

The COMPUTER & INTERNET *Lawyer*

Volume 29 ▲ Number 6 ▲ JUNE 2012

Ronald L. Johnston, Arnold & Porter, LLP Editor-in-Chief*

The America Invents Act: New Tools for Challenging Patents

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The Leahy-Smith America Invents Act (AIA) represents the most dramatic change to the United States patent system in 60 years, but it remains to be seen whether the new laws actually will alter the landscape of American patent litigation. The AIA provides for new contested proceedings before the United States Patent and Trademark Office (PTO) with the promise of faster, cheaper, and easier tools for patent challenges. With such lofty goals, the question is whether the proceedings will live up to their promise. Similar legislation for *inter partes* reexamination was introduced close to 10 years ago.¹ But today the procedure rarely is used. Will the contested proceedings face a similar fate? Or will the legislation provide the patent bar with better tools for challenging patents? This article

examines that question by discussing the advantages and disadvantages of the new contested proceedings, as well as their interplay with district court litigation and appeals to the Federal Circuit.

The New Contested Proceedings

The AIA provides several new contested proceedings, each of which serves as a potentially powerful tool for challenging a patent. The contested proceedings are trial-like procedures before the PTO's new Patent Trial and Appeal Board (PTAB) that include discovery, depositions, experts, and an administrative hearing.² These contested proceedings include the *inter partes* review, post-grant review, and transitional program for covered business method patents.³ Each contested proceeding takes place before a panel of at least three administrative patent judges, who possess technical aptitude and expertise in patent law.⁴

The *inter partes* review replaces *inter partes* reexaminations and may be the most important of the contested proceedings because of its early availability and broad applicability.⁵ The *inter partes* review becomes available on September 16, 2012, and it can be sought against virtually any

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patent other than those recently issued. A petition for *inter partes* review may be filed nine months after (a) the grant of the patent or issuance of a reissue patent, or (b) upon the termination of the post-grant review, if one had been instituted, whichever is later.⁶ An *inter partes* review, however, cannot be filed if the petitioner previously filed a declaratory judgment action challenging the validity of the same patent⁷ or if the petitioner had been served with a complaint alleging infringement of that patent more than one year prior to seeking the *inter partes* review.⁸ The *inter partes* review is restricted to challenges based on 35 U.S.C. §§ 102 or 103, and only on the basis of prior art patents and printed publications.⁹ The PTAB will institute an *inter partes* review upon a showing that there is a reasonable likelihood that the petitioner would prevail with respect to at least one claim challenged.¹⁰

The post-grant review is much broader in scope than the *inter partes* review because such a review can be sought under §§ 101, 102, 103, and 112, except best mode.¹¹ The drawback, however, is that this proceeding is limited to challenging patents issuing from applications with a priority date of March 16, 2013, or later.¹² As a result, this proceeding will not be widely used for several years. The standard for instituting a post-grant review is higher than an *inter partes* review in that the petitioner must show that it is more likely than not that at least one claim is unpatentable.¹³ A petition for post-grant review can be filed only within nine months after the grant of the patent or issuance of a reissue patent; this complements the *inter partes* review which can be filed only after this nine-month window closes.¹⁴

The transitional program for covered business method patents is similar to post-grant proceedings in that the transitional program “shall be regarded as, and shall employ the standards and procedures of, a post-grant review.”¹⁵ In some respects, the transitional program is more expansive than post-grant reviews because the petitioner can challenge the validity of a covered business method patent at any time during the lifetime of the patent.¹⁶ The transitional program, however, is narrower in several respects. First, the transitional program pertains to post-grant review of only a special class of patents that meet the definition of a “covered business method patent” pursuant to the AIA.¹⁷ Second, the petitioner must have been sued or charged with infringement to institute this proceeding.¹⁸ Third, the transitional program restricts the type of prior art that may be asserted in the proceeding. Under AIA Section 18, eligible prior art includes “prior art that is described by [current] section 102(a)” or “(i) prior art that discloses the invention more than one year before the

filing date before the date of the application for patent in the United States, and (ii) would be described by [the current] section 102(a) . . . if the disclosure had been made by another before the invention thereof by the applicant for patent.”¹⁹ Lastly, the transitional program is only temporary. It will begin on September 16, 2012, and last for only eight years until the program’s sunset on September 16, 2020.²⁰

Proposed Rules Governing Conduct of the Proceedings

The PTO recently issued proposed rules to govern the contested proceedings.²¹ These rules, together with the AIA, preview how the contested proceedings will be conducted before the PTAB. First, each contested proceeding starts with a petition. This petition must identify the claims challenged, the grounds on which the claims are challenged, a copy of all evidence relied on (such as prior art references or expert declarations, for example),²² as well as a claim construction.²³ Within two months thereafter, the patent owner may file a preliminary response indicating why a proceeding should not be instituted.²⁴ As a general matter, only evidence other than testimonial evidence is allowed.²⁵ If the petitioner satisfies its burdens, a trial will be instituted on a claim-by-claim and ground-by-ground basis within three months of the patent owner’s preliminary response.²⁶ If a trial is instituted, the patent owner may file a response within four months that must include any additional factual evidence or expert opinions on which they intend to rely.²⁷ Also, a patent owner may amend the patent to cancel any challenged claim or to propose a reasonable number of substitute claims.²⁸ Intervening rights, however, apply to all claim amendments.²⁹ Either party may request an oral hearing. The administrative trial before the PTAB concludes with a final, written decision.³⁰ The trial will be completed within one year of institution, except that it may be extended for up to six months for good cause.³¹

The proposed rules provide for two types of discovery during the trial: (1) routine discovery, and (2) additional discovery. Routine discovery need not be requested from the PTAB.³² Routine discovery includes producing the documents cited, taking depositions of any declarants relied on by the opposition, and producing information that is inconsistent with positions advanced during the proceeding.³³

A party seeking additional discovery must make both a request to the PTAB and a showing. For *inter partes* review, the party seeking the discovery must demonstrate that the discovery is in the interests of justice.³⁴ For post-grant review and the transitional program, only good cause needs to be shown.³⁵

Although these proceedings provide many advantages, petitioners must proceed with caution. Upon a final written decision, the petitioner is estopped from requesting or maintaining a proceeding before the PTO on any ground that the petitioner raised or reasonably could have raised.³⁶ The petitioner also is estopped from challenging the patent in a civil action or in an action before the International Trade Commission (ITC) based on any ground that the petitioner raised before the PTO.³⁷ In the case of an *inter partes* review or a post-grant review, but not a covered business method patent, the petitioner also is estopped in a civil action or ITC action from challenging the patent on any ground that reasonably could have been raised.³⁸

The contested proceedings, however, may terminate before a final written decision, in which case no estoppel attaches to the petitioner. Specifically, the parties may choose to settle the contested proceeding unless the PTAB already has decided the merits of the trial. Upon reaching a settlement, the PTAB may terminate the trial, or it may proceed to a final written decision.³⁹ The proposed rules expressly caution that, because the PTAB is not a party to the settlement, it may still determine any question of patentability.⁴⁰

Advantages and Disadvantages of the Proceedings

Before instituting one of the contested proceedings, prospective petitioners need to weigh the pros and cons. Although the contested proceedings provide the petitioner with certain procedural, evidentiary, and substantive advantages, there also are several potential disadvantages to consider.

Advantages

Expert Judges—As an initial matter, the contested proceedings provide the petitioner with an opportunity to present his invalidity arguments to a panel of three administrative patent judges who specialize in complex patentability disputes. This option seems preferable over a district court judge or jury who may possess little or no experience with patent law or the technology at issue.

Lower Standard to Prove Invalidity—The contested proceedings make it easier to invalidate a patent because of a lower standard of proof, broader claim construction, and no presumption of validity. The PTAB will evaluate validity under a “preponderance of the evidence” standard, rather than the heightened “clear and convincing” standard required in district court.⁴¹ In other words, this standard will be met where the petitioner establishes that it is merely more likely than not that at least one of the claims challenged is unpatentable. Also, the

patent claims will be evaluated using a “broadest reasonable construction” standard, which will draw in more potential prior art, as opposed to the standard applied in district court, which is typically a narrower construction favoring preservation of validity. Lastly, patents enjoy a presumption of validity in district courts, whereas in PTO proceedings, no such presumption applies.

Discovery Burden on Patent Owner—Although the contested proceedings contain notice and disclosure requirements for both parties, they are likely to be more burdensome on the patent owner. The proposed rules require the production of any “noncumulative information that is inconsistent with a position advanced by the patent owner or petitioner during the proceeding” as soon as practicable and must identify “where the information is presented in a document” and “how the information is pertinent to the claims.”⁴² Accordingly, depending on the PTO’s interpretation of this provision, it is possible that the patent owner may be required to produce any inconsistent evidence, arguments, or testimony from the inventor, any related applications, any relevant district court proceedings or other PTO proceedings. Such production could reveal a treasure trove of information for use against the patent owner, not only in the contested proceeding, but also in any related district court litigation.

Early Notice of Patent Owner’s Case—The petitioner has an enormous procedural advantage due to the proceeding’s compressed nature. Before filing its petition, the petitioner has ample opportunity to develop a detailed invalidity analysis based on an unlimited number of prior art references, prepare claim construction arguments based on a thorough review of the prosecution history, prepare fact and expert testimony, prepare for its notice and disclosure requirements, and gather any additional supporting evidence. The patent owner, on the other hand, is not so lucky. After a petition is filed, the patent owner’s preliminary response is due in only two months. Then, the trial is instituted three months later, and the patent owner’s complete response, including all of its evidence, is due four months thereafter. Thus, within nine months from receiving first notice of the petition, the patent owner needs to have retained counsel, retained experts, reviewed the petitioner’s evidence, analyzed the patentability issues, considered claim construction questions, complied with the mandatory notice and disclosure requirements, cross-examined the petitioner’s experts, gathered its evidence, and prepared its complete response. In essence, the patent owner needs to have developed its entire case by this time. This is even more challenging when there is a parallel district court litigation and every move before the PTAB must be analyzed for any effect on the

litigation. Of course, when there is a parallel litigation, the petitioner will gain critical, advance notice of the patent owner's litigation strategy, perhaps many months before otherwise receiving the same disclosure in the district court litigation.

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Pre-Institution Evidentiary Advantage—These proceedings provide a significant evidentiary advantage to the petitioner before institution. The patent owner typically will not be permitted to present any testimonial evidence, including declarations of fact or expert witnesses, in support of its initial response. In the absence of declaration rebuttal evidence, it may be difficult for the patent owner to respond to a *prima facie* case of invalidity supported by the petitioner's expert declarations. Cross-examination of the petitioner's experts will occur only after the PTO grants the petition for review. As a result, the petitioner will be afforded a significant evidentiary advantage prior to instituting the contested proceedings.

Disadvantages

While the contested proceedings provide significant advantages, there are several notable disadvantages of which petitioners should be mindful.

Estoppel Provision—The AIA contains an estoppel provision that bars the petitioner from asserting in a later action, whether it be administrative or civil, “any ground that the Petitioner raised or reasonably could have raised during” the contested proceedings.⁴³ The estoppel apparently attaches upon a written determination of the PTAB, not after the exhaustion of all appeals. If the courts interpret it this way, it will represent a significant difference from district court litigation because estoppel will be attainable within 12 to 18 months from the filing of the petition, rather than the typical six-year period required to obtain a final decision on appeal.

Although the text of the estoppel provision appears to have severe ramifications, it may not in practice. When confronted with a similar estoppel provision, courts have applied it narrowly. Rather than the AIA's “reasonably-could-have-raised” standard, *inter partes* reexaminations use a “could-have-raised” standard to

estop third party requesters from “asserting at a later time . . . the invalidity of any claim finally determined to be valid and patentable on any ground which the third-party requester *raised or could have raised* during the *inter partes* reexamination proceedings.”⁴⁴ Applying that standard, a court has declined to estop a defendant from raising prior art in a civil litigation even though the defendant knew of the prior art during the *inter partes* reexamination.⁴⁵ Moreover, although the text of the *inter partes* reexamination statute suggests that the estoppel may apply at the conclusion of the PTO's proceeding, much like the AIA, the Federal Circuit has found that *inter partes* reexamination estoppel is “triggered not when examination is completed but only after all appeal rights have been exhausted.”⁴⁶

The courts may apply a similar, or even weakened, approach for the contested proceedings because of the addition of the word “reasonably.” The legislative history of the AIA suggests that the use of the modifier “reasonably” was intended to soften the “could-have-raised” estoppel that is applied in *inter partes* reexaminations:⁴⁷

It is possible that courts would have read this limitation into [sic] current law's estoppel. Current law, however, is also amenable to the interpretation that litigants are estopped from raising any issue that it would have been physically possible to raise in the *inter partes* reexamination, even if only a scorched-earth search around the world would have uncovered the prior art in question. Adding the modifier “reasonably” ensures that could-have-raised estoppel extends only to that prior art which a skilled searcher conducting a diligent search reasonably could have been expected to discover.⁴⁸

Nonetheless, the estoppel provision encourages petitioners to assert all potential bases for invalidity to preserve all issues for appeal and to prevent a waiver of invalidity defenses based on prior art known to the petitioner at the time of the contested proceedings.

Difficulty Overturning Evidentiary Rulings—In the event that a petitioner receives an unfavorable evidentiary decision by the PTAB during the administrative hearing, a petitioner may request reconsideration of the decision to admit or exclude particular evidence. If the request for reconsideration is not successful, however, it may be difficult to overturn that decision on appeal because it would be reviewed by the Federal Circuit under an abuse of discretion standard.

Interplay with District Court Litigation

The AIA contemplates district court litigation proceeding in parallel with the contested proceedings.

Understanding this relationship is important for any prospective petitioner. Also, it is important that prospective petitioners understand what happens at the Federal Circuit should both the district court litigation and the contested proceeding be appealed.

District Court Litigation

A petitioner must be prepared to be sued for patent infringement if it files a petition when a parallel litigation is not pending. If well-funded and motivated, the patent owner may file a district court litigation and do so in a forum that is unfavorable to the petitioner. To prevent being sued in an unfavorable forum, the petitioner could file a declaratory judgment action on the same day as or later than the petition, but not earlier.⁴⁹ In this situation, the litigation will be automatically stayed unless the patent owner moves to lift the stay or counterclaims alleging infringement.⁵⁰

After being served with a patent infringement complaint, the defendant should petition for a contested proceeding as soon as possible.⁵¹ Once a proceeding is instituted, the petitioner should then seek a stay of the litigation. At least in the case of the transitional program for covered business method patents, stays should be granted liberally.⁵²

After being served with a patent infringement complaint, the defendant should petition for a contested proceeding as soon as possible.

For the transitional program, the AIA contains a provision that expressly authorizes a stay in any parallel litigation and provides for an immediate interlocutory appeal to the Federal Circuit for the district court's stay decision.⁵³ According to the AIA legislative history, Congress intended that a stay would be denied only in rare instances.⁵⁴ The provision specifically instructs courts to apply the four-factor test that was first announced in *Broadcast Innovation, L.L.C. v. Charter Commc'ns, Inc.*: (1) whether a stay will simplify issues for trial; (2) whether discovery is complete and a trial date set; (3) whether a stay would present a clear tactical advantage for the movant and prejudice the nonmoving party; and (4) whether a stay or denial thereof would reduce the burden of litigation on the parties and the court.⁵⁵ The AIA employs this test, rather than other multifactor tests used by some district courts, because this test properly emphasizes the fourth factor that often is ignored by the courts: "whether a stay will reduce the burden of litigation on

the parties and on the court."⁵⁶ Although these factors are already considered by many district courts, their statutory articulation may increase the likelihood that a district court grants a stay.

Nevertheless, even if a district court decides not to stay the litigation, the petitioner likely would receive a final decision in the contested proceeding before resolution of most district court cases. For example, the contested proceedings most often will be completed within 12 months from institution.⁵⁷ In comparison, the median time to trial for patent cases in the District of Delaware, the Northern District of California, and the Eastern District of Texas is 22 months, 26 months, and 34 months, respectively, after the filing date of the complaint.⁵⁸

The Federal Circuit

The AIA permits a direct appeal of an adverse decision in a contested proceeding to the Federal Circuit.⁵⁹ Thus, such an appeal may be co-pending with an appeal from a parallel district court litigation. Under these circumstances, the Federal Circuit likely would resolve the PTO decision first, applying the "broadest reasonable interpretation of the claims in light of the specification."⁶⁰ In doing so, the Federal Circuit would apply a deferential standard of review for the PTO decision. For example, in the case of PTO reexamination decisions, the Federal Circuit will reverse a PTO decision only when the PTO's findings are not supported by substantial evidence.⁶¹ In other words, if the evidence in the record will support several reasonable but contradictory conclusions, the Federal Circuit will not find that a PTO decision is unsupported by substantial evidence simply because the Board chose one conclusion over another plausible alternative.⁶² The same standard of review likely would apply for appeals from PTAB decisions on contested proceedings.

Conclusion

It remains to be seen whether the promise of a faster, cheaper, and easier tool for patent challenges will be realized by the new contested proceedings. Only time will tell. In the meantime, however, the contested proceedings appear to be a powerful tool that tips the scale in favor of the petitioner in many circumstances. Practitioners would be wise to consider these proceedings as part of their overall patent litigation strategy.

Notes

1. Pub. L. No. 106-113, 113 Stat. 1501.
2. The Patent Trial and Appeal Board (PTAB) will replace the Board of Patent Appeals and Interferences. *Id.* at § 7(a)(1), § 6(a).
3. The AIA also provides for derivation proceedings, which replace interference proceedings. Derivation proceedings

are a trial-like proceeding used to determine whether an inventor named in an earlier application derived the claimed invention from an inventor named in another application. AIA, § 3(i), § 135 (to be codified at 35 U.S.C. § 135). For the purposes of this article, the authors use the term “contested proceedings” to refer only to *inter partes* review, post-grant review, and the transitional program for covered business method patents.

4. *Id.* at § 7(a)(1), § 6(c).
5. *See id.* at § 6(a).
6. *Id.* at § 6(a), § 311(c).
7. A counterclaim challenging the validity of a patent, however, does not bar a defendant from initiating an *inter partes* review. *Id.* at § 6(a), § 315(2)(C).
8. *Id.* at § 6(a), § 315(b).
9. *Id.* at § 6(a), § 311(b).
10. *Id.* at § 6(a), § 314(a).
11. 35 U.S.C. § 321(b).
12. AIA, § 6(f)(2)(A).
13. *Id.* at § 6, § 324(a).
14. *Id.* at § 6, § 321(c).
15. *Id.* at § 18(a)(1).
16. *See* 37 C.F.R. § 42.303 (proposed Feb. 10, 2012).
17. AIA, § 18(d)(1) (defining a “covered business method patent” as “a method or corresponding apparatus for performing data processing or other operations used in the practice, administration, or management of a financial product or service, except that the term does not include patents for technological inventions.”).
18. *Id.* at § 18(a)(1)(B).
19. *Id.* at § 18(a)(1)(C).
20. *Id.* at § 18(a)(2)–(3).
21. *See* Rules of Practice for Trials Before the Patent Trial and Appeal Board and Judicial Review of Patent Trial and Appeal Board Decisions, 77 Fed. Reg. 6879 (proposed Feb. 9, 2012) (to be codified at 37 C.F.R. pts. 42, 90); Changes to Implement Inter Parties Review Proceedings, 77 Fed. Reg. 7041 (proposed Feb. 10, 2012) (to be codified at 37 C.F.R. pt. 42); Changes to Implement Post-Grant Review Proceedings, 77 Fed. Reg. 7060 (proposed Feb. 10, 2012) (to be codified at 37 C.F.R. pt. 42); Changes to Implement Transitional Program for Covered Business Method Patents, 77 Fed. Reg. 7080 (proposed Feb. 10, 2012) (to be codified at 37 C.F.R. pt. 42) (collectively, “the proposed rules”).
22. AIA, § 6(a), § 312(a)(5) (to be codified at 35 U.S.C. § 312); 37 C.F.R. § 42.6(c) (proposed Feb. 9, 2012).
23. 37 C.F.R. § 42.104(b)(3) (proposed Feb. 10, 2012).
24. AIA, § 6(a), § 313 (to be codified at 35 U.S.C. § 313); 37 C.F.R. §§ 42.107(a)–(b) (proposed Feb. 10, 2012).
25. 37 C.F.R. § 42.107(c) (proposed Feb. 10, 2012).
26. *Id.* at § 42.108(a)(b) (proposed Feb. 10, 2012).
27. AIA, sec. 6(a), § 316(a)(8) (to be codified at 35 U.S.C. § 316); 37 C.F.R. § 42.120(b) (proposed Feb. 10, 2012).
28. AIA, § 6(a), §§ 316(a)(9), (d) (to be codified at 35 U.S.C. § 316); 37 C.F.R. § 42.121(a) (proposed Feb. 10, 2012).
29. 35 U.S.C. § 328(c); AIA, § 6(a), § 318(c) (to be codified at 35 U.S.C. § 318).
30. 37 C.F.R. § 42.70(a) (proposed Feb. 9, 2012).
31. AIA, § 6(a), § 316(a)(11) (to be codified at 35 U.S.C. § 316); 37 C.F.R. § 42.100(c) (proposed Feb. 10, 2012);
32. 37 C.F.R. §§ 42.51(a)–(b) (proposed Feb. 9, 2012).
33. *Id.* § 42.51(b).
34. AIA, § 6(a), § 316(a)(5) (to be codified at 35 U.S.C. § 316); 37 C.F.R. § 42.51(c) (proposed Feb. 9, 2012);
35. 35 U.S.C. § 326(a)(5); 37 C.F.R. § 42.224 (proposed Feb. 10, 2012).
36. 35 U.S.C. § 325(e)(1); AIA, sec. 6, § 315(e)(1) (to be codified at 35 U.S.C. § 315); 37 C.F.R. § 42.73(d)(1) (proposed Feb. 9, 2012).
37. 35 U.S.C. § 325(e)(2); AIA, § 6, § 315(e)(2); AIA, § 18(a)(1)(D).
38. *See* AIA, § 18(a)(1)(A).
39. 35 U.S.C. § 327(a); AIA, § 6, § 327(a) (to be codified at 35 U.S.C. § 327).
40. 37 C.F.R. § 42.74(a) (proposed Feb. 9, 2012).
41. 35 U.S.C. § 326(e); AIA, § 6(a), § 316(e) (to be codified at 35 U.S.C. § 316).
42. 37 C.F.R. § 42.51 (proposed Feb. 9, 2012).
43. The “reasonably could have raised” estoppel in civil actions does not apply to the transitional program for covered business method patents. *See generally* AIA, § 18.
44. 35 U.S.C. § 315(c) (emphasis added).
45. *Acco Brands, Inc. v. PC Guardian Anti-Theft Prod., Inc.*, 592 F. Supp. 2d 1208, 1216–1217 (N.D. Cal. 2008).
46. *Bettcher Indus., Inc. v. Bunzl USA, Inc.*, 661 F.3d 629, 642–663 (Fed. Cir. 2011).
47. 157 Cong. Rec. S1375 (daily ed. Mar. 8, 2011) (statement of Sen. Kyl).
48. *Id.*
49. Once a party files a declaratory judgment action, it may not thereafter avail itself of the contested proceedings. 35 U.S.C. § 325(a)(1); AIA, § 6(a), § 315(a)(1) (to be codified at 35 U.S.C. § 315).
50. 35 U.S.C. § 325(a)(2); AIA, § 6(a), § 315(a)(2) (to be codified at 35 U.S.C. § 315).
51. 35 U.S.C. § 325(b); AIA, § 6(a), § 315(b) (to be codified at 35 U.S.C. § 315).
52. *See infra*, note 54.
53. AIA, § 18(b).
54. 157 CONG. REC. S1053 (daily ed. Mar. 1, 2011) (statement of Sen. Schumer) (“Since the entire purpose of the transitional program at the PTO is to reduce the burden of litigation, it

- is nearly impossible to imagine a scenario in which a district court would not issue a stay.”).
55. *Broadcast Innovation L.L.C. v. Charter Commc'ns, Inc.*, 2006 WL 1897165, slip. op. at *4 (D. Colo. Jul. 6, 2006); *see also* AIA, § 18(b)(1).
 56. *Broadcast Innovation*, 2006 WL 1897165, at *4.
 57. *See supra*, note 27 and accompanying text.
 58. PricewaterhouseCoopers, “2011 Patent Litigation Study: Patent Litigation Trends as the ‘America Invents Act’ Becomes Law (2011),” available at <http://www.pwc.com/us/en/forensic-services/publications/assets/2011-patent-litigation-study.pdf>.
 59. 35 U.S.C. § 329; AIA, § 6(a), § 319 (to be codified at 35 U.S.C. § 319).
 60. *In re Translogic Tech., Inc.*, 504 F.3d 1249, 1256 (Fed. Cir. 2007) (affirming the Board’s reexamination decision finding obviousness); *see also* *Translogic Tech., Inc. v. Hitachi, Ltd.*, 250 Fed. App’x 988, slip. op. at *1 (Fed. Cir. Oct. 12, 2007) (vacating a district court’s final judgment of infringement, monetary damages, and an injunction in a parallel litigation in light of the Court’s earlier decision in *In re Translogic Technology, Inc.*).
 61. *Translogic Tech.* at 1256.
 62. *Id.* (citing *In re Jolley*, 308 F.3d 1317, 1320 (Fed. Cir. 2002)).

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