

Patent Policy To Watch In 2026

By Ryan Davis

Law360 (January 2, 2026, 12:03 PM EST) -- After a year of significant shifts in U.S. Patent and Trademark Office policy on patent reviews and patent eligibility, attorneys will be closely following how the changes play out in 2026, along with proposals for further moves, and whether Congress decides to weigh in on patents.

Patent Challenge Restrictions

Over the past year, USPTO leadership under the Trump administration has instituted a raft of new policies that restrict the ability to challenge patents under the America Invents Act, upending what had been a key component of many patent disputes.

The changes include new factors such as denying reviews based on the age of the patent and USPTO Director John Squires making all decisions himself on whether to institute review, in summary orders without explanation. As a result, 2026 will be a year of monitoring how the policies impact the number of challenges filed and instituted, attorneys said.

Robert Weinschenk of Hogan Lovells, a former Patent Trial and Appeal Board judge, said he is looking forward "to seeing how this process plays out. It certainly was a pretty significant paradigm shift [in 2025]."

"I think people will be looking at the numbers and the statistics, because that gives you a general sense of how likely [it is] that your petition might get instituted," he said.

In his first few weeks of handling institution decisions solo, a task previously done by the PTAB, Squires has only found that a small number of petitions warrant review. If that trend continues, many observers expect the number of inter partes review challenges to drop significantly.

The USPTO's current leadership is "taking a much more skeptical approach on instituting these proceedings," so "I think what you're going to see in 2026 is probably fewer petitions being filed. You're going to see some parties decide to not even go down the route of filing a petition," said Andrew Zappia of Troutman Pepper Locke LLP.

Since Squires generally does not issue opinions explaining the reasoning of his institution decisions, attorneys will be scouring the briefing of each case in an effort to divine clues for what led to the decision, which can help inform what might happen in future cases, said Alex Yap of Morrison Foerster

LLP, another former PTAB judge.

"I think it's going to take another six months to figure out where we are in the post-grant process," he said. He noted that even with the changes, litigants will still look to IPRs in some cases, such as when patents involve complex technology that could be challenging to explain to a jury.

Attorneys said they expect accused infringers to increasingly look to ex parte reexaminations as a route to challenge patents, something that has already begun to happen.

That older type of proceeding often takes longer and involves limited participation from the challenger, but if IPRs are unavailable, they may become more appealing, said Kevin Schubert of McKool Smith.

"There's a big question in terms of, are some patent defendants that would ordinarily file IPRs going to be looking at other avenues like ex parte reexams to make new challenges," he said.

If there is an influx of reexam requests, Schubert said attorneys will be monitoring whether similar new policies are also implemented for those proceedings, since the USPTO may not want to "allow some of the issues that they saw with IPRs to be just ported over into re-exams."

Patent Review Rulemaking

In addition to the policies now in place, the USPTO has proposed implementing new rules that would limit the availability of patent challenges even further. Whether that plan is adopted or changed will also be closely followed.

The office received thousands of comments on the plan, many of which were strongly critical. It would require AIA review petitioners to forgo many invalidity arguments in other venues, and would also prohibit reviews when a patent has already had its validity adjudicated, or when a related proceeding may reach a validity decision first.

"That is on the forefront of everyone's practice right now," said Lea Speed of Baker Donelson Bearman Caldwell & Berkowitz PC. "Is it going to be adopted? Is it not? Is there going to be some variation with all of the commentary that's coming in?"

If the rule changes are put in place as proposed, that "could potentially be a major sea change to what's already been happening," said Yap of Morrison Foerster.

For instance, attorneys said requiring patent challengers to give up invalidity arguments in litigation that cannot be raised in inter partes reviews in order to file one could discourage many accused infringers from using IPRs. Also, the prospect of reviews being denied based on prior decisions on the patent might inspire litigants to work together on petitions.

"We just don't know what is coming down the line right now, so you have to be nimble, and you have to anticipate very, very conservatively," Speed said.

PREVAIL Act

A future USPTO director could discard many of the new AIA review policies upon taking office, whereas if the proposed rules are adopted, they would be enshrined in policy and would take another rulemaking

process to undo. However, legislation amending the AIA would be permanent, putting a spotlight on a bill designed to do just that to limit patent challenges.

The PREVAIL Act, reintroduced in May after narrowly advancing out of committee in 2024 but going no further, would restrict the ability to challenge patents in some similar ways to the proposed rules and also establish that only those sued for infringement could file a petition.

The bill's sponsors in Congress have urged Squires to support the measure, saying the policies he has implemented could be repealed by his successors, and "inventors need certainty and predictability to justify investment in new research and development" that passing the law would provide.

Given that there are proposed rules that are similar to what's in the bill, "does that mean that people are not going to push PREVAIL as hard because it's already in the rules? Or maybe they want to codify it in the statute," so the policies don't change with every administration, Yap said.

Patent Eligibility at the USPTO

Another focus of Squires' tenure at the USPTO so far has been patent eligibility. He has said he plans **on** "making sure the door to the patent office is wide open to transformative technologies" like artificial intelligence and that such patent applications should usually not be rejected on eligibility grounds.

To that end, he undid the PTAB's denial of an AI patent application, in a decision he made precedential. He wrote that "categorically excluding AI innovations from patent protection" threatens U.S. leadership on the technology.

Squires contended that the board's reasoning could lead most AI innovations to be deemed unpatentable by wrongly equating any machine learning with a patent-ineligible algorithm.

The director also stated that, rather than patent eligibility under Section 101 of the Patent Act, other issues like novelty and nonobviousness "are the traditional and appropriate tools to limit patent protection to its proper scope" and "should be the focus of examination."

"If you take that language at face value, it's suggesting that maybe the office shouldn't be really focusing on 101 anymore," said Justin Oliver of Venable LLP. "It'll be interesting to see what that means going forward."

The director's statements suggest that it's possible the USPTO will now reject fewer applications for patents on AI and other emerging technologies as ineligible for claiming only abstract ideas, which could be a boon for companies in those areas, at least in the short term.

However, once those patents are issued and asserted, the courts are in no way bound by the USPTO director's views of what should be patent eligible, said Schubert of McKool Smith.

"There is a possibility that those patents get challenged under 101, and under the current state of the law, there's a risk that the patents become invalid," he said.

Patent Eligibility Restoration Act

As with patent reviews, changes to patent eligibility policy could far outlive the current administration

and become binding on the courts, if they are codified in legislation, and there is a bill in Congress aiming to make more inventions eligible for patents.

The Patent Eligibility Restoration Act would effectively overrule court decisions holding that broad categories like abstract ideas and laws of nature are ineligible for patents, and instead set a narrower range of things that would be deemed ineligible, including mathematical formulas and mental processes.

Sen. Thom Tillis, R-N.C., one of the bill's sponsors, said in an October hearing that current case law on eligibility is constricted and unclear, and vowed to make getting the measure passed one of his top priorities before leaving Congress in about a year.

The statements and guidance from Squires on eligibility mean that "certainly the director is moving faster than Congress is with PERA," said Speed of Baker Donelson.

"With the director issuing patents on this technology, it doesn't resolve the potential invalidity for the courts," she said. "That's going to have to come through Congress, and so we're certainly looking at PERA to provide some clarity on patent eligibility."

Still, patent eligibility legislation has been bandied about in Congress for several years and has drawn strong opposition from the tech industry, so it faces hurdles to becoming law.

"Historically, patent legislation has been pretty bipartisan: it's not a very politicized area," said Dion Bregman of Morgan Lewis & Bockius LLP. "So it is possible that something happens there. I just don't think it's very high on the list of priorities of anyone."

--Editing by Drashti Mehta.