

In The News

Timothy Sendek Analyzes IPR, AIA Reviews in *Intellectual Property & Technology Law* Journal Article

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Timothy Sendek wrote an article published in *Intellectual Property & Technology Law Journal* analyzing inter partes reviews (IPR) and American Invent's Act (AIA) reviews in light of court rulings in recent years.

“After their creation in 2011, AIA reviews have become an important component of patent litigation. With the U.S. Supreme Court’s finding in *Thryv* that many decisions of the Patent Trial and Appeal Board (PTAB) cannot be reviewed on appeal by the U.S. Court of Appeals for the Federal Circuit, and the Federal Circuit’s finding in *Arthrex* that the Director (or the Secretary of Commerce) of the U.S. Patent and Trademark Office (USPTO) has broad power to remove the Administrative Patent Judges (APJs), the Director stands to shape patent policy significantly, as well as having tremendous discretion over individual reviews. Practitioners should be astutely aware of indicators of that policy, such as decisions of the USPTO’s Precedential Opinion Panel (POP).”

“In *Arthrex, Inc. v. Smith & Nephew, Inc.*, the Federal Circuit held that the structure of the PTAB violated the Appointments Clause of the U.S. Constitution. APJs are USPTO employees and constitute the PTAB panels in AIA reviews to invalidate issued patents like IPRs, post grant reviews (PGR), and covered business method (CBM) reviews. APJs are not

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appointed by the president and confirmed by the Senate, but rather are appointed by the Secretary of Commerce “in consultation” with the Director.”

“More recently, in April 2020, the Supreme Court held that many PTAB decisions regarding institution of AIA reviews could not be reviewed by higher courts. *Thryv* held that decisions of the PTAB to institute IPRs cannot be reviewed on appeal to determine whether the PTAB properly applied the AIA’s time bar provisions, which prohibit institution of an IPR on a petition filed more than one year after the defendant or one in privity with the defendant was served with a complaint asserting a claim of infringement.”

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