interpretation.

1. Benefits and Burdens for the IPR Petitioner

The petitioner has the most to gain from IPR because it could be successful in convincing the PTAB to invalidate some claims or even the entire patent.⁹⁵ If the PTAB invalidates all of the patent owner's claims, the petitioner will be completely free from infringement liability.⁹⁶ There are additional persuasive reasons for petitioners to invoke IPR. Most notably, the IPR process is much shorter than a typical federal trial.⁹⁷ This shortened timeframe saves petitioners attorney fees and allows petitioners to return to normal business more quickly.⁹⁸

District courts are also more likely to grant a stay of litiga-

95. *See supra* Introduction.

96. *See Fresenius USA, Inc. v. Baxter Int'l, Inc.*, 721 F.3d 1330, 1347 (Fed. Cir. 2013).

97. Daniel G. Barry, *Invalidating Patents Through Inter Partes Review*, SNELL & WILMER (July 14, 2013), http://www.swlaw.com/assets/pdf/news/2013/07/08/InvalidatingPatentsThroughInterPartesReview_Barry.pdf.

98. *Id.*

tion⁹⁹ pending IPR than they were for IPReX.¹⁰⁰ Because the statute requires IPR to last no longer than twelve months, district courts are more comfortable granting a stay, whereas IPReX could last for years and staying federal litigation could cause a patent owner to indefinitely postpone its case.¹⁰¹ Indeed, as of October 2014, district courts stayed corresponding litigation pending IPR litigation in approximately seventy percent of cases, and it is likely this percentage will rise.¹⁰² When a district court stays litigation, this saves the petitioner money because it no longer has to fund two simultaneous legal battles, and a successful IPR may cancel subsequent infringement litigation.¹⁰³ Patent practitioners thus predict the overall cost of IPR will be \$300,000 to \$800,000, making IPR cost a tenth of a typical patent litigation suit.¹⁰⁴

While attorneys were slow to embrace IPReX, these factors have made IPR popular, with the number of IPRs filed in the first year of its availability exceeding the PTO's expectations by five percent.¹⁰⁵ Further, between the beginning of IPR availability in September 2012 and August 7, 2014, petitioners filed more than 1500 petitions.¹⁰⁶

Despite these advantages, petitioners face new disadvantages. Whereas petitioners could submit petitions for IPReX comprising hundreds of pages, petitions for IPR may only be

99. A stay of litigation means that the district court places the case on hold until IPR is complete. See Meaghan H. Kent et al., *Stays of Litigation Pending IPR Are Likely To Increase*, LAW360 (June 26, 2014, 10:09 AM ET), <http://www.law360.com/articles/540456/stays-of-litigation-pending-ipr-are-likely-to-increase>.

100. Bryan Wheelock & Matthew Cutler, *A Look at 1st Year Stats on Inter Partes Review*, LAW360 (Oct. 15, 2013, 7:18 PM), <http://www.law360.com/articles/475994/a-look-at-1st-year-stats-on-inter-partes-review>.

101. See, e.g., *Interface, Inc. v. Tandus Flooring, Inc.*, No. 4:13-CV-46-WSD, 2013 WL 5945177, at *5 (N.D. Ga. Nov. 5, 2013); *Star Envirotech, Inc. v. Red-line Detection, LLC*, No. SACV 12-01861 JGB, 2013 WL 1716068, at *2 (C.D. Cal. Apr. 3, 2013); *Semiconductor Energy Lab. Co. v. Chimei Innolux Corp.*, No. SACV 12-21-JST (JPRX), 2012 WL 7170593, at *3 (C.D. Cal. Dec. 19, 2012).

102. Dorothy Whelan et al., *Stays, Finality, and Estoppel—Timing a Post-Grant Attack To Maximize Litigation Benefit*, FISH & RICHARDSON, 10 (Nov. 12, 2014), <http://fishpostgrant.com/wp-content/uploads/11.12.14-PG-Webinar.pdf>; see also Andrew J. Lagatta & George C. Lewis, *How Inter Partes Review Became a Valuable Tool So Quickly*, LAW360 (Aug. 16, 2013, 12:01 PM), <http://www.law360.com/articles/463372/how-inter-partes-review-became-a-valuable-tool-so-quickly> (noting comparable older statistics).

103. Lagatta & Lewis, *supra* note 102.

104. *Id.*

105. Doody, *supra* note 7.

106. See *id.*; see also Whelan & Attwell, *supra* note 86, at 5.

sixty pages, double-spaced, and size fourteen font.¹⁰⁷ This page limit compounds the redundancy problem described above because petitioners might lack space to fully explain how each prior art is not redundant. Petitioners must also spend part of this valuable space offering a claim construction, something they were not required to do in IPReX.¹⁰⁸

2. Benefits and Burdens for the IPR Patent Owner

While IPR places a patent owner's intellectual property rights in danger, there are some factors in IPR that favor patent owners. For example, unlike petitioners, patent owners do not have to offer a claim construction.¹⁰⁹ This is a major benefit for patent owners because it is theoretically possible for them to complete an entire IPR without offering a proposed claim construction and thus avoid unanticipated future claim narrowing.¹¹⁰ IPR also offers other procedural benefits for patent owners. After the petitioner files for IPR, the patent owner can argue both that IPR is inappropriate on the merits of the challenged claims and that the petitioner's arguments are redundant. Theoretically then, the patent owner could reduce ten of the petitioner's arguments to a single argument. After the PTO grants review, IPR discovery rules arguably favor patent owners.¹¹¹

Despite these advantages, the purpose of IPR is intrinsically adverse to the best interests of the patent owner.¹¹² Congress created IPR to make it easier for petitioners to invalidate patents, and to date, Congress's goal is being realized. As of March 2014, "the overwhelming majority of cases have seen all of the reviewed claims canceled."¹¹³ Further, between the issuance of the first IPR final decision in November 2013 and February 19, 2014, the PTAB did not uphold a single claim.¹¹⁴ The-

107. See 37 C.F.R. §§ 42.6(a), 42.24(a)(i) (2014).

108. See *id.* § 42.104(b)(3); see also Iancu et al., *supra* note 30, at 579.

109. See 37 C.F.R. § 42.120; see also Iancu et al., *supra* note 30, at 579.

110. Iancu et al., *supra* note 30, at 580; Cavanaugh & O'Neill, *supra* note 24 (noting an "[a]ccused infringer may be able to elicit disclaimers from the patentee that support a later non-infringement position").

111. See Iancu et al., *supra* note 30, at 574 (explaining that discovery favors patent owners because they usually have the opportunity to take discovery first).

112. See 35 U.S.C. § 311(b) (2012) (describing IPR as a process to cancel unpatentable claims).

113. Andrew Williams, *Inter Partes Review—A Look Back*, PATENT DOCS (Mar. 16, 2014), <http://www.patentdocs.org/2014/03/inter-partes-review-a-look-back.html>.

114. *Id.*

se statistics led the former chief judge of the Federal Circuit to call the PTAB “death squads.”¹¹⁵ Some practitioners believe these early statistics are misleading, however. Specifically, some argue that the PTAB overwhelmingly invalidated patents in early cases because parties only petitioned clearly invalid patents when IPR was introduced.¹¹⁶ In support of that argument, the PTAB chief judge noted the number of claims surviving IPR is rising.¹¹⁷

Whether or not the PTAB is a “death squad,” many aspects of IPR are problematic for patent owners. Specifically, the PTAB is more likely to invalidate claims than federal courts based on the PTAB’s claim construction standard, the burden of proof needed for invalidity, and the specialized nature of the court.¹¹⁸ First, the PTAB reads claims more broadly than district courts do, making them more susceptible to invalidation under nonobviousness or novelty requirements.¹¹⁹ Next, unlike federal courts, the PTAB does not afford patents a presumption of validity.¹²⁰ Thus, petitioners need only show invalidity by a preponderance of the evidence rather than by clear and convincing evidence.¹²¹

Further, the PTAB is more likely to invalidate claims than a district court would due to its specialized nature.¹²² At least one patent practitioner argues the PTAB is more likely to find claims invalid because its judges have technical backgrounds and patent experience which gives them a greater ability to combine multiple prior art references and find claims to be ob-

115. *Id.*

116. *Cf.* Ryan Davis, *USPTO Upheld Some Patent Claims in 41% of AIA Reviews*, LAW360 (May 22, 2014, 5:42 PM ET), <http://www.law360.com/articles/540857/uspto-upheld-some-patent-claims-in-41-of-aia-reviews>.

117. *Id.*

118. Gene Quinn, *The Past, Present and Future of Post Grant Administrative Trials*, IPWATCHDOG (Sept. 18, 2014), <http://www.ipwatchdog.com/2014/09/18/the-past-present-and-future-of-post-grant-administrative-trials/id=51298>.

119. Leslie A. McDonell & Robert A. Pollock, *Inter Partes Review: Tips for the Patent Holder*, FINNEGAN (May 24, 2013), <http://www.finnegan.com/resources/articles/articlesdetail.aspx?news=339129db-4df9-4439-a216-91cca9ba55f3>.

120. *Id.*

121. *Id.*

122. Kimberly D. Braslow, *Inaugural IPR Decision Provides Insight for Patent Challengers Deciding Between IPR and District Court Litigation*, AIA BLOG (Dec. 13, 2013), <http://www.aiablog.com/post-grant-proceedings/inaugural-ipr-decision-provides-insight-for-patent-challengers-deciding-between-ipr-and-district-court-litigation/#more-1018>.

vious.¹²³ In contrast, district court judges and juries with less experience are less likely to combine three or four prior art references to find a claim obvious and invalid.¹²⁴ Because of the potential for different outcomes in IPR and federal courts, many practitioners are interested in predicting how estoppel from IPR will affect federal litigation.

B. POSSIBLE INTERPRETATIONS OF *INTER PARTES* REVIEW ESTOPPEL

There are two likely interpretations for the IPR estoppel provision. First, there is a broad interpretation in which courts estop parties from using any and all printed publications and patents to challenge the validity of a patent in federal court or the International Trade Commission on novel and nonobvious grounds.¹²⁵ Proponents of this interpretation argue a petitioner reasonably could have raised any printed publication or patent in its petition, and thus a court should apply the estoppel provision broadly.¹²⁶ Thus, if a petitioner did not discover “a university research paper in a library in Norway” in time for IPR, for example, the petitioner would never be able to use this reference because it could have been reasonably located.¹²⁷

A second interpretation hinges on the term “reasonably.” Under this narrower interpretation, courts would estop some, but not all, patents and printed publications to invalidate a patent on novel or nonobvious grounds.¹²⁸ There are many types of evidence and arguments courts could allow in. For example, courts could allow petitioners to continue to raise arguments they included in their petitions, but were “not part of the review authorized by the” PTAB due to the heightened institution standard or redundancy findings.¹²⁹ In these cases, since the PTAB prevented the petitioner from bringing its arguments in

123. *Id.*

124. *Id.*

125. See Cheryl Milone, *Raise the Standard of Care in Prior Art Research*, LAW360 (May 6, 2013, 12:56 PM), <http://www.law360.com/articles/436211/raise-the-standard-of-care-in-prior-art-research> (noting challengers may not “get a second chance” asserting prior art); see also Letter from IBM Corp. to Lead Judge Michael Tierney, Comments Regarding “Changes To Implement Inter Partes Review Proceedings” (Apr. 6 2012), available at http://www.uspto.gov/sites/default/files/aia_implementation/comment-ibm5.pdf.

126. See Milone, *supra* note 125.

127. *Cf. id.* (describing how such a paper invalidated an NPE’s patent in IPRex).

128. See Letter from IBM Corp. to Lead Judge Michael Tierney, *supra* note 125, at 5.

129. See *id.*; see also Iancu et al., *supra* note 30, at 551 n.62.

trial, the petitioner could not reasonably have raised its arguments, and courts would not apply the estoppel provision.

Subsection 1 describes considerations of the first interpretation, and Subsection 2 describes considerations of the second interpretation.

1. Considerations of a Broad Interpretation of Estoppel

Courts will need to consider statutory interpretation principles when determining which IPR estoppel interpretation to apply. Specifically, courts must analyze the plain language of the IPR provision, accompanying legislative history, and policy considerations of each interpretation to effectuate Congress's intent in making IPR a popular alternative to federal litigation.¹³⁰

a. Statutory Support for a Broad Interpretation of Estoppel

Statutory interpretation could support a broad interpretation of estoppel and prohibit defendants from using any and all printed publications and patents to challenge the validity of a patent in a future forum on novel and nonobvious grounds. If a court construes "reasonably" broadly they will likely apply a broad interpretation of estoppel, as the more one expects a petitioner to reasonably argue, the more that is actually estopped. Further, a plain meaning interpretation could support a broad estoppel interpretation because the IPR estoppel statute does not contain an escape clause preventing estoppel of these arguments like the IPR estoppel statute did.¹³¹

b. Positive Policy Effects of a Broad Estoppel Interpretation

Further, there are many positive policy effects from interpreting IPR estoppel broadly. A broad interpretation of IPR estoppel is best for patent owners and the federal court system. First, a broad estoppel interpretation is fairest for the patent owner. As discussed, patent owners are most at risk in IPR, and once the PTAB invalidates the patent owner's patent, it does not have a second chance to get the patent reinstated.¹³² Thus, the petitioner should not have a full second chance to in-

130. H.R. REP. NO. 112-98, pt. 1, at 48 (2011).

131. Compare 35 U.S.C. § 315(e)(2) (2012) (containing no escape clause provision), with 35 U.S.C. § 315(c) (2002) (current version at 35 U.S.C. § 315(e)(2) (2012)) (providing an exemption from estoppel for newly discovered prior art).

132. See *Fresenius USA, Inc. v. Baxter Int'l, Inc.*, 721 F.3d 1330 (Fed. Cir. 2013).

validate the patent, even on evidence not fully examined during trial by the PTAB. A patent owner would further argue that IPR is simply a high risk, high reward process for the petitioner. Indeed, petitioners voluntarily assume the risk of IPR, and since they could forego the risk and challenge the patent in federal court, it is appropriate to subject them to more stringent restrictions meant to balance burdens between parties.¹³³

Secondly, a broader estoppel interpretation is better for the judicial system because it reduces redundant arguments and promotes judicial efficiency.¹³⁴ Emphasis on preserving judicial resources is especially important in the patent litigation system because patents may be litigated in so many forums including federal courts, the PTO, and the International Trade Commission.¹³⁵ Indeed, as one magistrate judge from the Northern District of California stated, it is difficult “to identify even a single circumstance outside the patent world where such redundancies are not only permitted, but invited.”¹³⁶ A broad estoppel requirement thus places patent litigation more in line with other types of civil litigation.

While petitioners may argue broad estoppel is unfair because the PTAB ultimately rejects many of the arguments they raise in petitions as redundant,¹³⁷ it is reasonable to expect petitioners to bring forth only their best arguments, as they would to a jury considering the same issues.¹³⁸ Further, the PTAB is more likely to invalidate claims than federal courts because of IPR’s unique procedural aspects,¹³⁹ so it would be inefficient to expect district court judges to consider issues the

133. See Doody, *supra* note 7.

134. See generally Robert L. Stoll, *Maintaining Post-Grant Review Estoppel in the America Invents Act: A Call for Legislative Restraint*, 2012 PATENTLY-O PAT. L.J. 1, 14, available at <http://patentlyo.com/media/docs/2012/11/stoll.2012.estoppel.pdf> (discussing how stronger estoppel for a different adjudicative patent proceeding leads to less judicial waste).

135. See Doody, *supra* note 7.

136. Pi-Net Int’l, Inc. v. Focus Bus. Bank, C-12-4958-PSG, 2013 WL 4475940, at *1 (N.D. Cal. Aug. 16, 2013), *adhered to in part on reconsideration*, C-12-4958 PSG, 2013 WL 5513333 (N.D. Cal. Oct. 3, 2013).

137. For example, the PTAB denied nearly 100 grounds as redundant in the *Berk-Tek, LLC v. Belden, Inc.* litigation. Matt Cutler, *51 for 56: Two IPR Trials Granted, Despite Dozens of Grounds Being Denied As Redundant*, HARNESSING PAT. OFF. LITIG. (July 1, 2013), <http://ipr-pgr.com/51-for-56-two-ipr-trials-granted-despite-dozens-of-grounds-being-denied-as-redundant>.

138. Julie Blackman et al., *East Texas Jurors and Patent Litigation*, JURY EXPERT (Mar. 1, 2010), <http://www.thejuryexpert.com/2010/03/east-texas-jurors-and-patent-litigation> (emphasizing the need for simple and disjunctive arguments during jury trials).

139. See *supra* Part II.A.

PTAB denied, even when they were only denied for being redundant or failing to meet the heightened institution standard. Lastly, a bright line rule preventing the use of any printed publications for invalidating the patent based on novel and nonobvious requirements is better for the judicial system because it leads to predictability for the parties and is an easier standard for judges to apply.¹⁴⁰

c. Negative Policy Effects of a Broad Estoppel Interpretation

While there are many reasons a stricter estoppel interpretation benefits patent owners and courts, there are several situations that demonstrate the disparate effect this interpretation has on petitioners.

The most classic example of a disparate effect on petitioners occurs when a petitioner challenges twenty claims based on a large number of prior art references, and the PTAB institutes IPR on only one claim based on one prior art reference. Then, the IPR petitioner would be unable to argue the other nineteen claims are invalid in a future forum based on novelty and non-obvious arguments. In that case, the petitioner may have rather had its petition completely denied so it could start over in another forum because when the PTAB denies IPR, estoppel does not attach.¹⁴¹

Additionally, some procedural rules of IPR make a broad estoppel interpretation disadvantageous for petitioners. First, a defendant must petition for IPR within a year of receiving notice of an infringement lawsuit against it.¹⁴² If the defendant does not submit a petition within a year, it can never file for IPR on that patent.¹⁴³ In many cases, one year is much too short for the defendant to mount its defense to infringement liability while creating an offensive position by petitioning for IPR. As soon as it receives notice of the suit, the defendant must draft

140. See LeRoy L. Kondo, *Untangling the Tangled Web: Federal Court Reform Through Specialization for Internet Law and Other High Technology Cases*, UCLA J.L. & TECH., no. 1, 2002, at 1, available at http://www.lawtechjournal.com/articles/2002/01_020309_kondo.pdf (noting that bright line rules “enhanc[e] predictability of judgment throughout the district courts”).

141. Dorothy Whelan & Karl Renner, *USPTO Declines Petition for Inter Partes Review—Marking the First Time Since the Proceeding Has Become Available Under AIA*, FISH & RICHARDSON (Mar. 7, 2013), <http://fishpostgrant.com/alert/uspto-declines-petition-for-inter-partes-review-marking-the-first-time-since-the-proceeding-has-become-available-under-aia>.

142. 35 U.S.C. § 315(b) (2012).

143. *Id.*

its motion to stay federal litigation pending IPR, because if litigation is in the early stages, this weighs in favor for staying litigation.¹⁴⁴ Next, as the defendant prepares its petition for IPR it may not know which claims to challenge because it may not even know which claims a plaintiff is asserting. While *Twombly* and *Iqbal* require notice pleading,¹⁴⁵ Form 18 of the Federal Rules of Civil Procedure provides the facts a plaintiff needs to adequately plead infringement, and this form does not require stating the allegedly infringing claims.¹⁴⁶ The defendant may thus be left in the dark while trying to find every possible invalidating patent and printed publication, analyze this prior art, obtain expert testimony, craft arguments, and draft its sixty-page petition with hopes the PTO will find its arguments meet the heightened institution standard and are not redundant.¹⁴⁷

Another IPR procedure which detrimentally affects the petitioner regarding estoppel is the claim construction process which differs markedly from federal litigation. In district court, the parties participate in a *Markman* hearing where a judge rules on the breadth of the claims.¹⁴⁸ The *Markman* hearing occurs after some, but not all, discovery and is before the jury trial on infringement and invalidity.¹⁴⁹ Practically, this means patent challengers have a greater opportunity to develop their arguments for the ultimate ruling on invalidity since the judge construes the claims earlier.

In contrast, petitioners are at a disadvantage regarding claim construction in IPR. For example, a petitioner may challenge claim 1 with Prior Art A and B, focusing its limited space for arguments on Prior Art A because it believes the PTAB will likely construe claim 1 in a certain manner. The PTAB may deny Prior Art B on redundancy grounds. Then, at the end of IPR the PTAB may issue a claim construction that construes claim 1 differently than the petitioner expected. It may be that Prior Art B would have had a better chance of invalidating claim 1.

144. See Software Rights Archive, LLC v. Facebook, Inc., C-12-3970 RMW, 2013 WL 5225522, at *3-4 (N.D. Cal. Sept. 17, 2013).

145. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

146. The Federal Circuit has noted that if “any conflict exists between *Twombly* (and its progeny) and the Forms regarding pleadings requirements, the Forms control.” *K-Tech Telecomms., Inc. v. Time Warner Cable, Inc.*, 714 F.3d 1277, 1283-84, 1287 (Fed. Cir. 2013).

147. See *supra* Part I.B.

148. *Supra* Part I.B.

149. *Supra* Part I.B.

Now, however, the PTAB's claim construction is persuasive to district courts and the petitioner cannot use Prior Art B, even though this reference was dismissed simply for being redundant when the presumptions were different. Therefore, because judges construe claims at the end of the process, petitioners face an uphill battle in IPR.¹⁵⁰

Overall, considering the limited number of arguments petitioners can make in IPR due to short page limits, denial on redundant grounds, and the heightened institution standard, a broad estoppel requirement may be problematic considering the current patent litigation landscape. Specifically, the PTO receives a burdensome number of patent applications every year, and while it tries to make headway in this backlog, it unfortunately grants patents that it should not have issued.¹⁵¹ Between 2007 and 2011, district courts only fully upheld fourteen percent of challenged patents.¹⁵² A broader estoppel interpretation will thus lead to fewer arguments a defendant can use to challenge patents in district court, and courts may invalidate fewer low-quality patents. And since lower quality patents lead to more unnecessary and potentially abusive litigation, true innovators will face onerous legal costs and have less incentive to innovate, defeating the purpose of the intellectual property clause of the Constitution.¹⁵³

2. Considerations of a Narrower Interpretation of Estoppel

Proponents of a narrower estoppel interpretation may point to the above deficiencies when advocating for a more flexible interpretation of estoppel. This Subsection outlines statu-

150. See *supra* Part I.C. (noting judges also construe claims at the end of litigation in the International Trade Commission which disadvantages patent challengers).

151. Mike Masnick, *New Study: USPTO Drastically Lowered Its Standards in Approving Patents To Reduce Backlog*, TECHDIRT (Apr. 9, 2013, 8:24 AM), <http://www.techdirt.com/blog/innovation/articles/20130408/08244222623/new-study-uspto-dramatically-lowered-its-standards-approving-patents-to-reduce-backlog.shtml>.

152. ROBERT SMYTH, MORGAN LEWIS, WHITE PAPER REPORT: UNITED STATES PATENT INVALIDITY STUDY (Sept. 2012), https://www.morganlewis.com/pubs/Smyth_USPatentInvalidity_Sept12.pdf.

153. See Julie Samuels, *GAO Study Confirms the Obvious: Bad Patents Lead to Trolls*, ELEC. FRONTIER FOUND. (Aug. 22, 2013), <https://www.eff.org/deeplinks/2013/08/gao-study-confirms-obvious-bad-patents-lead-trolls>.

The Constitution empowers Congress “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. CONST. art. I, § 8, cl. 8.

tory support for a narrow interpretation of estoppel and provides positive and negative policy effects of a narrow interpretation. Certainly, some negative effects of a broad interpretation of estoppel lend themselves to positive effects of a narrow interpretation of estoppel, so this Subsection seeks to introduce only new considerations.

a. Statutory Support for a Narrower Interpretation of Estoppel

Statutory interpretation could also support a narrower interpretation of estoppel. A court may determine the term “reasonably” to be ambiguous. When a court determines the statute is ambiguous, it looks to the legislative history for guidance.¹⁵⁴ As noted above, Senator Kyl supported a narrower and more forgiving estoppel provision.¹⁵⁵ Additionally, judges could interpret “reasonably” to differentiate between types of evidence. For example, courts could refuse to estop evidence deliberately hidden by the patent owner.¹⁵⁶

b. Positive Policy Effects of a Narrower Estoppel Interpretation

Petitioners likely desire a narrower interpretation of estoppel. Under a narrower interpretation of estoppel, petitioners could raise arguments in district court they did not have the opportunity to fully argue before the PTAB.¹⁵⁷ Indeed, petitioners spend time and money on these arguments, and many argue the PTAB does not have the authority to deny arguments on cumulative grounds when arguments meet the heightened institution standard.¹⁵⁸ Petitioners would thus argue estoppel should not attach in such cases.

c. Negative Policy Effects of a Narrower Estoppel Interpretation

Opponents of a narrower estoppel interpretation note that allowing petitioners to advance additional arguments in subsequent litigation is burdensome for the court system. Specifically, any additional benefit a narrow estoppel interpretation pro-

154. See *Wyeth v. Levine*, 555 U.S. 555, 600 (2009).

155. See 157 CONG. REC. S1375 (daily ed. Mar. 8, 2011) (statement of Sen. Kyl).

156. See Letter from IBM Corp. to Lead Judge Michael Tierney, *supra* note 125, at 5.

157. See *id.*

158. Matt Cutler, *PTAB Drawing Fire for Denying Petition Grounds As Cumulative—Not Backing Down*, HARNESSING PAT. OFF. LITIG. (Apr. 10, 2013), <http://ipr-pgr.com/ptab-drawing-fire-for-denying-petition-grounds-as-cumulative-not-backing-down>.

vides for the petitioner likely does not exceed the cost to the court system. As noted, at the conclusion of IPR the PTAB releases a claim construction based on the evidence offered and arguments made.¹⁵⁹ This claim construction will be very persuasive for district courts, negating new arguments by the defendant.¹⁶⁰ Ultimately, a narrower estoppel interpretation may only make more work for already busy federal courts that do not have the time or resources for many complex patent cases.¹⁶¹ And with the increase in abusive litigation, a narrower estoppel interpretation may induce patent assertion entities (patent trolls)¹⁶² or other harassing plaintiffs to continue to raise poor arguments in future forums with hopes of forcing the defendant into settlement.¹⁶³

III. A MODIFIED BROAD ESTOPPEL INTERPRETATION IS BEST WHEN COMBINED WITH PROCEDURAL CHANGES TO RECTIFY UNNECESSARY DISADVANTAGES FOR THE PETITIONER

Per 35 U.S.C. § 315(e), some estoppel must attach to prevent petitioners from advancing duplicative arguments in forums after completing IPR.¹⁶⁴ Practitioners have noted the ambiguity of the statute and some of the problems which arise from different interpretations. Section A thus proposes a novel interpretation for judges: federal judges should interpret IPR estoppel broadly, preventing petitioners from bringing all arguments in a future forum, excluding instances where the patent owner hid prior art. Still, as previously noted, a broad interpretation of estoppel unfairly burdens petitioners, and this may persuade potential petitioners against using IPR, defeating its purpose as a cost-effective and speedy alternative to traditional patent litigation.¹⁶⁵ Thus, Section B provides remedies

159. See *supra* Part I.B.

160. *Supra* Part I.B.

161. The “Smart Phone War” trials are an example of the resource draining patent litigation cases that are becoming more common. See Florian Mueller, *The Truth Is Neither the Court nor the Parties Really Wanted Today’s Apple-Samsung Damages Retrial*, FOSS PATENTS (Nov. 12, 2013), <http://www.fosspatents.com/2013/11/the-truth-is-neither-court-nor-parties.html>.

162. Patent trolls purchase patent rights and sometimes unfairly litigate baseless claims against users, with hopes of achieving a quick settlement. See Colleen Chien, *Patent Trolls by the Numbers*, PATENTLYO (Mar. 14, 2013), <http://www.patentlyo.com/patent/2013/03/chien-patent-trolls.html>.

163. See Morgan, *supra* note 3.

164. 35 U.S.C. § 315(e) (2012).

165. See *supra* Part II.B.1.

to lessen the disproportionate effect on petitioners while protecting patent owners from duplicative arguments to invalidate their patents.

A. THE BEST ESTOPPEL INTERPRETATION IS BROAD WITH AN EXCEPTION FOR PRIOR ART THE PATENT OWNER HIDES

Judges should interpret IPR's estoppel provision to prevent petitioners from raising any printed publications and patents to invalidate a patent on novel or nonobvious grounds in district court, so long as the patent owner did not maliciously hide this prior art.¹⁶⁶ As discussed, inventions must be novel under 35 U.S.C. § 102 to receive patent protection, and IPR allows petitioners to use patents and printed publications to destroy novelty.¹⁶⁷ In an egregious case, a patent owner could gain possession of the only copy of a printed publication and deliberately withhold it. If a patent owner possessed this prior art, but maliciously hid this evidence, a court should not estop a petitioner from raising this evidence in a future forum if the petitioner discovers this prior art. This interpretation is in accord with the plain language of the statute because the petitioner cannot reasonably find prior art that is deliberately hidden. One could argue that this interpretation does not reflect the change of "raised or could have raised" to "reasonably raised or could have raised," but ensuring an exception for when the patent owner hides prior art effectuates the statutory change in language.

Further, a broad estoppel interpretation is the best for the patent litigation system.¹⁶⁸ Specifically, a broad estoppel interpretation forces petitioners to choose their best arguments carefully, as in typical federal litigation. This interpretation is fairest for owners of legitimate patent rights because it protects them from facing duplicative arguments in subsequent litigation.¹⁶⁹ Further, as the PTAB is already predisposed to invalidate patents, a broad estoppel interpretation preserves judicial efficiency.¹⁷⁰ Finally, a broad estoppel interpretation with an exception for hidden prior art leads to predictability for both the patent owner and petitioner.¹⁷¹

166. *See supra* Part II.B.

167. *See supra* Introduction.

168. *See supra* Part II.B.1.

169. *Id.*

170. *Id.*

171. *Id.*

B. PROCEDURAL CHANGES MUST BE ENACTED TO PREVENT
DISPARATE EFFECTS ON PETITIONERS FROM A BROAD ESTOPPEL
INTERPRETATION

While a broad estoppel interpretation is best, there are still procedural factors that make a broad estoppel interpretation especially burdensome for petitioners. As discussed, these primarily are the limited time-to-file for IPR and the PTAB's practice of denying redundant arguments even when they meet the heightened institution standard.¹⁷² To fix these problems, Congress or the courts should require heightened notice pleading to provide defendants with better information regarding the claims asserted against them and prohibit the PTAB from denying institution on arguments it deems redundant.¹⁷³

First, when courts estop nearly all invalidity arguments in subsequent litigation, petitioners are unfairly prejudiced because they lack sufficient time to prepare arguments for the PTAB.¹⁷⁴ Congress recognized this issue when drafting the America Invents Act. The original time limit for filing for IPR was six months from the date of service of an infringement lawsuit,¹⁷⁵ but recognizing this was too short of a time, Congress extended the time-to-file to twelve months.¹⁷⁶ However, some argue even a year is not long enough, and instead suggest linking the deadline to file for IPR to the *Markman* decision when the judge construes the claims.¹⁷⁷ Thus, petitioners would have time to determine how to best challenge the claims in IPR after the district court rules on the claims' meanings.

Ultimately, however, tying the deadline to file to the *Markman* decision would likely be too complex and inefficient. Each district court has its own procedure for the *Markman* hearing, as this is a judicially created procedure.¹⁷⁸ While courts with larger patent dockets wait until meaningful discovery is

172. See *supra* Part II.A.1.

173. See generally Dennis Crouch, *Heightened Pleading Requirements: Patent Reform Through the Supreme Court and Judicial Conference*, PATENTLYO (Feb. 11, 2014), <http://patentlyo.com/patent/2014/02/heightened-requirements-conference.html> (discussing possible solutions for modifying patent litigation to require heightened notice pleading like other types of civil litigation).

174. See *supra* Part II.A.1.

175. *America Invents Act: Hearing Before the Subcomm. on Intellectual Prop., Competition, & the Internet of the H. Comm. on the Judiciary*, 112th Cong. 74 (2011) [hereinafter *AIA Hearings*] (statement of Procter & Gamble).

176. 157 CONG. REC. S5429 (daily ed. Sept. 8, 2011).

177. *Id.*

178. A 1996 Supreme Court decision gave judges the authority to construe claims, rather than having a jury interpret claims. See *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996).

complete, other courts construe claims earlier.¹⁷⁹ If Congress tied the time to file to the *Markman* decision, this could lead to variable results where some parties have spent more resources on discovery than parties in other districts.¹⁸⁰ Further, even if Congress tied the time to file for IPR to the *Markman* decision, Congress would still need to give additional time for parties to construct arguments after the judge releases her *Markman* construction. Overall, tying the time to file to the *Markman* decision may lead to judicial inefficiency since “[s]ome courts don’t even hold a *Markman* hearing until [] a week or so before the trial,” and then parties will have already completed all discovery.¹⁸¹ This would be unfair to the parties.¹⁸²

The better solution would be for Congress or the courts to require plaintiffs to state which claims are allegedly infringed. During the 113th Congress, there were several bills that set forth heightened pleading standards for patent infringement.¹⁸³ The House passed one such bill, Representative Goodlatte’s “Innovation Act,” which required plaintiffs “to identify the patents and claims infringed,” and to specify “exactly how they are infringed.”¹⁸⁴ Senator Leahy, however, pulled the bill’s counterpart in the Senate, so reform against abusive patent litigation did not pass in the 113th Congress.¹⁸⁵ While reform did not pass in the previous Congress, preeminent patent scholar Dennis Crouch predicts that the new Republican legislature will pass the Innovation Act in 2015.¹⁸⁶

179. See Vincent P. Kovalick, *Markman Hearings and Their Critical Role in U.S. Patent Litigation*, FINNEGAN (Oct. 2009), <http://www.finnegan.com/resources/articles/articlesdetail.aspx?news=9a8bf39b-c419-4329-9f6a-08ac0a647c7c>.

180. *Id.*

181. *AIA Hearings*, *supra* note 175 (statement of Procter & Gamble).

182. *Id.*

183. Innovation Act of 2013, H.R. 3309, 113th Cong. (1st Sess. 2013). There were several bills in the House and Senate targeted at curbing abusive patent litigation. See *Ending Abusive Patent Litigation*, INTELLECTUAL PROP. OWNERS ASS’N, <http://www.ipso.org/index.php/advocacy/hot-topics/patent-reform> (last visited Mar. 31, 2015).

184. *Section by Section—Innovation Act* (Oct. 2013), <http://judiciary.house.gov/news/2013/10232013%20%20Section%20by%20Section%20Patent%20Bill.pdf>; Dennis Crouch, *Next Step in Patent Reform*, PATENTLYO (Dec. 5, 2013), <http://patentlyo.com/patent/2013/12/next-step-in-patent-reform.html>.

185. See *Patent Progress’s Guide to Federal Patent Reform Legislation*, PATENT PROGRESS, <http://www.patentprogress.org/patent-progress-legislation-guides/patent-progresss-guide-patent-reform-legislation> (last visited Mar. 31, 2015) (providing information on the status of pending patent legislation).

186. Dennis Crouch, *Patent Reform 2015: Republican Agenda*, PATENTLYO (Nov. 5, 2014), <http://patentlyo.com/patent/2014/11/patent-reform-republican.html>.

The Supreme Court may also have the opportunity to raise pleading standards in patent litigation.¹⁸⁷ The Judicial Conference Advisory Committee is now considering eliminating Form 18 and requiring patent litigation to adhere to typical civil litigation notice pleading.¹⁸⁸ If the committee approves eliminating Form 18, the Supreme Court will eventually need to approve this measure as well.¹⁸⁹ Action by either Congress or the Court will help defendants have adequate knowledge to construct arguments for their IPR petitions. Then, petitioners are less disadvantaged by a broad estoppel interpretation since they have ample notice of which invalidity contentions they need to create.

The second main way in which a broad estoppel interpretation disadvantages petitioners is the PTAB's denial of redundant arguments.¹⁹⁰ Congress should clarify the IPR procedural rules and prohibit denial based solely on redundant grounds. Multiple petitioners have argued the PTAB does not have the authority to deny arguments solely for being redundant.¹⁹¹ The PTAB argues it has this authority because it needs to complete IPR proceedings within twelve months.¹⁹² Still, when parties pay for a petition and the IPR institution standard does not mention denial based on redundant grounds, parties deserve a full review of their arguments. There may need to be more PTAB judges to ensure they finish IPRs within a year, but this is the proper interpretation of the statutory rules.¹⁹³

These solutions will effectuate Congress's intent for enacting the America Invents Act by making IPR the primary cost-effective vehicle for invalidating low-quality patents.¹⁹⁴ A broad

187. See Crouch, *supra* note 173.

188. *Id.*; see also John B. Pegram, *The Question of Specificity in Patent Pleadings Heats Up*, FISH & RICHARDSON (Mar. 25, 2014), <http://www.fish.com/fish-litigation/question-specificity-patent-pleadings-heats>.

189. See Crouch, *supra* note 173.

190. See *supra* Part II.A.1.

191. See Cutler, *supra* note 158.

192. Patrick Doody, *Post Grant Proceedings Estoppel on Denied Grounds? Statistics on IPRs and CBMs*, PILLSBURY WINTHROP SHAW PITTMAN (May 29, 2013), <http://www.pillsburylaw.com/siteFiles/Events/Presentationforwebinaron52913.pdf>.

193. Some have already noted Congress will need to increase the number of PTAB judges, of which there are approximately 200, if it passes some of the new bills targeting abusive litigation. See Ryan Davis, *Expanding Biz Method Review Could Swamp USPTO*, LAW360 (Oct. 31, 2013, 7:05 PM), <http://www.law360.com/articles/485134/expanding-biz-method-review-could-swamp-uspto>.

194. H.R. REP. NO. 112-98, pt. 1, at 48 (2011).

interpretation of estoppel is best for effective patent litigation, but requiring better notice pleading and prohibiting the PTAB from denying redundant arguments ensures petitioners will be able to fairly use IPR.

CONCLUSION

Problems with patent litigation are impeding the purpose of the constitutionally created patent system, to promote technological progress. Companies face numerous low-quality patents, a rise in the total number of patent litigation suits, a rise in the cost of such suits, and abusive litigation tactics by some plaintiffs. Congress thus created IPR, intending to give defendants an efficient and inexpensive alternative to traditional federal litigation. IPR must coexist with federal patent litigation, however, so Congress drafted an estoppel provision to prevent unnecessary duplicative litigation for patent owners.

Patent practitioners are currently unsure of how future courts will apply estoppel from IPR. Of the possible interpretations, the best interpretation from a statutory and policy viewpoint is to estop parties from using any and all printed publications and patents to challenge the validity of a patent in a future forum on novel and nonobvious grounds, not including any prior art a patent owner hides. However, due to procedural factors of IPR, a broad interpretation detrimentally affects petitioners. The detrimental effects could prevent petitioners from filing for IPR and thwart Congress's intent of making IPR an attractive alternative to federal litigation. Thus, Congress or the Supreme Court should require heightened notice pleading by plaintiffs in federal litigation, and Congress should prohibit the PTAB from denying redundant arguments when they otherwise meet the requirements needed for IPR. Overall, a broad estoppel interpretation and procedural fixes for petitioners will effectuate Congress's desire in improving the patent system to promote progress.