

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

GOOGLE LLC,
Petitioner,

v.

VIRTAMOVE, CORP.,
Patent Owner.

Case No. IPR2025-00489
Patent No. 7,784,058

**PETITIONER'S REQUEST FOR REHEARING OF DECISION
GRANTING PATENT OWNER'S REQUEST FOR DISCRETIONARY
DENIAL AND DENYING INSTITUTION OF *INTER PARTES* REVIEW**

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I. INTRODUCTION

The Director¹ wrongly exercised her discretion to deny institution in this proceeding. While conceding that “[s]ome factors,” including the lack of a trial date in the parallel litigation involving the challenged patent, counsel “against discretionary denial,” the Director nonetheless found denial appropriate because (a) “the challenged patents have been in force for more than 14 years, creating strong settled expectations,” and (b) “Petitioner does not provide any persuasive reasoning why an *inter partes* review is an appropriate use of Board resources.” Paper 10 (“Decision”) at 2. Both cited reasons are flawed and must be reconsidered.

The Director’s first cited reason—the patentee’s “settled expectations”—is “not in accordance with law” and cannot provide an APA-compliant basis for denying institution. 5 U.S.C. §706(2)(A). In *Celgene Corp. v. Peter*, 931 F.3d 1342 (Fed. Cir. 2019), the Federal Circuit—at the Patent Office’s behest—explicitly rejected a patentee’s contention that it had an expectation that its pre-AIA patents would not be subject to IPR, a proceeding that did not exist at the time its patents issued. As the Federal Circuit explained, “the *expectation* that patent owners have had for nearly four decades” is “that patents are open to PTO reconsideration and possible cancelation.” *Id.* at 1361-62.² The *Celgene* patentee knew its patents were

¹Acting Director Stewart delegated her authority to issue the Decision here.

² Unless otherwise indicated, all emphases herein are added.

subject to potential reconsideration by the Patent Office during the patents' term, and thus had no reasonable expectations to the contrary.

Just as the *Celgene* patentee—as a matter of law—lacked an expectation that its patent would not be subject to IPR, so too did VirtaMove. The Director's contrary finding is not in accordance with *Celgene*, and such an unlawful finding cannot be the basis for denying institution. 5 U.S.C. §706(2)(A). Notably, principles of judicial estoppel preclude the Patent Office from arguing otherwise, as it was the ***Patent Office*** that successfully convinced the Federal Circuit to find that the *Celgene* patentee lacked an expectation of immunity from IPR.

The Director's reliance on VirtaMove's alleged "settled expectations" also exceeds her authority under the AIA, which explicitly sets forth only ***one*** issue-date-based limit on when a patent can be challenged in an IPR: *i.e.*, an IPR cannot be filed within the first nine months after the patent was granted. 35 U.S.C. §311(c)(1). Congress plainly knew how to limit what patents are subject to IPR based on their issuance date, and Congress's decision to bar IPRs only during the first nine months of a patent's term means that Congress did not intend to impose any other term-based restrictions on IPRs. The Director's reliance on a patentee's (non-existent) "settled expectations" as a basis for denying institution effectively immunizes an entire generation of patents that Congress intended to be subject to IPR. The Director's decision thus improperly exceeds her statutory authority, and is arbitrary

and capricious. 5 U.S.C. §706(2)(A), (C).

Finally, the Director’s second cited reason—that Google failed to provide “any persuasive reasoning” why IPR was an appropriate use of the Patent Office’s resources—overlooks the many reasons that Google provided in its discretionary-denial briefing and petition. Google’s briefing and its petition provided the Director and the Board with evidence-based reasons why reconsidering VirtaMove’s unpatentable claims was an appropriate use of the Board’s resources—indeed, Google’s detailed showing that the claims are unpatentable is *itself* a persuasive reason for the Board to use its resources in this proceeding, as the very purpose of IPR is “to weed out bad patent claims efficiently.” *Thryv, Inc v. Click-To-Call Techs., LP*, 590 U.S. 45, 54 (2020).

II. THE DIRECTOR’S RELIANCE ON VIRTAMOVE’S ALLEGED “SETTLED EXPECTATIONS” VIOLATES THE APA

A. The Director’s Decision Violates the APA.

1. The Director’s “settled expectations” finding is not in accordance with the law.

The Director’s finding that VirtaMove had “settled expectations” that its patent would not be subject to IPR because it has “been in force for more than 14 years” (Decision at 2) is irreconcilable with the Federal Circuit’s *Celgene* decision. Because the Director’s “settled expectations” finding is not in accordance with the law, the Decision denying institution must be reconsidered and should be reversed.

In *Celgene*, the patentee argued that the retroactive application of IPRs to two

of its patents was an unconstitutional taking because those patents had issued prior to the AIA's passage. 931 F.3d at 1349. Similar to VirtaMove's patent, the two *Celgene* patents issued, respectively, 14 and 15 years prior to being challenged in IPR. *Id.* at 1347, 1359 (discussing institution decisions in 2015, and identifying 2000 and 2001 issue dates for the patents). The *Celgene* patentee argued that subjecting its pre-AIA patents to post-AIA IPR proceedings "unfairly interferes with its reasonable investment-backed expectations without just compensation," and was thus an unconstitutional regulatory taking. *Id.* at 1358.

The Patent Office intervened in *Celgene* and argued that no regulatory taking had occurred because, *inter alia*, "patents have been subject to reconsideration and cancellation by the USPTO in administrative proceedings for nearly four decades, and *Celgene*'s own patent[s were] issued subject to this administrative revocation authority." *Id.* at 1358 (quoting Intervenor's Br. at 42) (alterations original). The Federal Circuit ultimately agreed with the Patent Office.

Echoing the Patent Office's argument, the Federal Circuit explained that "for the last forty years, patents have been subject to reconsideration and possible cancellation by the PTO" and that the new IPR procedures "do not differ significantly enough from preexisting PTO mechanisms for reevaluating the validity of issued patents to constitute a Fifth Amendment taking." *Id.* at 1359. Given the similarities between IPRs and the reconsideration mechanisms that existed when its

patents issued, the *Celgene* patentee obtained the patents knowing full well that the Patent Office “possessed the authority to reexamine—and perhaps cancel—a patent claim it had previously allowed.” *Id.* at 1359 (quoting *Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261, 267 (2016)).

The *Celgene* patentee’s knowledge that its patents were granted subject to potential reconsideration (and cancelation) by the Patent Office defeated the patentee’s claim of reasonable investment-backed expectations. As the Federal Circuit explained, “the ***expectation*** that patent owners have had for nearly four decades [is] that patents are open to PTO reconsideration and possible cancelation if it is determined, on the grounds specified in [35 U.S.C.] § 311(b), that the patents should not have issued in the first place.” *Celgene*, 931 F.3d at 1361-62; *see also id.* at 1362-63 (“For forty years, patents owners have [] had the ***expectation*** that the PTO could reconsider the validity of issued patents...”).³

The Director’s finding that VirtaMove had “settled expectations” that its patent would not be subject to IPR because the patent issued over 14 years ago is impossible to reconcile with the Federal Circuit’s *Celgene* decision. The Federal Circuit made clear that the only ***expectation*** patent owners have had for over forty years is that their patents are subject to potential reconsideration by the Patent Office,

³ *See also Agarwal v. TopGolf Int’l, Inc.*, 813 F. App’x 476, 481 (Fed. Cir. 2020) (applying *Celgene* to patents filed before *inter partes* reexamination existed).

including via the vehicle of IPR challenges.⁴ That the *Celgene* patents had also issued 14 (and 15) years prior to being challenged highlights the inconsistency between the Director’s “settled expectations” finding and the *Celgene* decision.

Under the APA, agency findings that are not in accordance with the law are unlawful and must be set aside. 5 U.S.C. §706(2)(A). Because the Director’s “settled expectations” finding is not in accordance with *Celgene*, it is unlawful. The Director must reconsider the Decision and should refer the Petition to a merits panel.

2. Separately, judicial estoppel precludes the Director from finding that VirtaMove had “settled expectations” that its patent would not be subject to IPR.

“Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position.” *Davis v. Wakelee*, 156 U.S. 680, 689 (1895). In such scenarios, judicial estoppel operates to bar the previously-prevailing party from later advancing a contrary position.

⁴ *Celgene* also made clear that patentees have known that their patents have “always been subject to challenge in district court.” 931 F.3d at 1359; *see also Return Mail, Inc. v. U.S. Postal Service*, 587 U.S. 618, 622 (2019) (“After a patent issues, there are several avenues by which its validity can be revisited. The first is through a defense in an infringement action.”). Put simply, no matter the forum, patentees have no “settled expectations” against potential reconsideration or invalidation.

Judicial estoppel is warranted when (1) a party’s later position is “clearly inconsistent” with its prior position, (2) the party successfully persuaded a court to accept its prior position, and (3) the party “would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.” *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001). All three factors are present here, and thus judicial estoppel provides a separate reason why the Director must reconsider her decision. *United States v. Paulson*, 68 F.4th 528, 547 & n.29 (9th Cir. 2023), *cert. denied*, 144 S. Ct. 1029-30 (2024) (“[J]udicial estoppel may be applied to prevent the government from asserting inconsistent legal arguments.”).

First, the Director’s current position is that VirtaMove enjoys a settled expectation that its patent will not be subject to IPR because it issued over 14 years ago. Decision at 2; *see* Interim Process for PTAB Workload Management (March 26, 2025). That position is inconsistent with the position that the Director, on behalf of the Patent Office, advanced through the course of the *Celgene* case. In that earlier proceeding, the Office *repeatedly* advanced the position that the *Celgene* patentee lacked *any* expectation that its patents—which also had issued 14 and 15 years earlier—would not be subject to post-issuance reconsideration, including IPRs.

For example, in its Intervenor Brief in the *Celgene* case, the Patent Office argued that IPRs did not constitute a taking of a private property right because “patents have been subject to reconsideration and cancellation by the USPTO in

administrative proceedings for nearly four decades,” thereby precluding patentees from having any reasonable expectation that their patents would not be subject to such proceedings, including IPRs. *Celgene*, No. 2018-1167, Brief for Intervenor, Doc. No. 43 at 42-43 (Fed. Cir. Aug. 30, 2018).

Likewise, in responding to Celgene’s petition for rehearing, the Patent Office argued that no regulatory taking had occurred because “patent owners have long known that any unpatentable patent claims may be invalidated through judicial or administrative avenues.” *Celgene*, No. 2018-1167, Intervenor’s Response to Petition for Rehearing En Banc, Doc. No. 92 at 12 (Fed. Cir. Nov. 19, 2019). The Patent Office stated in no uncertain terms that: “There is also ***no reasonable expectation that a patent will be shielded from scrutiny***, or that invalid patents will be sheltered from procedural changes that bring their defects to light.” *Id.* at 14.

And, in opposing Celgene’s petition for a writ of certiorari from the Supreme Court, the Patent Office approvingly quoted the Federal Circuit’s *Celgene* decision and argued that: “The differences between inter partes review and its reexamination predecessors did ‘not disrupt the ***expectation*** that patent owners have had for nearly four decades’ that the USPTO may cancel patent claims that the agency reconsiders and finds unpatentable.” *Celgene*, No. 19-1074, Brief for Respondent in Opposition to Certiorari at 16 (Sup. Ct. May 2020) (quoting *Celgene*, 931 F.3d at 1361).

The Patent Office thus repeatedly took the position throughout the course of

the *Celgene* case that patentees have no reasonable expectation that their patents could be free from post-issuance reconsideration, including in the form of IPRs. Indeed, prior to the Director’s recent “settled expectations” doctrine, the Patent Office’s position had been that the **only** expectation that patentees have had for forty years is that their patents **are subject** to post-issuance reconsideration and cancellation. *See also NHK Spring Co. Ltd. v. Intri-Plex Techs., Inc.*, IPR2018-00752, Paper 8 at 19 (Sept. 12, 2018) (precedential) (rejecting patentee’s contention that ten-year delay in challenging patent warranted discretionary denial).

Second, there can be no dispute that the Patent Office successfully persuaded the Federal Circuit that patentees should expect that their patents are subject to IPRs and thus patentees have no expectation that their patents could be immune from such challenges. As discussed *supra* II.A.1, that is the holding of *Celgene*. Advancing that same argument, the Patent Office also successfully persuaded the Federal Circuit to deny Celgene’s rehearing petition and the Supreme Court to deny Celgene’s petition for a writ of certiorari.

Third, allowing the Patent Office to reverse course and now declare that at least some patentees have settled expectations that their patents will not be subject to IPRs imposes an unfair detriment on Google. The detriment is clear: but for the Patent Office’s abrupt change in position, the Director would have referred the IPR to a merits panel. VirtaMove’s “settled expectations” was the **only** factor cited as

outweighing the other “factors” that the Director found counseled “*against* discretionary denial.” Decision at 2. Put simply, if the Director had not changed positions, she would have had no reason to discretionarily deny Google’s petition.

The three factors for judicial estoppel are met in this case. In *Celgene*, the Patent Office explicitly took the position that the patentee had *no* expectation that its patents—which, like VirtaMove’s patent, had issued 14 or 15 years earlier—would not be subject to IPR. The Director’s decision in this proceeding is directly contrary to that prior position, a position the Director successfully advanced before the Federal Circuit and Supreme Court. Accordingly, the Director’s decision must be reconsidered because judicial estoppel bars the Director from finding that a patent owner, like VirtaMove, has settled expectations that its patent will not be subject to an IPR at some point in the patent’s term.

B. The Director’s Decision Exceeds Her Statutory Authority.

The Director has some discretion to deny IPR petitions, but she cannot exercise that discretion in a manner that exceeds her statutory authority. 5 U.S.C. §706(2)(C); *Halo Electronics, Inc. v. Pulse Electronics*, 579 U.S. 93, 103 (2016) (“In a system of laws discretion is rarely without limits, even when the statute does not specify any limits upon the [tribunal’s] discretion.”) (cleaned up). By treating the age of VirtaMove’s patent as dispositive in this proceeding, the Director created a *de facto* deadline requiring that IPRs must be filed within some ill-defined period

of time early in a patent’s term. This Director-crafted deadline is inconsistent with the AIA, and the Director therefore exceeded her statutory authority by relying exclusively on that deadline to discretionarily deny Google’s meritorious petition.

The AIA explicitly sets the IPR filing “deadline” as *any time after* the later of either “the date that is 9 months after the grant of a patent” or the date of termination of any instituted post-grant review of that patent. 35 U.S.C. §311(c). Congress knew how to impose an issue-date-based deadline affecting when an IPR must be filed, and the *only* such deadline that Congress elected to impose is one that limits IPRs to patents that have been issued for at least nine months. Congress’s decision to impose one issue-date-based deadline means that other issue-date-based deadlines—like the Director’s “settled expectations” deadline—were not intended. *See Cook v. Principi*, 318 F.3d 1334, 1339 (Fed. Cir. 2002) (en banc) (superseded by statute) (applying the canon of *expressio unius est exclusio alterius* to conclude that, in listing two statutory exceptions, Congress did not intend to allow other exceptions).

Consistent with the statute’s plain text, Justices Alito and Sotomayor have interpreted the AIA to permit “anyone [to] file a petition challenging the patentability of an issued patent claim *at almost any time.*” *Cuozzo*, 579 U.S. at 287-88 (citing 35 U.S.C. §311(a), (c)) (Alito and Sotomayor concurring in part and dissenting in part). As has the Federal Circuit. *Samsung Elecs. Am., Inc. v. Prisua Eng’g Corp.*, 948 F.3d 1342, 1346 (Fed. Cir. 2020) (citing 35 U.S.C. §311(c),

§315(b), and explaining that “[IPRs] can be requested *at any time* during a patent’s enforceability period, with certain restrictions.”). As the Justices and the Federal Circuit recognized, 35 U.S.C. §311(c) provides the only issue-date-based restriction on when a patent may be challenged via IPR, and that provision limits how *early* in its term a patent can be challenged, but does not limit how *late* in its term a patent can be challenged. Indeed, the Federal Circuit recently confirmed that even expired patents can be challenged via IPR. *Apple Inc. v. Gesture Tech. Partners, LLC*, 127 F.4th 364, 368-70 (Fed. Cir. 2025).

Analogously, in *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, the Supreme Court rejected as a matter of law any attempt to limit actions based on timing where Congress has been express about the time frame in which such actions are to take place. 580 U.S. 328, 346 (2017) (“Laches cannot be interposed as a defense against damages where the infringement occurred within the period prescribed by § 286.”). The same result should apply to the Director’s implication of petitioner “laches” here.

The Director’s imposition in this proceeding of a new issue-date-based deadline for filing an IPR exceeds her statutory authority under the AIA. By exceeding her statutory authority, the Director violated the APA and her decision must be reconsidered (and should be reversed). 5 U.S.C. §706(2)(C).

For similar reasons, the Director’s reliance on the age of VirtaMove’s patent

to deny institution must also be reconsidered because such reliance is arbitrary and capricious. 5 U.S.C. §706(2)(A). Agency action is arbitrary and capricious when “the agency has relied on factors which Congress has not intended it to consider.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Here, the Director acted in an arbitrary and capricious manner when she took into consideration the age of VirtaMove’s patent despite Congress intending that any patent that has been issued for at least nine months is subject to IPR *at any point in time*. The Decision should be reconsidered for this reason too.

III. THE DIRECTOR’S DECISION OVERLOOKS NUMEROUS REASONS GOOGLE PROVIDED DEMONSTRATING WHY THIS IPR IS AN APPROPRIATE USE OF THE OFFICE’S RESOURCES

The Decision says, “Petitioner does not provide any persuasive reasoning why an *inter partes* review is an appropriate use of Board resources.” Decision at 2. But that statement is only plausibly accurate if the Director mistakenly *overlooked* the numerous reasons that Google provided. The Director should take those numerous reasons into consideration, and reconsider her decision denying institution.

The Petition itself provides a compelling reason why this IPR would be an appropriate use of Board resources, as the Petition spells out in detail why the challenged claims are unpatentable. In its preliminary response, VirtaMove offered only a meek defense premised on a claim-construction argument that “running...simultaneously” requires simultaneous hardware-level actions rather

than software-level function calls. Paper 9 at 3. But VirtaMove’s argument is inconsistent with the specification and fails to address the prosecution history that the Petition highlighted. Paper 2 at 48-49.

“By providing for *inter partes* review, Congress, concerned about overpatenting and its diminishment of competition, sought to weed out bad patent claims efficiently.” *Thryv*, 590 U.S. at 54. Congress thus intended for the Office to use the Board’s resources to reconsider patents of dubious validity, and the Petition demonstrates that the ’058 patent is such a patent. Instituting IPR is not only an appropriate use of the Board’s resources, it is Congress’s *intended* use of those resources. H. R. Rep. No. 112-98, pt. 1, p. 40 (2011) (“The legislation is designed to establish a more efficient and streamlined patent system that will improve patent quality and limit unnecessary and counterproductive litigation costs.”).

Beyond being what Congress intended the Board to do with its resources, instituting IPR in this proceeding is an appropriate use of those resources for several other reasons that Google identified in its briefing. For example, Google highlighted the fact that its Petition challenges at least 11 unpatentable claims that would not be addressed in the pending district court litigation given VirtaMove’s litigation tactics. Paper 8 at 16. Evaluating the merits of these 11 claims—an evaluation that the district court will not do—is thus an appropriate (and Congressionally intended) use of the Board’s resources so as to avoid future costly litigation. *Purdue Pharma L.P.*

v. Collegium Pharm., Inc., 86 F.4th 1338, 1344 (Fed. Cir. 2023) (“the purpose of the AIA” is “to create a more efficient alternative to district court litigation”).

Google also highlighted the fact that VirtaMove never asserted the ’058 patent before 2024, and never alleged that Google knew of the patent prior to being sued in 2024 (Paper 8 at 42-43), a fact that cuts against VirtaMove’s alleged “settled expectations,” if such expectations were a lawful consideration (they are not). *Shenzhen Tuozhu Tech. v. Stratasys, Inc.*, IPR2025-00438, -00531, -00532, -00585, Paper 10 (Director July 17, 2025). Further, Google explained that VirtaMove having asserted the ’058 patent against six companies provides “compelling reasons” for the Board to more efficiently assess unpatentability in one forum, and “substantial negative economic consequences” if the Board does not. Paper 8 at 44.

Google further discussed the “efficiencies that would be gained by instituting IPR” because two other companies VirtaMove sued (Microsoft and Oracle) sought to join Google’s petition rather than file their own. Paper 8 at 21. Google’s Petition provided the Board an opportunity to address three different companies’ challenges to VirtaMove’s claims in a single proceeding, thus conserving both the Board’s resources and those of the district courts. That Google provided a *Sotera* stipulation—which the Decision does not even mention—further highlights the efficiencies that would be gained by the Board instituting review. *Id.* at 18.

/Elisabeth Hunt/ August 7, 2025
Elisabeth Hunt, Reg. No. 67,336

CERTIFICATE OF SERVICE UNDER 37 C.F.R. §42.6(E)(4)

I certify that on August 7, 2025, a copy of the foregoing document, including any exhibits or appendices filed therewith, is being served via electronic mail, as previously consented to by Patent Owner, upon the following:

Reza Mirzaie	rmirzaie@raklaw.com
	rak_almondnet@raklaw.com
Marc A. Fenster	mfenster@raklaw.com
Neil Rubin	nrubin@raklaw.com
James A. Milkey	jmilkey@raklaw.com
Qi (Peter) Tong	ptong@raklaw.com
	rak_virtamove@raklaw.com

Date: August 7, 2025

/Dara Del Rosario/
Dara Del Rosario
Paralegal
WOLF, GREENFIELD & SACKS, P.C.