INTELLECTUAL PROPERTY UPDATE AND YEAR IN REVIEW

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Dykema

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Reflections from 2025 and Looking Forward to 2026

J. DANIEL HARKINS, Intellectual Property Department Practice Group Leader

As we reflect on 2025, one thing is clear—this was a year defined by acceleration. Innovation cycles shortened, AI capabilities expanded at an unprecedented pace, and the legal frameworks governing intellectual property continued to shift in real time. Across industries—from advanced manufacturing and mobility to healthcare technology, consumer goods, and digital commerce—our clients faced fast-evolving challenges that required not only legal precision but strategic adaptability.

Within the IP landscape, we saw increased scrutiny on AI-generated works, heightened global enforcement activity, and continued divergence in international IP standards. USPTO policy updates, the surge in design protection, and the uptick in complex trademark disputes made this a year that demanded both technical depth and practical creativity.

At Dykema, our team spent 2025 helping clients protect innovation in an environment where traditional boundaries are being redefined. We expanded our guidance on AI use and risk, strengthened cross-border enforcement strategies, deepened our work across all industries, and continued to deliver strong outcomes in litigation, prosecution, and portfolio management. Looking to 2026, we expect continued momentum. AI-related IP questions will become more urgent, not less. Copyrights and brand protection will increasingly require real-time monitoring and rapid enforcement responses. Patents in machine learning, advanced materials, and medical devices will remain highly contested. And as global IP systems evolve, coordination across jurisdictions will be more important than ever.

What will not change is our commitment to delivering thoughtful, practical counsel that helps clients innovate with confidence. I am incredibly proud of the work our team has done, and I'm even more energized by the opportunities ahead. Thank you for your trust in Dykema and for allowing us to be your partners in protecting what you create. We look forward to navigating the next chapter of innovation with you in 2026 and beyond.

Tips for Handling New Trademark Office Filing Fee Surcharges

JENNIFER FRASER

The new PTO filing fee surcharges implemented in January 2025 have wreaked havoc on budgeting and delayed new filings. The full ramifications remain to be seen, as applications filed under the new fee rules have only recently been examined. The Trademark Office claimed the new filing fee surcharges were implemented to promote more efficient examination of trademark applications by encouraging applicants to use standardized processes, with the goals of ensuring accuracy, reducing pendency, and recovering the costs of processing filings that require extra examination time. However, for many applicants and counsel, the surcharges have added complexity to the process, increased costs, and raised other concerns.

Budgeting Challenges

As a result of the surcharges, it is generally safe to assume that the typical government filing fee is $550/class, even though the minimum fee is $350/class and can increase to $650/class in more unusual situations. The most significant aspect of the new filing fee structure is that it forces applicants to use the preapproved wording from the Acceptable Goods and Services Manual (“Manual”) to avoid the extra $200/class. Those who file applications for items listed in the Manual, such as commonly known products, can avoid the surcharge and take advantage of the base application fee of $350/class. Because most of the other issues that can result in surcharges are more predictable, those other fees likely can be minimized. However, the Manual’s failure to adequately cover many goods and services often forces applicants to choose between obtaining sufficient protection and reducing filing fees. Applicants can take other steps in advance to reduce costs as well.

Madrid applicants do not have to pay the per-class surcharges, although the PTO is exploring other ways to increase those fees because Madrid filings entail significantly more effort during examination, mostly due to lengthy lists of goods and services and rules in different countries that allow for much broader wording.

Implications of Delayed Filings vs. Cost Savings

We work with our clients to reduce costs and provide options for filing. In some instances, the back-and-forth with applicants to obtain information and approvals can delay filing. To mitigate such delays, we recommend providing additional details to the PTO up front.

Brand owners must decide whether to file immediately using the Manual's narrower, preapproved wording to avoid the surcharge—securing an earlier filing date and starting the examination timeline—or take additional time to craft accurate descriptions and accept the higher fee. Other factors that may affect this decision include whether certain details are available before filing and whether the applicant prefers to file broadly and avoid volunteering unnecessary information that could result in a higher fee.

Strategies Related to the New Fees

For larger brand owners, we frequently compile a list of commonly used descriptions of goods and services for their products, including wording that conforms to the Manual. We also perform audits to update wording from older registrations with preapproved wording. Applicants can request prior to filing (e.g., during the search process) that new wording be added to the Manual, which they can then use in their application if the request is granted. It usually takes a week to have wording added to the Manual, and currently about 30% of submissions are added.

Applicants should consider whether using the Manual is worth the cost savings. In areas of new technology, the Manual will usually be insufficient. Furthermore, if the current wording is not a perfect fit or suitably broad, applicants are better served by using customized wording and arguing during examination that it should be acceptable. Examiners prefer to use the wording in the Manual, but it is possible to explain that the proposed wording in the application is sufficiently clear or known in the industry, or that the applicant (or its competitors) has submitted many other applications/registrations with similar wording. Unfortunately, wording in pending applications cannot be added to the Manual (although we have raised this issue with the PTO for consideration).

Do your research on prior registrations for identical marks, translations, descriptions of the marks, and complete information regarding other informalities. When filing multiclass applications, be aware that the surcharges apply to every class in an application. When the PTO tries to impose a surcharge on an issue that is discretionary (e.g., a description of the mark that did not include the examiner's preferred level of detail), you can argue that the applicant reasonably attempted to comply with the requirement.

Other Warnings

The PTO claims that using the Manual results in a "more complete" application, but the PTO does not necessarily know when an applicant uses an incorrect description of goods and services when the application is filed. Because examiners prefer the wording in the Manual, applicants feel pressured to use it. Because an inaccurate description will affect the specimens the PTO will accept and, in most instances, an applicant cannot modify the description of goods and services, this negates any cost savings if the application is incorrect. Further, third parties could challenge the accuracy of the wording, especially if claims of use in commerce are incorrect, which could render the registration vulnerable to cancellation and higher costs in the future.

Because the surcharges are relatively new and office actions on the new fees are beginning to emerge, the long-term implications on pendency and the vulnerability of registrations are unknown. However, it is unlikely the PTO will reverse the surcharges. Thus, practitioners and brand owners will have to develop strategies to ensure suitably broad and accurate descriptions of goods and services that streamline examination within a predictable budget, even if that means disregarding reliance on the Goods and Services Manual and other rules in appropriate cases.

PTO Updates

JENNIFER FRASER, THOMAS MOGA, AND RYAN BORELO

There have been significant changes and developments at the Trademark Office in 2025, which began with major backlogs across all departments, including examination. The year ushered in a new filing fee surcharge that affected filing strategies, added complexity to the process and/or increased costs, and revamped the Trademark Center's application forms. All of this occurred on the heels of major IT and software changes in 2024, including the implementation of a completely different cloud-based trademark search system (formerly TESS) and the retirement of TRAM (Trademark Reporting and Monitoring), the legacy trademark data management system. Stakeholders and the PTO struggled to adapt to these changes, and these major transitions occurred while never-ending and constantly evolving fraudulent efforts emerged, added to the backlog, and forced the PTO to divert resources and attention to combat these schemes.

The Trademark Office Is Reducing Pendency Compared to Its Peak in 2024

Despite numerous challenges, examination pendency has been reduced to an average of almost five months, down from nearly nine months in 2024, with a target of approximately three months. In part, this reduction is because many applicants are filing more "complete" applications in 2025, using the Acceptable Goods and Services Manual, thereby reducing the burden on examining attorneys. Examination has been prioritized and is largely unaffected by recent issues such as the change in administration and telework policies. Twenty-six new examining attorneys were recently sworn in, and they will be required to work in person for one to two years. Numerous departures and retirements in the past year, in addition to a 7.4% year-over-year increase in filings, are also affecting pendency and other operations.

In contrast to the pendency improvements, many of the other service departments—such as assignments, post-registration, intent to use, the Trademark Assistance Center, Madrid Processing Unit, pre-examination, certified copies—are behind or understaffed. For example, Statements of Use are currently taking around 4.5 months to examine, and Combined Declarations of Use and Applications for Renewal take over 2.5 months, on average. As a result, brand owners should act promptly to avoid complications and extra fees.

While the Trademark Office appears pleased with the increase in applicants filing more-complete applications to reduce the burden on examiners, experienced practitioners still raise concerns about the surcharges assessed for applications that use unique descriptions. In particular, the wording in the Goods and Services Manual is not acceptable for new and emerging technologies, many applicants use alternative wording that is inadequate, and the PTO reports that only about 30% of requests (most of which likely come from experienced attorneys) to add wording to the Manual are allowed, which limits the Manual's usefulness for brand owners. For our part, we have raised these issues with the PTO and will continue to do so given that the new surcharges result in higher costs for all brand owners and add complexity to the process. While those filing applications directly pay these higher per-class surcharges, applicants using the Madrid Protocol—usually the ones using extremely long descriptions of goods/services requiring more extensive review by examiners—pay only an additional $100 fee for examination.

The TTAB has also been allocated more funding for IT improvements, and many agree that this is long overdue.

Key Updates at the Patent Trial and Appeal Board

Recent actions by the U.S. Patent and Trademark Office (USPTO) mark a significant recalibration of practice before the Patent Trial and Appeal Board (PTAB), particularly around institution decisions, prior-art standards, and transparency obligations. Under Director John Squires, the agency has shifted toward more centralized oversight and more stringent requirements for petitioners seeking post-grant review.

1. Artificial Intelligence Strategy

The USPTO has implemented its Artificial Intelligence Strategy designed to "guide the agency's efforts toward fulfilling the potential of AI within USPTO operations and across the intellectual property (IP) ecosystem." The strategy provides for the use of AI by patent examiners in prior art searching. On the utility side, similarity search tools are being utilized. On the design side, the AI-powered DesignVision search tool has been employed.

2. Continuation Application Fee

A new Continuation Application Fee has been implemented for continuing applications on utility, plant, and design cases more than six years old. This will have a great impact on patent applications pending in Technology Center 1600, the biotechnology group, due to the significant amount of time involved in prosecution. The average first office action pendency period in TC 1600 is nearly two years.

3. Streamlined Claim Set Pilot Program

The PTAB implemented its Streamlined Claim Set Pilot Program. The program is structured to determine the length of prosecution time needed to examine patent applications having a limited number of claims. To qualify for the program, an applicant must submit a Petition to Make Special. The claim count cannot exceed 10, and only one claim can be independent.

4. Pending Legislation

Several legislative actions are pending:

- The Patent Eligibility Restoration Act of 2025, intended to clarify patent eligibility under 35 U.S.C. § 101;
- The PREVAIL Act, which responds to possible abuses in the PTAB system; and
- The RESTORE Patent Rights Act of 2025, which deals with the reestablishment of the rebuttable presumption of injunctive relief in patent infringement cases.

5. Director Reclaims Institution Authority

In a memo issued October 17, 2025, Director Squires announced that, effective October 20, 2025, he will personally decide whether to institute inter partes review (IPR) and post-grant review (PGR) proceedings. While he will consult with at least three PTAB judges, his decisions will generally take the form of summary notices unless a petition presents "novel or important" legal or factual questions. Since assuming this authority, Director Squires has issued 34 institution decisions and summarily denied all 34 petitions. This pattern underscores a significantly higher bar for institution and a more restrictive gatekeeping philosophy.

6.Stricter Real-Party-in-Interest Disclosures

On October 28, 2025, the USPTO reinstated a rigorous requirement that petitioners must fully identify all real parties in interest (RPIs) when filing IPR or PGR petitions. This reverses a more flexible approach under prior leadership and more closely follows PTAB precedent regarding disclosure of RPIs for post-grant proceedings, emphasizing transparency and accuracy. Director Squires cited concern over potential misuse by foreign-controlled entities as a factor motivating this change.

7. Limitations on Prior Art in IPRs

Effective September 1, 2025, the USPTO restricted the use of certain prior-art categories in IPR challenges. Specifically, petitioners may no longer rely on applicant-admitted prior art or general knowledge to supply missing claim elements. Instead, each claim limitation must now be mapped to prior art in patents or printed publications, as provided under USPTO regulations governing IPR petitions. This new policy will prevent a patent owner's admissions on prior art from being used in IPR challenges to its patents. Petitioners should confirm that prior art references clearly cover every element of the claims they challenge in a post-grant proceeding.

8. Search Derivation Declarations as a Favorable Factor for Institution

Petitioners may now submit search derivation declarations (SDDs) describing how they located the prior art supporting their invalidity grounds. An SDD can detail databases and repositories searched; search terms, filters, and analytics applied; the amount of time spent searching and reviewing; and any novel or underutilized search pathways.

Although voluntary, SDDs are treated as favorable discretionary factors supporting institution, particularly when they reveal search efforts that uncover new prior-art avenues or highlight USPTO examination error. In the current environment of heightened scrutiny and elevated denial rates, SDDs may become an important strategic tool for petitioners seeking to demonstrate diligence and strengthen institutional likelihood.

Strategic Considerations

- For patent holders, the combination of centralized institution authority, enhanced RPI transparency, tightened prior-art rules, and a demonstrated trend of institution denials indicates a strengthened defensive positioning, which may result in greater leverage in pre-litigation negotiations.
- Patent challengers face a more demanding review environment, requiring rigorous RPI diligence, assembly of thorough and targeted prior art, and consideration of detailed SDDs to bolster institution prospects. They may consider alternative tools for patent invalidation such as reexamination or federal district court litigation.
- Corporate legal teams may consider analyzing their IP challenge strategy, risk models, and internal protocols for evaluating or defending against PTAB challenges.

The USPTO's recent reforms reflect a move toward more centralized oversight, higher transparency, and stricter evidentiary expectations at the PTAB. Patent owners and challengers should assess how these changes affect their post-grant strategy, resource allocation, and risk exposure.

Fraudulent Activities Continue to Be an Area of Concern

In addition to ongoing issues with fake specimens, bogus filings, and attempts to hijack trademark registrations through false assignments and the misuse of attorney credentials, the main areas of concern still relate to improper filings used to secure registrations for online retailers and criminal syndicates impersonating government officials (and others) in an attempt to steal money (see Scammers are Impersonating the USPTO). These criminal organizations often pay for GoogleAds to be displayed in searches for trademark services, offering low-cost services and guaranteeing registration; frequently mimicking other, known trademark service providers; and violating other laws, apparently to dupe applicants into paying money.

We've also seen private companies using official-sounding names and seals on bogus solicitations offering to renew trademarks and warning that registrations will be canceled if the fee is not paid. This is a widespread scam affecting many countries. These notices are sent sometimes more than a year in advance of any deadline in an attempt to deceive trademark owners or others who receive the notice into paying the fee. A good reminder is that the email should ALWAYS come from your legal counsel or an official .gov email address. While the PTO is limited in its enforcement capabilities, it is working with other agencies and taking steps to address these issues:

- Implementing two-step authentication and requiring attorneys and authorized users to set up USPTO accounts and credentials.
- Working with the Department of Justice, Federal Trade Commission, and others to educate consumers and take enforcement action.
- Pursuing domain name dispute proceedings and working with domain name registrars to take down websites using government insignia, names of PTO agencies, trademark law offices, and even the names of examining attorneys. The PTO has taken action on over 370 improperly registered domain names (and about 270 have been taken down).

The PTO registered its own name and logo to assist with enforcement of its trademark rights in combating these fraudulent activities. In addition, the USPTO has created a webpage to help protect against trademark scams and solicitations. You can also report a scam at tmscams@uspto.gov.

Use of AI to Improve Trademark Operations

Prior to 2025, AI initiatives were not a major focus; however, the current administration aims to utilize AI to enhance efficiency. The PTO is exploring the best way to implement AI, particularly considering the current limitations related to budget and staffing.

While image/design searching is an obvious way to utilize AI, the Trademark Office believes examiners are already well trained to do this efficiently. For the time being, the office would rather focus on using AI in areas that reduce the backlog and assist stakeholders. In particular, it appears to be focusing on using a chatbot to assist with questions and navigation and utilizing AI to aid with pre-examination tasks such as design coding and classification, help formulate descriptions of goods and services, and verify the *Official Gazette* for quality review. While AI could be deployed to investigate fraud and account/filing anomalies, the office is cautious about considering those tools prematurely before it is able to handle the likely increase in cases.

Upcoming Changes

The Trademark Center docket will be utilized to secure attorney credentials and the attorney of record for filings. The USPTO is still exploring how best to accomplish this, but it expects to issue a notice of proposed rulemaking to change the rule that representation ends upon issuance of the registration.

Of course, the issues facing the USPTO are always evolving, and we will keep you informed of significant developments so that you can be prepared for these changes.

California Amends Right of Publicity Statute to Add Digital Replicas and Injunctive Relief

MARTIN HIRSHLAND

As of January 1, 2026, Californians now have more arrows in their quiver to fight right of publicity violations, especially unwanted digital replicas, and will be able to turn up the heat on infringers.

California SB683 amends the state's already robust right of publicity law, California Civil Code Section 3344 in two important ways. First, Section 3344 now includes a remedy of injunctive relief requiring a violator "to remove, recall, or otherwise cease the publication or distribution of the … name, voice, signature, photograph, or likeness" and requiring compliance "within two business days from the day the order is served, unless otherwise required by the order." Cal. Civ. Code Section 3344(a)(2) (effective January 1, 2026). The two-business-day compliance period is lightning fast, signaling that the California Legislature is adamant about stopping misappropriation in its tracks. Often, misappropriations linger for weeks, months, or years while court disputes play out, all the while causing incalculable harm to the victims and allowing the perpetrators to profit. Now, plaintiffs can obtain injunctive relief that specifically requires a defendant to comply within two business days, which is virtually unheard of at common law.

Furthermore, Section 3344 was amended to clarify that misappropriation includes digital replicas, addressing concerns about generative AI and other emerging technologies. Cal. Civ. Code Section 3344(f) (effective January 1, 2026). The "digital replica" language is borrowed from California's post-mortem right of publicity statute (Section 3344.1), which originated from the Legislature's concerns about an AI replica James Dean movie, generative AI songs by deceased artists like Jimi Hendrix, and an AI replica George Carlin comedy special. The definition of "digital replica" is as follows:

"Digital replica" means a computer-generated, highly realistic electronic representation that is readily identifiable as the voice or visual likeness of an individual that is embodied in a sound recording, image, audiovisual work, or transmission in which the actual individual either did not actually perform or appear, or the actual individual did perform or appear, but the fundamental character of the performance or appearance has been materially altered.

The digital replica language covers two situations: (1) where someone's likeness was generated from scratch and used to create a brand-new performance, and (2) where an existing performance was altered such that the "fundamental character" of the performance has been changed. What these terms actually mean in practice, only litigation will tell. Until then, Californians (and IP attorneys) should be prepared to take advantage of the new statutory provisions and seek injunctive relief wherever possible.

Note that for deceased individuals, a digital replica may be used without consent if (1) the use is in connection with any news, public affairs, or sports broadcast or account; (2) the use is for purposes of comment, criticism, scholarship, satire, or parody; (3) the use is a representation of the individual as the individual's self in a documentary or in a historical or biographical manner, including some degree of fictionalization, unless the use is intended to create, and does create, the false impression that the work is an authentic recording in which the individual participated; (4) the use is fleeting or incidental; or (5) the use is in an advertisement or commercial announcement for a work described above. See Cal. Civ. Code Section 3344.1(a)(2)(A)(ii).

AI and Trademark Law: What We're Learning—and What Clients Should Know

ERIC FINGERHUT

AI is reshaping trademark practice faster than any tool in the past 30 years. Tasks that once took days—like preliminary clearance searches or portfolio analysis—now start in minutes. But while AI has become a powerful accelerator, it hasn't replaced the need for experienced legal judgment.

How We're Using AI Internally

- Faster clearance screening: AI tools flag phonetic, visual, and conceptual conflicts across multiple jurisdictions, letting us begin the strategic analysis sooner.
- Portfolio management: Automated monitoring identifies unused registrations, upcoming renewals, and maintenance gaps—helping clients spend smarter.
- Litigation support: AI analyzes TTAB trends, attorney patterns, and case outcomes, giving us better insight when preparing responses or briefs.
- Drafting assistance: AI can generate first drafts of routine documents, letting us focus our time on the nuanced arguments and strategy.

Where We Still Exercise Caution

AI can be wrong—sometimes confidently wrong. We've seen fabricated citations, inverted legal standards, and misapplied factors. That's why our internal protocol is strict:

- Verify every citation.
- Cross-check all legal standards.
- Trace factual claims back to original sources.
- Require human review of any AI-assisted work.

What Clients Should Consider

Clients often ask how they should structure their own AI usage. Our guidance mirrors our internal practice:

- Use AI to accelerate routine tasks, but never to replace legal judgment.
- Establish a verification requirement—trust but always verify.
- Know where AI adds value (pattern recognition, summarization) and where it falls short (novel reasoning or legal interpretation).
- Train teams on prompt quality—garbage in, garbage out still applies.

AI is here to stay, and it's already enhancing the speed and quality of trademark work. The key isn't choosing between humans or AI—it's using both responsibly. The firms and companies that master that balance will lead the next decade of brand protection.

Navigating Right to Repair: Trademark, Patent, and Antitrust Tools for Brand Protection

JENNIFER FRASER AND MICHAEL WORD

In recent years, many states have implemented right to repair laws to give consumers and independent repair shops access to parts and information, despite challenges from original equipment manufacturers (OEMs) and authorized suppliers with warnings about the negative effect of such laws on safety, privacy, and security. The implementation of right to repair laws has threatened the aftermarket business of OEMs and authorized suppliers. Intellectual property (IP) rights and laws, if employed properly, may help protect this aftermarket business.

With its 100-year history beginning in the Motor City, Dykema and its automotive and antitrust attorneys have successfully represented motor industry clients and handled inquiries raised by the Federal Trade Commission (FTC) and state attorneys general, and represented well-known brands in class action litigations related to warranties and right to repair laws. In the course of doing so, it has clarified some of these standards for companies on all sides. Dykema's IP attorneys also assist when repair shops and resellers cross the line and confuse consumers as to whether the parts or services are authorized or truly compatible. In the age of vehicle telematics and wireless data, which is often the subject of IP and privacy rights, right to repair laws can jeopardize those rights. Right to repair laws not only affect the automotive industry but everything from medical devices to electronics to agricultural equipment.

Right to repair laws, antitrust laws, IP laws, and data privacy protections affect all companies that seek to manufacture, sell, repair, and service these products, while consumers try to find the best products and services they know and trust while factoring in other considerations such as price and convenience.

Trademark laws are one effective avenue that OEMs and authorized suppliers can utilize to address the aftermarket business. Trademark laws provide an important tool for companies to protect their brands while ensuring consumers are not confused about the source and quality of parts and services. Trademark law protects

a brand's ability to control how its name and logo are used to prevent consumer confusion. Legal doctrines like nominative fair use allow for limited use of another company's trademark for identification (e.g., "we repair Acme products"), but this is a *narrow* exception that is frequently misunderstood. Under nominative fair use, if a company represents that it repairs another brand, it must use no more of the mark than is necessary—meaning no logos, color, or prominent use of the trademark should be used. This limitation is important to keep in mind because most third parties would prefer to use the brand's colorful logo and put the actual logo in lights, promotional materials, and advertisements. But such use can often exceed the acceptable boundaries of nominative fair use by leading to consumer confusion, the hallmark of trademark infringement.

A related issue frequently arises when *formerly* authorized distributors or service providers continue to promote their status as authorized, using outdated signage or website pages. Such uses also run afoul of trademark laws, leading to consumer confusion and weakening the brand owner's ability to control the source of its goods or services. Apart from right to repair laws, brand owners are permitted to take action against such misuses. In fact, brand owners have a duty to police their marks; otherwise, they jeopardize their ability to serve as unique source identifiers, and, in the extreme, such trademarks could be "genericized" and no longer function as trademarks (e.g., formerly trademarked names such as escalator and thermos have lapsed into the public domain due to widespread misuse).

Patent laws provide another avenue for OEMs and authorized suppliers to protect the aftermarket business. Unlike copyright laws, which include exceptions that allow for the use of copyrighted material in the case of repairs, federal patent law rights are not diminished by state right to repair laws. As a result, patent laws may be used to protect after-market parts and services. Design patents in particular are effective in protecting exterior-facing components but may also be used to protect the fit and placement of internal components. Marking of parts with patent numbers can also be effective in warding off unauthorized copycats or would-be suppliers of protected parts.

Tips

- Set up a watch for improper uses, and enlist employees to report issues. When resources are scarce, focus on the more significant issues.
- Take action against prominent misuses. Often, companies are unaware of the misuse, and a polite request can result in an acceptable and lawful modification.
- Use online platform/social media takedown procedures. These are relatively inexpensive.
- Be mindful of the viral nature of the internet and the adage that you catch more bees with honey. A polite request to a mom-and-pop shop offering a reasonable phaseout and modification can be better received than a threatening letter.
- Make sure former distributors know to remove eye-catching logos and return previously approved signage.
- If a product is not equivalent or compatible, address it before customers complain or more serious issues emerge.
- Register variants of your branded domain name and even misspellings to reduce issues (e.g., acmerepair.com, acmeparts.com, with various extensions). Domain names are less expensive than enforcement.
- Ensure that key parts and services are protected by patents and that licenses are in place to ensure that only authorized suppliers and repair shops have the right to use or sell such parts and services.
- Ensure that key parts comply with patent-marking statutes, to allow for full recovery of damages against copycats and would-be suppliers of protected parts.

5 Things You Need to Know: Third-Party Litigation Funding in Patent Disputes

BRAD MICSKY

Third-party litigation funding (TPLF) continues to reshape the patent litigation landscape. Once a niche financing tool for certain nonpracticing entities (NPEs), it has rapidly expanded into all facets of patent litigation. Supporters say it levels the playing field for smaller innovators and companies with limited resources, while critics warn of ethical concerns, increased forum shopping, and an increase in cases of questionable merit. Below are five key points to understand about TPLF's growing role.

1. Rapid Market Growth and Influence

- TPLF has become a major force in patent disputes, with at least 25% of NPE cases over the past three years traced to litigation investment entities. TPLF has also increased funding in patent enforcement actions filed by small practicing enterprises with limited resources to fund active litigations.
- The Westfleet Insider 2024 Litigation Finance Market Report shows consistent growth in total funding commitments, with a significant share allocated to patent cases.

2. Access to Justice vs. Potential Abuse

- TPLF provides critical resources for small and midsize enterprises to enforce patent rights domestically and abroad, helping balance financial disparities.
- Critics warn that increased funding can fuel non-meritorious lawsuits and introduce ethical concerns regarding funder influence on litigation strategy and settlements.

3. Disclosure Requirements Are Evolving and Influencing Forum Choice

- Already, 33 U.S. district courts require disclosure of a litigation funder's existence. Delaware, an early adopter of litigation funder disclosure rules, saw a 41% decline in patent filings after adopting such rules.
- The proposed Litigation Transparency Act of 2025 (H.R. 1109) would mandate disclosure of funder identities and agreements, with limited exceptions for straightforward funding loans.

4. Judicial and Policy Scrutiny Is Increasing

- The Judicial Conference of the United States created a Subcommittee on Third-Party Litigation Funding in October 2024 to evaluate disclosure rules and the broader impact of funding on litigation.
- Key questions include whether disclosure rules should be tailored to specific types of cases (e.g., high-value), whether TPLF serves to increase claims of questionable merit, and how courts should handle disclosed information involving funders and funding agreements.

5. Impact on Litigation Strategy and Court Resources

- Greater access to capital can increase litigation expenses. It can also complicate mediation and settlement efforts when funding agreements and their parameters are not known.
- Practitioners remain divided: some see TPLF as essential for innovation and fairness in an increasingly expensive system, while others view it as a driver of forum shopping and court congestion through an increase in litigation filings.

AI and Software Patents in 2025: New Leadership and § 101 Eligibility Guidance

JON SEPPELT AND DIEGO FREIRE

Top Takeaways from 2025

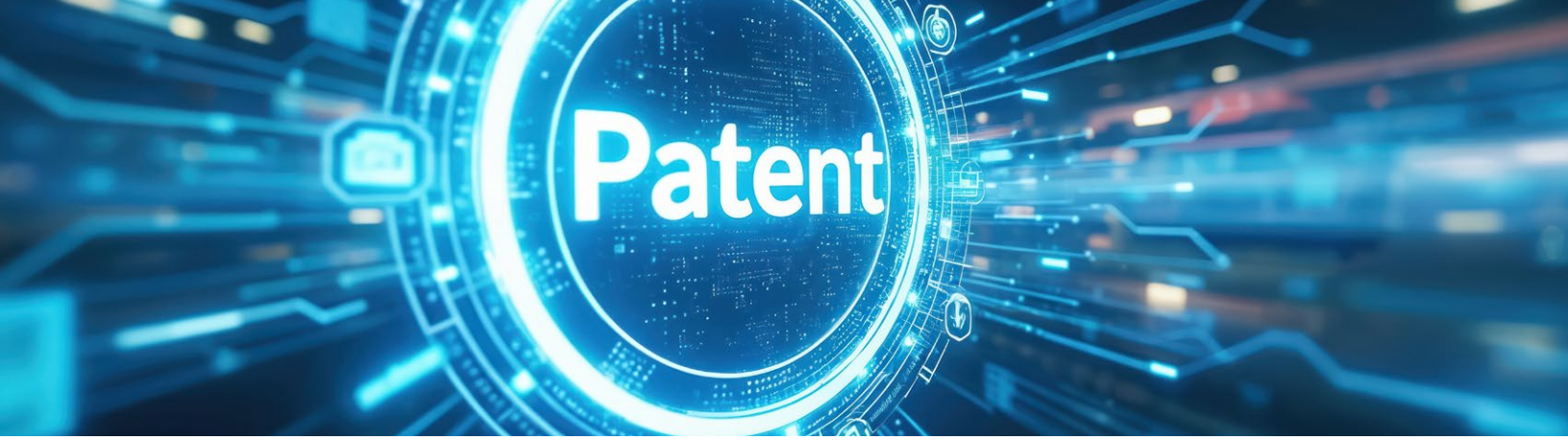
- Limit "mental processes" to what humans can actually perform. Only treat a step as a mental process if it can practically be performed in the human mind.
- Separate "recites" from "involves" abstract ideas. Many AI claims merely involve mathematical concepts rather than reciting a judicial exception, and in those cases, a Step 2A/2B analysis may not even be necessary.
- Anchor eligibility in concrete technological improvements. Focus on specific improvements to computer functioning or a technical field, not just automation, efficiency gains, or applying standard machine learning (ML) to new data.
- Analyze the claim as a whole. Determine whether the claim merely says "apply it on a computer/neural network" or instead claims a particular technical solution or improved way of achieving a result.
- Provide evidence in close cases using subject matter eligibility declarations (SMEDs) and the preponderance standard. In borderline situations, remember the "more likely than not" standard and consider using SMEDs to document mental-process limits or technological improvements.

The United States Patent and Trademark Office (USPTO) has recently undergone significant changes both in leadership and in Section 101 subject matter eligibility guidance. John Squires has been appointed as undersecretary of commerce for intellectual property and director of the USPTO. Under his leadership, the USPTO has issued updated eligibility guidance that builds on and refines its 2024 AI-focused direction and has influenced PTAB practice through key Appeals Review Panel decisions such as *Ex parte Desjardins*.[1]

The 2024 guidance, published on July 17, 2024, introduced the AI-SME Update, which set out foundational principles for evaluating AI-related patent applications under 35 U.S.C. § 101. Among other things, it emphasized the distinction between claims that "recite" a judicial exception and those that merely "involve" one. Claims recite a judicial exception when they explicitly set forth or describe an abstract idea, such as by naming specific algorithms like backpropagation or gradient descent. By contrast, claims that merely involve an exception are based on or utilize an abstract idea without explicitly reciting it in the claim language. The 2024 guidance also made clear that simply incorporating AI, large language models, or neural networks into an abstract idea does not transform that idea into a patent-eligible application, and it included Examples 47-49 to illustrate the eligibility analysis for AI-related claims.

Against this backdrop, on April 18, 2025, the Federal Circuit's decision in *Recentive Analytics v. Fox Corp.*[2] serves as a cautionary counterpoint that helped define the 2024 guidance and highlights what to avoid in AI claiming. The court held that patents applying ML models to generate optimized network maps and event schedules were directed to abstract ideas and ineligible under Section 101 because they merely applied conventional ML techniques to a new data environment, without any improvement to the ML technology or computer functioning itself. This outcome underscores that patent applications, beyond reciting functional results, must set forth concrete implementations that solve technological problems and improve computer or ML capabilities.

On August 4, 2025, the USPTO issued a Section 101 subject matter eligibility memorandum that, among other things, clarifies how examiners should analyze AI-related claims and offers a series of reminders and clarifications that, in practice, tend to favor applicants. First, it reiterates that examiners should not expand the "mental process" grouping to encompass claim limitations that cannot practically be performed in the human mind, and it expressly recognizes that AI-related limitations that cannot realistically be performed mentally fall outside this grouping, a critical constraint on overbroad Section 101 rejections.



Second, it strengthens the 2024 “recites” versus “involves” distinction by providing concrete examples, distinguishing claims that merely involve mathematical concepts (such as “training a neural network”) from claims that actually recite judicial exceptions by naming specific algorithms like backpropagation or gradient descent.

Third, the memo stresses that Step 2A, Prong Two analysis must assess how additional elements work together with any recited exception, rather than evaluating limitations in isolation. Examiners are instructed to adopt a holistic, claim-as-a-whole approach that considers how limitations interact and influence one another in determining whether an exception is integrated into a practical application.

Fourth, the guidance offers more detailed instruction on separating true technological improvements from mere automation, requiring examiners to evaluate whether claims present particular solutions to problems or particular ways to achieve outcomes, rather than just the idea of a solution, and warning against oversimplifying claims under the “apply it” rubric; the memo recognizes that the “apply it” and improvement inquiries often overlap.

Finally, the memorandum highlights a significant practical point: examiners should make a Section 101 rejection only when it is more likely than not (greater than 50%) that the claim is ineligible, explicitly anchoring the analysis in a preponderance-of-the-evidence standard and discouraging rejections in close cases.

On September 26, 2025, the USPTO issued its *Ex parte Desjardins* Appeals Review Panel decision, which further clarifies the contours of eligibility for AI-related inventions. In that decision, issued by Director Squires, the office overturned a Section 101 rejection and held that improvements to the functioning of machine learning models can constitute practical applications under the subject matter eligibility framework. *Desjardins* signaled an increased willingness to treat ML model improvements as technological improvements and to shift the focus of examination toward Sections 102 and 103, rather than reflexively relying on subject matter eligibility rejections.

On December 4, 2025, the office introduced clarifying guidance on SMEDs under 37 C.F.R. § 1.132, giving applicants a voluntary mechanism to submit factual evidence relevant to eligibility determinations. The two memoranda explain that applicants may use declarations to provide evidence such as proof of technological improvement, the state of the art at the time of filing, or information showing how a judicial exception is integrated into a practical application. Examiners must evaluate properly submitted SMEDs as part of the record under the same preponderance-of-the-evidence standard. The guidance emphasizes that SMEDs are most effective when presented in a declaration focused solely on subject matter eligibility, supported by objective evidence tied to the claimed invention, and that they are not a vehicle to supplement the original disclosure.

Taken together, the developments in 2025 built on the foundation laid by the 2024 AI-SME guidance, layering in a new director, fresh Federal Circuit authority, and a precedential PTAB decision to create a more coherent Section 101 landscape for AI and software. Under Director Squires, the USPTO’s August 4 memorandum, the Federal Circuit’s decision in *Recentive*, the ARP’s ruling in *Desjardins*, and the new SMED guidance all point in the same direction: claims that emphasize concrete technological improvements, are framed as more than mental processes or generic automation, and are supported by a clear evidentiary record stand a far better chance of clearing the eligibility hurdle.

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[1] *Ex parte Desjardins, Appeal 2024-000567 (decided September 26, 2025).*

[2] *Recentive Analytics, Inc. v. Fox Corp., 1:22cv1545.*

Evolving Options for Design Trademark Clearance Searches: AI as a Useful Tool to Supplement Your Clearance Efforts

JENNIFER FRASER

Not too long ago, clearance of design marks and logos in the U.S. was mostly limited to a search of Patent and Trademark Office (PTO) records, which only yielded designs in filed applications, not other uses of design marks or logos that could still have trademark rights regardless of whether an application was filed. The PTO categorized designs according to elements coded by clerks at the PTO based on their perception of a design or how the applicant voluntarily described the mark. Those elements were assigned numerical design codes at the PTO (e.g., 01.01.06 for stars with radiating lines) that you could search, or you could search keywords if the applicant described them appropriately in the description of the mark in the application. Such searches typically yielded thousands of largely irrelevant results that needed to be manually reviewed or culled by further search terms using, for example, the goods or class. Other than searches at the PTO, searching options could also include reverse image searches, such as by using Google Images, as a part of the vetting process for design marks and logos. Other than PTO filings and reverse image searches, options were limited. Accordingly, those with prior rights based on use were difficult to locate. While the PTO had a system for categorizing design marks in applications, finding prior uses of design marks was less reliable and brand owners were limited in fully vetting designs, which limited their confidence in the uniqueness of a new logo.

AI Design Search Options and Practical Applications

AI now affords broader, more-efficient, and less-expensive tools to supplement clearance searches, which is particularly important to clear house marks or logos with high visibility, including those on app stores where the design is likely more noticeable than the wording. In today's world, apps are ubiquitous, and the recent disputes among apps and the icons used to identify businesses highlight the importance of clearance for icon designs. App stores offer apps across every industry, and they all use an icon to offer products to consumers at the touch of a finger or a mouse.

We rely on apps to travel, order food, check the weather, and transact business in every industry. Even the Trademark Practice Group at Dykema has an app (please email us at Dykema-TM@dykema.com if you want to test Mark Minder™ and have your entire portfolio and other tools at your fingertips). Many app store operators have informal takedown procedures outside of formal legal proceedings, which increases the importance of obtaining proper clearance to ensure extrajudicial processes are not used to delist a valuable business tool over an allegation of a similar app. Further, protecting your logo through the federal registration process is important to be able to effectively utilize those procedures when necessary.

With the increasing importance of apps featuring source-identifying designs and the growing availability of cost-effective and efficient design searching, AI provides brand owners more opportunities to select and screen logos and designs. While traditional searches still provide a useful role in clearance, AI offers pixel searches across the internet, app stores, and other databases and thus covers common law uses that could still create a conflict. Further, to rapidly identify direct conflicts, AI can sort and assign risk percentages. While this does not replace review by a skilled trademark attorney/searcher, especially for important marks, AI searches have a useful role, especially when trying to quickly eliminate candidate marks before proceeding to a more in-depth review.

The Role of Clearance

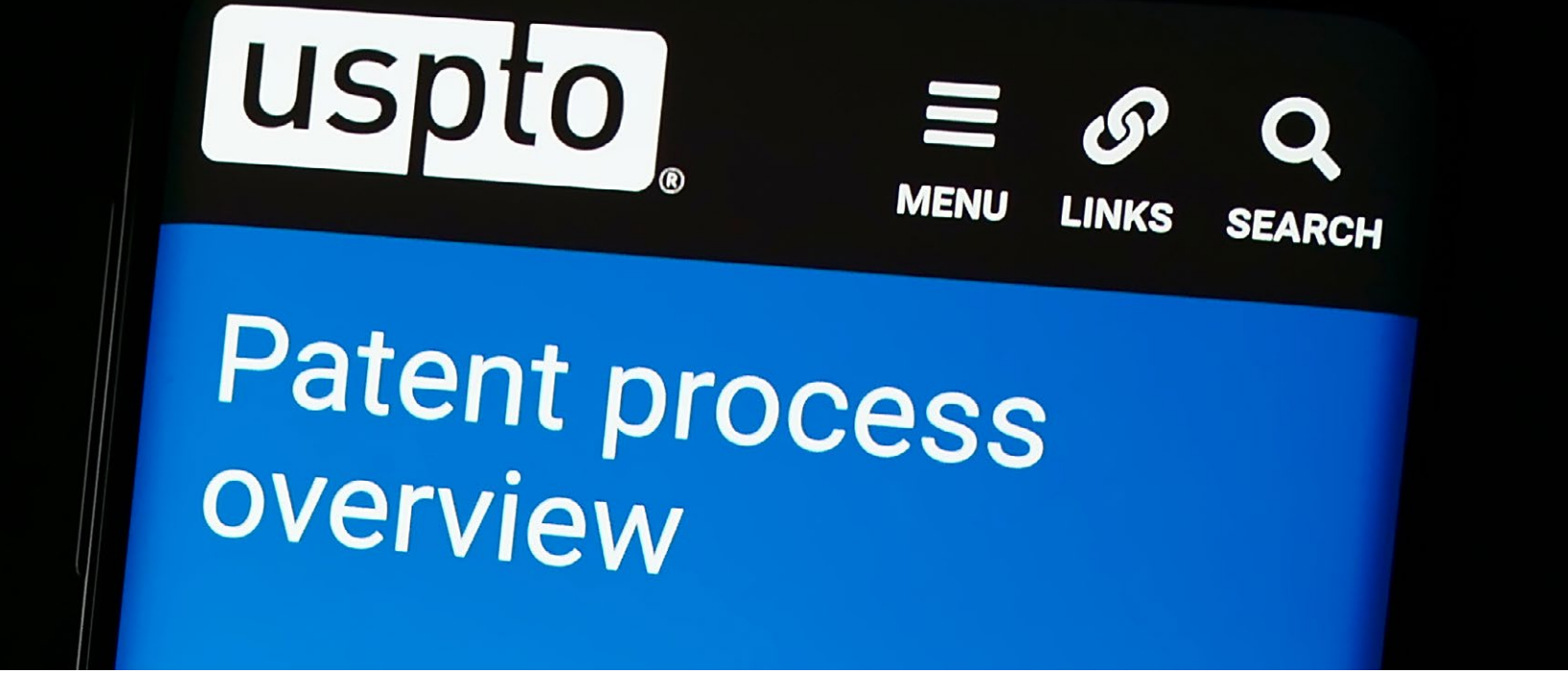
While courts have stopped short of declaring an affirmative duty to investigate a trademark for conflicting uses prior to adoption of the mark, conducting the clearance search is a prudent business decision to avoid conflicts and expensive changes to branding if an issue emerges. Further, performing the search and obtaining a competent legal opinion protects a business from a finding of willful infringement, which can result in treble damages and an award of attorneys' fees in egregious situations. There are now many more online tools to help brand owners take these steps prior to adopting a logo or design mark, which should reduce risk and potential problems after use commences. AI and search tools continue to evolve, and the clearance of design trademarks is more reliable than ever and will improve at a rapid pace.

New USPTO Leadership Implements Centralized IPR Authority and Strict RPI Disclosure While Proposing Fundamental Bars to IPR Challenges

DIEGO FREIRE

Top Takeaways from 2025

- The USPTO director now makes institution decisions for IPRs, personally determining whether to institute inter partes review (IPR) and post-grant review (PGR) proceedings. This centralizes authority, aiming to eliminate the perception of PTAB self-incentivization, and increases accountability and consistency in policy application.
- Petitioners may be required to designate their primary forum at the outset. The USPTO has proposed a required stipulation under which an IPR petitioner must agree that, if IPR is instituted, it will not pursue invalidity challenges under 35 U.S.C. § 102 (novelty) or 103 (obviousness) in parallel district court or ITC proceedings.
- Subsequent IPRs may be curtailed once patent validity has been upheld. The USPTO has also proposed that IPR be declined where the same claims have already been upheld under 35 U.S.C. § 102 (novelty) or 103 (obviousness) in district court, the ITC, prior PTAB final written decisions, or ex parte reexaminations, absent extraordinary circumstances.
- IPR proceedings may be mandated to yield when courts or the ITC are likely to conclude first. The USPTO further proposed that institution of an IPR should be withheld when a district court, ITC, or other PTAB proceeding is likely to reach a Section 102/103 validity determination before the PTAB would issue its final written decision.
- Real party in interest (RPI) disclosure requirements are being strictly enforced. The PTAB terminated an IPR after finding the petition failed to identify all real parties in interest as required by 35 U.S.C. § 312(a)(2), establishing that a petition cannot be considered unless all RPIs are properly identified.

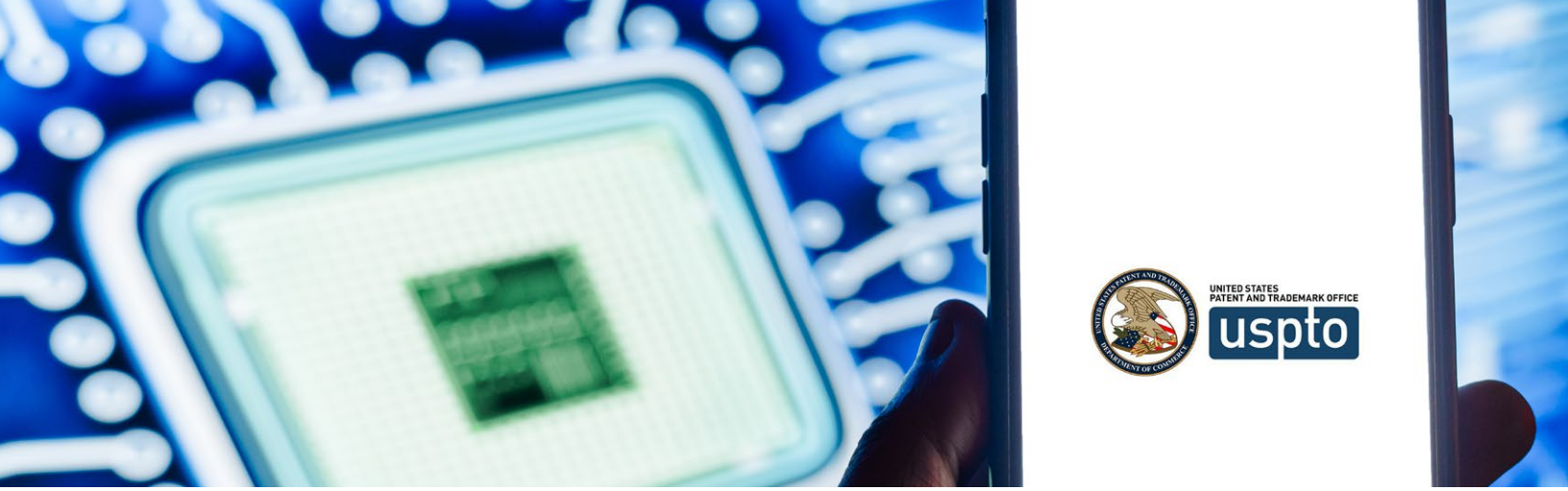


The USPTO has recently undergone significant changes in leadership and policy direction. John Squires has been appointed as undersecretary of commerce for intellectual property and director of the USPTO. Under his leadership, the USPTO has implemented sweeping procedural reforms to the Patent Trial and Appeal Board (PTAB), including reclaiming personal authority over institution decisions for inter partes review (IPR) and post-grant review (PGR) proceedings and proposing new rules that substantially restrict access to IPR challenges through mandatory estoppel stipulations and bars on repeated validity challenges. Additionally, the USPTO has designated as precedential the *Corning Optical Communications*[3] decision, which requires petitioners to identify all real parties in interest before institution and permits termination of IPR proceedings for failure to comply with this disclosure requirement under 35 U.S.C. § 312(a)(2).

On October 17, 2025, the USPTO issued a memorandum from Director Squires announcing that, effective October 20, 2025, the director will personally determine whether to institute IPR and PGR proceedings, rather than delegate this authority to PTAB panels. The memorandum, titled "Director Institution of AIA Trial Proceedings," reclaims the statutory authority expressly vested in the director under 35 U.S.C. § 314(a) and aims to eliminate the perception of PTAB self-incentivization, where institution decisions could appear to affect docket size and resource allocation. The director will consult with at least three PTAB judges and will issue summary notices for routine institution decisions, while reserving the option to issue detailed decisions on novel or important issues or to refer complex matters to PTAB members. This change supersedes the March 26, 2025, "Interim Processes for PTAB Workload Management" memorandum, under which the director only reviewed discretionary considerations, and represents a fundamental shift in centralizing accountability for institution decisions in a presidentially appointed, Senate-confirmed officer.

The practical impact of this change was quickly illustrated. On October 31, 2025, Director Squires issued a summary notice denying institution of IPR in 13 separate proceedings, covering IPR2025-01014 through IPR2025-01240. The notice provides no detailed reasoning, stating only that "the Petitions are denied, and no trial is instituted," consistent with the director's October 17, 2025 memorandum establishing that routine institution decisions would be limited to summary notices.

[3] *Corning Optical Commc'ns RF, LLC v. PPC Broadband Inc.*, IPR2014-00440 (PTAB Aug. 18, 2015).



Also on October 17, 2025, the USPTO further issued a notice of proposed rulemaking that would fundamentally restrict access to IPR proceedings before the PTAB. The proposed rules would require petitioners to stipulate up front that, if IPR is instituted, they will not pursue invalidity challenges under 35 U.S.C. § 102 (novelty) or 103 (obviousness) in parallel district court or ITC proceedings, effectively forcing petitioners to choose their forum at the outset. Additionally, the proposed rules would bar institution of IPR where the challenged claims have already been found valid or not invalid under Section 102 or 103 in prior district court trials, ITC final determinations, prior PTAB final written decisions, or ex parte reexaminations, absent extraordinary circumstances. The rules would also prohibit institution when a parallel district court trial, ITC determination, or another PTAB proceeding is likely to reach a Section 102/103 validity determination before the PTAB would issue its final written decision. The USPTO justifies these changes as necessary to reduce serial and parallel patent challenges that create uncertainty around patent validity, which the agency argues deters innovation investment and disproportionately harms small and midsize businesses.

A related tightening of procedural requirements occurred on October 28, 2025, when the USPTO designated as precedential the decision in *Corning Optical Communications RF*, restoring the office's pre-*SharkNinja* practice of requiring petitioners to identify all real parties in interest (RPIs) before institution of inter partes review. In the *Corning Optical* decision, the board granted a patent owner's motion to dismiss and terminated the IPR after finding that the petition failed to identify all RPIs as required by 35 U.S.C. § 312(a)(2), establishing that a petition cannot be considered unless all RPIs are properly identified. The accompanying memorandum from Director Squires emphasized that the RPI requirement functions not merely as a procedural safeguard but as a national security measure, noting that opaque investment structures have been used by foreign adversaries to gain influence over U.S. intellectual property assets and that entities on the Department of Commerce entity list, including Chinese companies deemed threats to national security, have filed a substantial and increasing number of IPRs. This designation reverses the 2020 SharkNinja decision, which had been de-designated as precedential on September 26, 2025.

Against this backdrop, on December 9, 2025, the Federal Circuit issued a *per curiam* order in *In re Cambridge Industries USA Inc.*[4] that underscores how difficult it is for petitioners to obtain mandamus relief from IPR denials. In that case, the panel of Judges Prost, Chen, and Hughes denied a mandamus petition challenging the USPTO's discretionary refusal to institute two IPRs based on the "settled expectations" of the patent owner, reinforcing that institution decisions and the director's choice of discretionary factors are ordinarily insulated from appellate review.

In sum, Director Squires has moved decisively to centralize control over AIA trial institutions, tighten access to IPR as a parallel validity forum, and strengthen disclosure requirements for real parties in interest, while the Federal Circuit's *Cambridge* decision confirms that most institution denials will remain effectively unreviewable on mandamus. The combination of director-level institution decisions, proposed rules that force early forum selection and curb repeat and parallel challenges, and a revived, security-inflected RPI doctrine reflects a deliberate shift toward enhancing the perceived reliability and integrity of issued patents. Patent applicants and owners should factor these developments into their filing and enforcement strategies and remain closely attuned to further rulemaking, litigation, and guidance that may shape how these reforms are implemented in practice.

Dykema Out and About

"If Not China, Where?" panel. Speakers included Tom Moga, moderator (Dykema); Conrad Wong, attorney (advisor, Office of Policy and International Affairs, USPTO); Chen Wang (former IP counsel, DuPont); and Paul Coletti (former IP counsel, J&J Medical Devices).

"Fake Test Data: An Insidious Newer Form of AI Hallucination" presentation at the Chinese Embassy. Speakers included Tom Moga.

"Navigating the 2025 USPTO Trademark Changes" presentation at the IPO 2025 Annual Conference. Speakers included Jen Fraser (Dykema), Commissioner Dan Vavonese, Diane Gabl Kratz (Dolby Laboratories), Matt Homyk (Blank Rome LLP), and Sandra Nowak (Solventum).

Recent Developments in Third-Party Litigation Funding" presentation at the IPO 2025 Annual Conference. Speakers included Steve Zeller (Dykema), Magistrate Judge Sallie Kim, Emily Johnson (Amgen, Inc), and Kristen Jakobsen Osenga (University of Richmond School of Law).

Dykema Drives Automotive Legal Summit 2025.
Pictured L-R: Eric Mitchell (GM), Luke Popiel (GM), Laura Baucus (Dykema), Michael Word (Dykema), Michael Sinodis (FLEX).

#TeamDykema at Dykema's recent Members Meeting.
Pictured L-R: Karen Poppel, Jennifer Fraser, Reed Heimbecher, Mike Adams, Jon Seppelt, Shannon McKeon, Eric Fingerhut, Steven Zeller, Mike Word, and Dan Harkins.

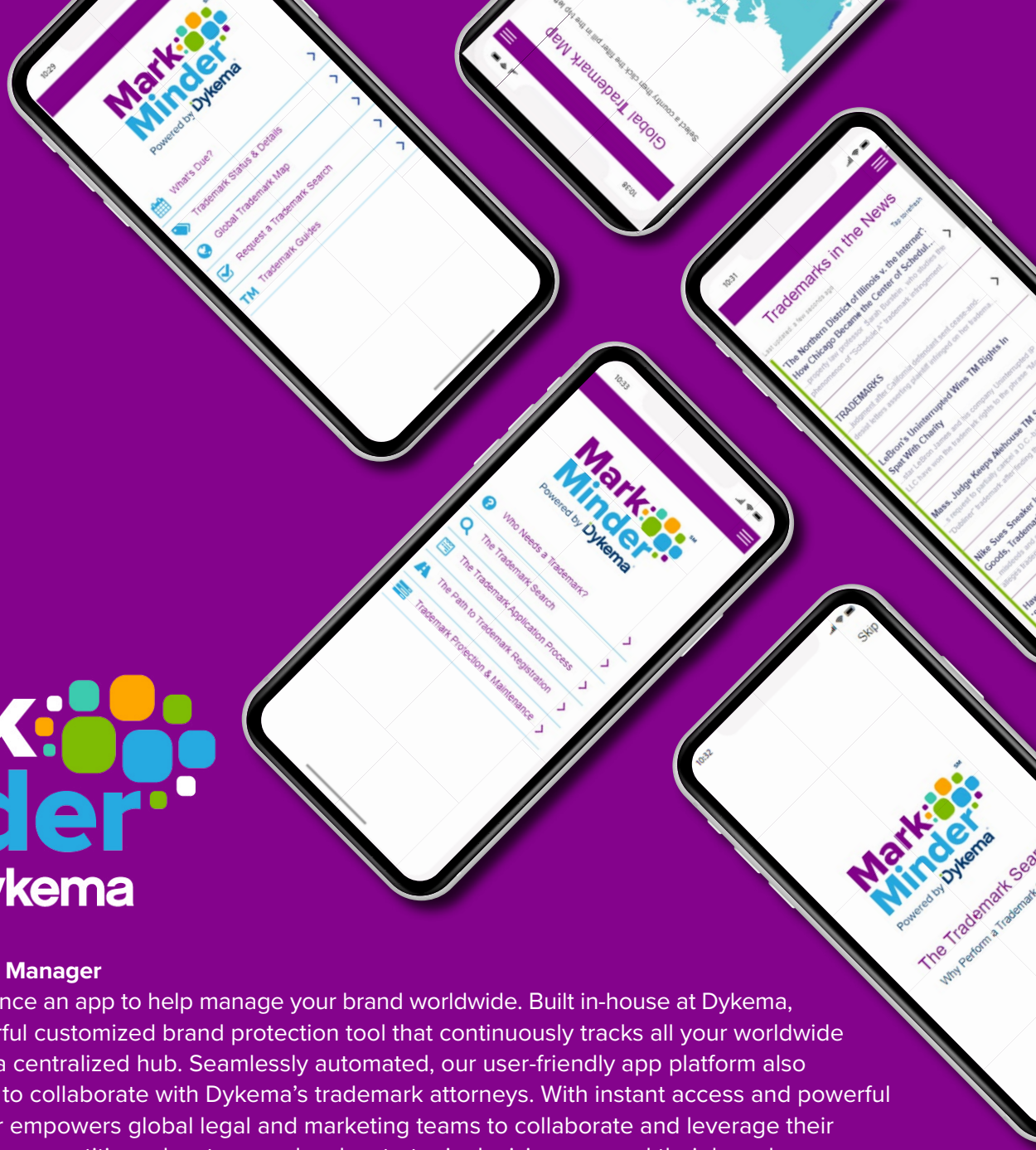
[4] *In re Cambridge Indus. USA Inc.*, No. 2026-101, 2025 U.S. App. LEXIS 32053 (Fed. Cir. Dec. 9, 2025).

Join us in 2026

- **January 14-15:** Litfincon in Houston, Texas
- **February 8-11:** AUTM Annual Meeting in Seattle, Washington
- **May 2-6:** International Trademark Association Annual Meeting in London, England
- **June 2-3:** World Intellectual Property Organization Advisory Committee on Enforcement in Geneva, Switzerland
- **July 15-17:** Dykema's Dental Service Organization Conference in Denver, Colorado
- **November 17-20:** International Trademark Association Leadership Meeting in Phoenix, Arizona
- **November:** Advanced Patent Law Institute Conference in Austin, Texas
- **December 2-3:** World IP Forum in Bangkok, Thailand
- **December 7-8:** Speakers Series, Can Tho University School of Law, Can Tho, Vietnam

Attending these events too? We would love to see you!

Please send an email to IPMail@dykema.com to schedule a meeting.



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