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Rethinking Patent Risk in a Changing Landscape

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When a company is accused of patent infringement, it may be able to challenge the validity of the patent at the U.S. Patent and Trademark Office (USPTO) rather than litigating validity exclusively in federal court. USPTO proceedings can offer important advantages over federal-court litigation. For example, these proceedings are decided by technically trained patent judges or examiners, apply a lower burden of proof and may resolve validity issues more efficiently and at a lower cost than full-scale litigation.

For years, companies frequently used a streamlined USPTO proceeding known as inter partes review (IPR) to challenge patent validity. Recent policy changes, however, have made IPR proceedings more difficult and less predictable. The reported rate at which the USPTO agrees to review challenged patents in IPR proceedings has fallen from historically above 60% to approximately 30%. As a result, businesses have begun increasingly considering an older, alternative USPTO proceeding known as ex parte reexamination (Reexamination). A record number of Reexamination requests were filed during the first three quarters of fiscal year 2026.

Reexamination also offers potential advantages but differs from IPR in several key respects. For example, an IPR challenger remains an active participant throughout the proceeding. In Reexamination, by contrast, the challenger generally steps out of the process after filing the initial request, leaving the patent owner to work directly with the examiner. The patent owner also may amend its claims more readily in Reexamination than in IPR. Consequently, a Reexamination challenge intended to eliminate a patent could instead result in revised claims that are more difficult to invalidate and may still cover the accused product. Despite the recent shift toward Reexamination, early signs indicate that the process may also be becoming less automatic. The reported institution rate for Reexamination has declined from 93%–98% historically to approximately 84% between April and September 2026.

For business leaders, the growing difficulty of invalidating patents should inform a company's overall patent-risk calculus. Businesses may no longer be able to assume that the USPTO offers a quick, cost-effective and challenger-friendly process for eliminating questionable patents. Companies should therefore consider reevaluating their patent-clearance practices, particularly before launching significant products, entering new markets or making substantial investments in new technology. Depending on the circumstances, earlier patent searches, targeted freedom-to-operate reviews, competitor-portfolio monitoring and timely design-around efforts may reduce the likelihood that the company will later need to defend against a patent claim. In this

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changing landscape, identifying and addressing patent risks before launch may offer greater strategic control, lower costs and more business flexibility than attempting to invalidate a patent after litigation begins.

For questions regarding patent protection, intellectual property strategy, technology transactions, data privacy or related matters, please contact Michael Golenson, chair of Masuda Funai's Intellectual Property & Technology Practice.

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