Inter Partes Review Survival Rates
Based on Decision Statistics—A Preliminary Report

John B. Pegram
Senior Principal
Fish & Richardson P.C.

Our statistical evaluation of actual institution and final Inter Partes Review decisions by the Patent Trial and Appeal Board indicates that in 52% of the cases, all challenged claims survive the review. In another 21% of the cases, at least one, but not all, of the challenged claims survive. All challenged claims are found unpatentable in only 27% of cases decided by the Board. These statistics appear to be rather balanced. Indeed, given the probability that weaker patents are more likely to be attacked in an IPR, and the costs of preparing and filing an IPR Petition, it is surprising Petitioners have not been more successful.

Methodology

We obtained a custom report from LegalMetric, limited to USPTO data on actual institution and final written decisions by the Board.¹ This data intentionally excluded the large number of settled cases, open pre-institution cases, cases joined to other cases, procedurally dismissed cases and cases in which the patent owner disclaimed the patent. We also considered some data in publicly available reports of Lex Machina.

The first two charts below, on institution decisions and final written decisions, are based on actual data as of January 2018, provided by LegalMetric.

The third chart is an estimate, intended to indicate the probability that at least some patent claims will survive an IPR. Combining data on institution and final decisions in an IPR is difficult, because approximately 20% of all instituted cases are still pending, and because a detailed correlations between institution and final decisions in the same case are not available. We have considered the final decision statistics as a percentage of cases instituted. For example, the percentage of patents found patentable is the sum of the non-instituted percentage plus the

¹ The LegalMetric data differs from that published by the PTO. LegalMetric has explained to us, “The outcome identified by the USPTO for PTAB proceedings is not always accurate. A Final Written Decision is often identified as something else (probably based upon what title the APJ gave the document). We look at the actual closing documents and are able as a result to identify all FWDs, not just the ones that have been properly identified by the PTO. To determine the number in which some but not all claims are unpatentable, we look at both the number of claims for which the proceeding is instituted and the number that survived the FWD. We record that as a percentage. For your report, we counted all proceedings with a survival percentage greater than 0 and less than 100 as being in the “some but not all” category.”

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instituted percentage times the percentage of instituted cases found patentable. These estimates are reasonably accurate, because final decision statistics were relatively steady in recent years.

**Actual Decision Data**

The most overlooked aspect of evaluating patent survival is PTAB institution decisions. As shown in the first chart below, 38% of these decisions deny institution for all challenged claims and 14% of decisions institute an IPR for some, but not all, challenged claims. This data indicates the probable importance of the Patent Owner’s pre-institution response.

The second chart below shows the success rate of partially or fully instituted cases at the final written decision stage, based on actual data.
**Overall Survival Rate**

Many commentators have focused on final written decision statistics. Some of them have suggested that the Board finds all claims unpatentable in too many IPRs. Our estimate of overall survival rates, however, does not support that conclusion. As shown in our third chart, when both the institution and final decisions are considered, all challenged claims survive in 52% of IPRs and some challenged claims survive in an additional 21% of cases. We estimate that all challenged claims are found to be unpatentable by Board action, and probably cancelled, in only 27% of instituted IPR cases.

The 21% survival rate for some, but not all, challenged claims indicates the value of having a range of claims in a patent and making separate arguments of patentability for dependent claims. The statistics indicate that approach has proven much more effective for Patent Owners than attempting to amend claims during an IPR. From a Petitioner’s perspective, the survival rate for some, but not all, challenged claims suggests the importance of carefully addressing patentability of all contested claims in the IPR Petition.