Expert Insights

The Quiet Comeback of Patent Reexamination: Shifting Currents in Patent Post-Grant Practice

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For more than a decade after enactment of the America Invents Act (AIA), *inter partes* review (IPR) dominated the post-grant landscape. For accused infringers and in-house legal teams, IPR offered what traditional patent litigation often did not: speed, technical decision makers, and statistically meaningful odds of claim cancellation. It quickly became the default administrative response to asserted patents.

That assumption is becoming harder to sustain.

Recent USPTO filing data reflects a sharp decline in IPR petitions and a corresponding surge in *ex parte* reexamination requests. A first-ever crossover occurred in early 2026, with the volume of reexamination filings exceeding IPR petitions. This widely noted shift suggests a strategic recalibration by sophisticated patent challengers rather than a temporary aberration.

For IP legal counsel this development has practical consequences. It suggests that the post-grant toolbox must be reassessed, and that an older, less adversarial procedure is increasingly aligned with modern corporate risk management priorities.

IPR's Predictability Problem

The rise of IPR followed a straightforward logic: strong merits would lead to institution. That logic eroded gradually and then decisively.

Expanded discretionary denial doctrines, most notably those tied to district court overlap and timing considerations, have injected uncertainty into the institution decision. Even well-supported IPR petitions now face meaningful risk of denial for reasons unrelated to patentability. Because institution decisions are largely unreviewable, a denial leaves petitioners with sunk costs and little strategic benefit.

The data underscores how strongly this dynamic has affected filer behavior. IPR petitions have dropped to levels not seen since the Patent Trial and Appeal Board's earliest days, while reexamination requests, once considered a marginal option, have surged.

From a corporate governance perspective, this matters. Legal departments are expected to justify litigation spending with predictable outcomes, particularly when decisions are scrutinized at the executive or board level. A procedure that may never be instituted is harder to defend as a default response.

Why Reexamination is Gaining Ground

Ex parte reexamination is not new. It has existed in some form since 1981 and was carried forward by the AIA alongside newer post-grant proceedings. For years, it was overshadowed by IPR's adversarial appeal.

That balance has shifted; not because reexamination changed, but because its structural features now address weaknesses that have emerged in IPR practice.

Reexamination is initiated upon a showing of a "substantial new question of patentability" (SNQ). If the SNQ standard is met, the USPTO must grant the request. In contrast, a higher threshold (showing "reasonable likelihood" that challenged claims are unpatentable) must be demonstrated for an IPR to be instituted. There also is no discretionary institution stage comparable to IPR.

For counsel tasked with forecasting outcomes and managing expectations, that certainty is meaningful. The question is no longer whether the USPTO will engage, but how the examination will proceed.

There also is no standing requirement for seeking *ex parte* reexamination, and a patent challenger has historically been

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able to remain anonymous throughout the proceeding, which can provide an attractive strategy posture. Even under a recent USPTO proposal to require the identification of all real parties in interest, confidentiality would remain available upon request.

Perhaps reexamination's most consequential feature for corporate counsel is that it lacks statutory estoppel.

Unlike IPR, reexamination does not bar a requester from later asserting the same invalidity grounds in district court. This design difference transforms reexamination from a "one-shot" proceeding into a risk-mitigating overlay. It allows companies to apply administrative pressure without surrendering future defenses.

Reexamination is examiner-driven and non-adversarial. There is no discovery, no hearing, and no ongoing advocacy beyond limited written submissions. Practitioner commentary consistently places reexamination costs at around 20% of those associated with IPR, which often reach mid-to-high six figures by the final written decision.

When Reexamination Makes Strategic Sense

Despite what may present as great advantages, it should be noted that reexamination is rarely a substitute for litigation or IPR in isolation. Rather, its increasing relevance lies in how it is being integrated into broader enforcement-defense strategies.

Filed early, reexamination can slow enforcement momentum, introduce narrowing amendments or arguments into the prosecution history, and materially affect settlement dynamics. Even before completion, the proceeding may alter how courts and opposing parties evaluate risk.

Because of its cost profile, however, reexamination is scalable. Some companies are using it to address multiple asserted patents, particularly in non-practicing entity disputes where cost control and signaling matter as much as outright invalidation.

In addition, patent owners may take advantage of the process to initiate reexaminations voluntarily to strengthen claims ahead of licensing or enforcement. A successfully confirmed claim set can emerge with a refreshed presumption of validity and a clarified file history.

What This Means for Patent Strategy

The post-grant system is no longer IPR-centric. Unless USPTO policy dramatically reverts, IPR is unlikely to regain its former default status. The current filing data suggests a durable shift driven by institutional incentives, not momentary tactics.

Instead, the post-grant system has become more selective, with companies choosing procedures based on business needs and the degree of control they offer rather than headline claim-cancellation rates.

Reexamination's quiet resurgence as a central procedural mechanism reflects a broader shift towards valuing a flexible approach. In today's business environment, the most effective patent strategies are not necessarily the most aggressive—they are the ones that maximize control while preserving optionality.

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