

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE OFFICE OF THE UNDER SECRETARY OF COMMERCE
FOR INTELLECTUAL PROPERTY AND DIRECTOR OF THE
UNITED STATES PATENT AND TRADEMARK OFFICE

**AMAZON.COM, INC.,
AMAZON.COM SERVICES LLC,
AMAZON WEB SERVICES, INC., and
AUDIBLE, INC.,**
Petitioners,

v.

AUDIO POD IP, LLC,
Patent Owner.

Case No. IPR2025-00774
U.S. Patent No. 8,738,740

PETITIONERS' REQUEST FOR DIRECTOR REVIEW

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INTRODUCTION

The Acting Director should reverse the discretionary denial of *inter partes* review (“IPR”) here and allow the Board to reach the merits of the Petition. The discretionary denial was based on the newly created “settled expectations” standard, which presumptively bars IPR petitions filed more than six years after a patent’s issuance. But that standard is contrary to law because it violates Federal Circuit precedent and seeks to effectively rewrite the timing requirements of the IPR statute. Further, retroactively applying that incorrect standard to the Petition here—filed *before* the Office (“PTO”) announced the standard—violated the Administrative Procedure Act (“APA”) and the Constitution. The PTO also violated the APA by enacting the new standard without notice-and-comment rulemaking. For each of these reasons, the Acting Director should reverse the discretionary denial and allow the Board to reach the merits of the Petition.

ARGUMENT

I. FACTUAL BACKGROUND

A. **Since Congress Enacted the AIA, the PTO Consistently Instituted IPRs Without Regard for the Challenged Patent’s Age.**

The America Invents Act (“AIA”) created the IPR process. The IPR provisions of the AIA took effect in 2012. For the next twelve years, the PTO consistently instituted IPR petitions without regard for the challenged patent’s age. For example, the very first IPR challenged a patent that was more than eight years

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old at the time the IPR petition was filed. *Garmin Int’l, Inc. v. Cuozzo Speed Techs. LLC*, IPR2012-00001, Paper 1 at 1 (P.T.A.B. Sept. 16, 2012) (challenging a patent issued on “August 17, 2004”). The PTO instituted this IPR with no mention of “settled expectations” or any six-year threshold. *Garmin*, IPR2012-00001, Paper 15 (P.T.A.B. Jan. 9, 2013).

As another example, the PTO instituted an early IPR (filed by some of the Petitioners here) in 2014 even though the patent at issue was more than fifteen years old. *Amazon.com, Inc. v. Personalized Media Commc’ns, LLC*, IPR2014-01527, Paper 7 (P.T.A.B. Mar. 26, 2015). The PTO has instituted hundreds of other IPRs, if not thousands, against patents that were far more than six years old.

**B. The PTO Previously Rejected
Settled-Expectations Arguments.**

In 2018, the Board rejected a patent owner’s settled-expectations argument in a decision designated precedential. *NHK Spring Co. Ltd. v. Intri-Plex Techs., Inc.*, IPR2018-00752, Paper 8 at 19 (P.T.A.B. Sept. 12, 2018) (precedential). The patent there was more than seventeen years old and the petitioner had known about the patent “for more than ten years.” *Id.* However, the Board was “not persuaded that this lapse in time favors denying review.” *Id.*

In *Microsoft Corp. v. Dareltech, LLC*, IPR2020-00483, Paper 11 at 13 (P.T.A.B. Sept. 16, 2020), the Board addressed a Patent Owner’s argument that it had “developed and implemented the claimed invention in reliance on the

[challenged] patent.” The Board rejected this argument because it was “not persuaded that reliance on a patent is a proper basis for denying a petitioner the ability to challenge the patentability of the claims in a patent.” *Id.*

Petitioners are not aware of any decisions to the contrary in the first twelve years following the enactment of the AIA.

C. The PTO Previously Convinced the Federal Circuit that Patent Owners Have No Settled Expectations that Preclude IPR.

In *Celgene Corp. v. Peter*, 931 F.3d 1342, 1361-62 (Fed. Cir. 2019), a patent owner claimed an expectation that its pre-AIA patents could not be challenged via IPR proceedings, which did not exist at the time the patents issued. *Id.* at 1358. But the PTO disagreed, arguing that the patent owner was not entitled to any such expectation—even though the patents were more than fifteen years old at the time. *Id.*; *see also id.* at 1346 (identifying U.S. Patent Nos. 6,045,501 and 6,315,720). Accepting the PTO’s arguments there, the Federal Circuit held: “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.

D. The PTO’s Longstanding Policy Permitted IPRs Even When the Challenged Patents Were So Old that They Had Expired.

From the very beginning, the PTO’s rules governing IPRs made clear that IPRs were available even for very old patents. Specifically, the original PTO rule

governing claim construction in IPRs expressly provided for challenges to patents that would be expired before the deadline for any final written decision in an IPR. *See* 37 C.F.R. § 42.100(b) (2012). Although the PTO later amended this claim-construction rule, it continued its policy of allowing IPRs against expired patents. *E.g.*, *Apple, Inc. v. Gesture Tech. Partners, LLC*, IPR2021-00922, Paper 10 at 17-19 (P.T.A.B. Nov. 29, 2021). And the Federal Circuit affirmed that longstanding policy—holding that IPR remains available even after the challenged patent expires. *Apple Inc. v. Gesture Tech. Partners, LLC*, 127 F.4th 364, 369 (Fed. Cir. 2025).

E. The PTO Abruptly Reversed Its Longstanding Policy by Announcing a New Six-Year Standard for “Settled Expectations.”

Earlier this year, the Acting Director issued a memorandum titled “Interim Processes for PTAB Workload Management,” which described a new procedure for evaluating discretionary denial factors before an institution decision. (Memorandum from Acting Director Stewart, Interim Processes for PTAB Workload Management (March 26, 2025) (“Stewart Memo”).) In this memo, the Acting Director articulated for the first time that among the “relevant considerations” for discretionary denial, the PTO would consider “[s]ettled expectations of the parties, such as the length of time the claims have been in force[.]” (*Id.* at 2.) But the Acting Director did not specify at that time how long the claims would need to be in force before such “settled expectations” would apply. Nor did she explain that settled expectations

alone, once established, would typically be sufficient to outweigh every other factor.

The Acting Director’s rollout of the new settled-expectations standard began in June with *iRhythm Techs., Inc. v. Welch Allyn, Inc.*, IPR2025-00363, Paper 10 (P.T.A.B. June 6, 2025), in which she found that “settled expectations favor denial” because “one of the patents has been in force since as early as 2012.” *Id.* at 3. Later in June, the Acting Director issued another “settled expectations” denial in *Dabico Airport Sols. Inc. v. AXA Power APS*, IPR2025-00408, Paper 21 (P.T.A.B. June 18, 2025). In that case, the challenged patent had “been in force almost eight years.” *Id.* at 2. *Dabico* held that this period of less than eight years was long enough to create settled expectations barring IPR. To explain this holding, the decision cited the six-year period that limits infringement damages under 35 U.S.C. § 286. *Id.* at 3. *Dabico* applied the Acting Director’s new “settled expectations” standard based solely on the passage of time, explaining that “actual notice of a patent or of possible infringement is *not* necessary to create settled expectations.” *Id.* (emphasis added).

Over the months of June and July, it quickly became clear that the Acting Director had adopted a six-year rule; that is, if a patent issued more than six years before the filing of the IPR petition, she consistently held that settled expectations favored denial. Compare, e.g., *Amgen Inc. v. Bristol-Myers Squibb Co.*, IPR2025-00601, Paper 9 at 2-3 (P.T.A.B. July 24, 2025) (settled expectations favor denial for patents issued six and seven years earlier) with *WebGroup Czech Republic, A.S. v.*

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Dish Techs. LLC, IPR2025-00467, Paper 14 at 2 (P.T.A.B. July 16, 2025) (no settled expectations for patents issued 2-6 years earlier). Although the Acting Director has identified exceptions to the six-year standard, they are narrow and rarely available. *See, e.g., Embody, Inc. v. LifeNet Health*, IPR2025-00248, Paper 13 at 2-3 (P.T.A.B. June 26, 2025) (where “Patent Owner has not developed strong settled expectations” as to a recently issued patent, “it is an efficient use of Board resources to address [a] related patent” that issued earlier); *Globus Med., Inc. v. Spinelogik, Inc.*, IPR2025-00225, Paper 8 at 2 (P.T.A.B. June 12, 2025) (rejecting settled-expectations argument where “the challenged patent expired almost four years ago due to non-payment of maintenance fees”). Apart from such narrow exceptions, the Acting Director has established a consistent policy of immunizing patents from IPR if they are more than six years old.

II. THE NEW SETTLED-EXPECTATIONS STANDARD VIOLATES THE APA.

The Director should not have applied the settled-expectations standard here because doing so violated the APA in at least five ways.

A. The New Settled-Expectations Standard Contravenes Precedent.

The APA requires that agency action that is “not in accordance with law” must be set aside. 5 U.S.C. § 706(2)(A). The Acting Director’s new “settled expectations” policy is not in accordance with law because it contradicts *Celgene*. As a

matter of law, *Celgene* held that patent owners have no expectation that their patents will be immune from challenges at the PTO. *Celgene Corp. v. Peter*, 931 F.3d 1342, 1361-62 (Fed. Cir. 2019). To the contrary, “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. Immunizing patents from IPR, for a reason that the Federal Circuit expressly held does *not* confer immunity, is contrary to law.¹

B. The New Settled-Expectations Standard Is Inconsistent with the AIA.

Agency action that is “in excess of statutory jurisdiction, authority, or limitations” must also be set aside. 5 U.S.C. § 706(2)(C). Because the Director’s settled-expectations standard presumptively bars challenges to patents more than six years old, it is contrary to the AIA. The AIA sets the “filing deadline” for IPRs as the later of “the date that is 9 months after the grant of a patent” or the date of termination of any post-grant review. 35 U.S.C. § 311. Thus, Congress knew how to create time-based deadlines for filing IPRs. Congress chose to impose only a *lower* limit of nine

¹ In addition to time elapsed since the challenged patent issued, the discretionary denial here also mentioned the time elapsed since one petitioner received a letter about an “issued ancestor” of the patent. (Paper 15 at 2-3.) But this letter is irrelevant. As a matter of law, knowledge of an ancestor does not provide notice of a later-issued patent. *Intellectual Ventures II LLC v. Sprint Spectrum, L.P.*, No. 2:17-cv-662, 2019 WL 1987172, at *2 (E.D. Tex. Apr. 12, 2019), *adopted* 2019 WL 1979866; *see also Vasudevan Software, Inc. v. TIBCO Software Inc.*, No. 11-6638, 2012 WL 1831543, at *3 (N.D. Cal. May 18, 2012) (awareness of patent application “does not imply the requisite knowledge of the existence of the later-issued patent”).

months on the patent’s age, without imposing any upper limit.

The Federal Circuit has consistently found that patents can be challenged in IPR at any time after the nine-month period of 35 U.S.C. § 311, including after their expiration. *Samsung Elecs. Am., Inc. v. Prisia Eng’g Corp.*, 948 F.3d 1342, 1346 (Fed. Cir. 2020) (IPRs “can be requested at any time during a patent’s enforceability period, with certain restrictions”); *Apple*, 127 F.4th at 368-70 (expired patents can be challenged). Because the new settled-expectations standard effectively sets a filing deadline different from the one that Congress enacted, it exceeds the PTO’s statutory authority.²

C. The New Settled-Expectations Standard Is Arbitrary and Capricious Because It Is Contrary to Congressional Intent.

The APA also requires setting aside agency action that is “arbitrary” or “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 new settled-expectations standard relies on a six-year upper

² For the same reasons, the new settled-expectations standard contravenes the Constitution’s separation of powers. *See, e.g., Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 322-27 (2014) (agency’s rule “would deal a severe blow to the Constitution’s separation of powers” where it was “inconsistent with” the statutory structure and goes “beyond the bounds of its statutory authority” (internal quotation marks and citation omitted)).

limit for the age of challenged patents, even though Congress intended only a nine-month lower limit. (*Supra* § II.B.) Thus, the settled-expectations standard is arbitrary and capricious.

D. The New Settled-Expectations Standard Is Arbitrary and Capricious Because It Violates the Change-in-Position Doctrine.

The change-in-position doctrine holds that agency action is arbitrary and capricious when the agency “changed existing policy” without displaying “awareness that it [was] changing position” or offering “good reasons for the new policy,” including considering “serious reliance interests” related to its prior policy. *FDA v. Wages & White Lion Invs., L.L.C.*, 145 S. Ct. 898, 918 (2025); *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221-22 (2016). Here, the new settled-expectations standard changed longstanding policy by presumptively barring IPRs against patents more than six years old, even though the PTO had previously allowed IPR challenges throughout a patent’s lifetime (and even after expiration). (*Supra* §§ I.A-I.E.) The PTO made this change without offering good reasons or accounting for serious reliance interests of parties like Petitioners, who developed and coordinated district court and IPR strategies based on the PTO’s prior policies. Thus, the PTO’s adoption of the new settled-expectations standard was arbitrary and capricious.

E. Enacting the New Settled-Expectations Standard Without Notice-and-Comment Rulemaking Violated the APA.

Under the APA, agencies must promulgate substantive rules (e.g., those that “effect a change in existing law or policy or ... affect individual rights and obligations”) through notice-and-comment rulemaking, and agency action that fails to comport with this requirement must be set aside. *Coal. for Common Sense in Gov’t Procurement v. Sec’y of Veterans Affs.*, 464 F.3d 1306, 1317 (Fed. Cir. 2006) (vacating VA letter for failing to follow notice-and-comment procedures). The new settled-expectations standard is such a substantive rule because it imposes a presumptive obligation on petitioners to challenge patents within six years of their issuance. Moreover, the new approach to settled expectations has altered the “substantive standards by which the USPTO evaluates” IPR petitions and thus is subject to notice-and-comment rulemaking. *In re Chestek PLLC*, 92 F.4th 1105, 1110 (Fed. Cir. 2024). Because the PTO failed to enact the settled-expectations policy through notice-and-comment rulemaking, its application here must be set aside.

III. RETROACTIVELY APPLYING THE NEW SETTLED-EXPECTATIONS STANDARD WAS UNCONSTITUTIONAL.

Applying the new settled-expectations standard to deny institution of the Petition here violated the Due Process Clause of the Fifth Amendment. Under the Due Process Clause, the government cannot deprive parties of protected property rights without “constitutionally adequate procedures.” *Cleveland Bd. of Educ. v.*

Loudermill, 470 U.S. 532, 541 (1985). The “property” interests subject to procedural due process protection include “a broad range of interests that are secured by ‘existing rules or understandings.’” *Perry v. Sindermann*, 408 U.S. 593, 601 (1972) (citation omitted).

Even where an agency is conferred broad discretion, the agency may constrain its own discretion and in doing so create a cognizable property interest. *See Brown v. Eppler*, 725 F.3d 1221, 1226 (10th Cir. 2013) (“the district court overlooked the possibility the [agency] had constrained its own discretion to deny service to a sufficient extent as to give rise to a ‘legitimate claim of entitlement’ to service”). Agencies may adopt such constraints on their own discretion by way of “the consistent practice of a decisional body—even in the absence of express regulatory language,” *Tarpeh-Doe v. U.S.*, 904 F.2d 719, 724 (D.C. Cir. 1990), or a “constant, consistent pattern of ALJ decisions,” *Furlong v. Shalala*, 156 F.3d 384, 395 (2d Cir. 1998). Here, Petitioners were entitled to rely on the PTO’s longstanding policy of allowing patents to be challenged in IPRs many years after they issued, and even after they expired. (*Supra* §§ I.A-I.D.) The Due Process Clause protects this reliance interest. *Brown*, 725 F.3d at 1226; *Furlong*, 156 F.3d at 395.

“To satisfy the Due Process Clause, [an agency] must at a minimum ‘provide regulated parties fair warning of the conduct a regulation prohibits or requires.’” *Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451, 462 (D.C. Cir. 2017). When an agency

changes a policy from one which “engendered serious reliance interests, due process considerations of fair notice and fundamental fairness demand a reasonable explanation for the agency’s change in position” as well as requiring the agency to “take into account reliance interests when changing course.” *Cemex Inc. v. Dep’t of the Interior*, 560 F. Supp. 3d 268, 281-82 (D.D.C. 2021). Here, the PTO gave Petitioners no such fair notice. Instead, the PTO retroactively applied a standard that did not exist at the time Petitioners filed this IPR.³ By preventing Petitioners from accessing the IPR process that was available under the prior policy, and ignoring their serious reliance interests, the discretionary denial violated Petitioners’ due process rights.

CONCLUSION

For the reasons set forth above, the Acting Director’s discretionary denial based on “settled expectations” was erroneous and should be reversed. The Acting Director should allow the Board to reach the merits of the Petition.

Respectfully submitted,

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September 15, 2025

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³ The filing date of the Petition was March 24, 2025. (Paper 1.) That was *before* the Acting Director announced the settled-expectations standard and began to apply it. (*Supra* § I.E.)

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **PETITIONERS’ REQUEST FOR DIRECTOR REVIEW** is being served on September 15, 2025, via e-mail on counsel of record for Patent Owner at the address below:

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