

ILLEGAL, PUNITIVE, AND ROUTINE: THE UNCONSTITUTIONALITY OF IPRS IN PATENT LAW

Garrett S. Anderson*

I. INTRODUCTION

The United States Constitution provides Congress with the power to foster the growth of our country's intellectual labor.¹ Article I, Section 8, Clause 8 of the United States Constitution allows the government "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."² This constitutional provision addresses the value of scientific discovery.³ Congress has enacted numerous patent statutes in accordance with the limitations set forth by the Constitution.

Historically, patent disputes were handled in federal district court.⁴ A patent holder would sue someone for infringing upon their patent.⁵ The alleged infringer then had multiple defenses at his disposal that could be used at trial.⁶ The defendant could claim that no infringement ever took place.⁷ The defendant could claim that the patent holder's patent was invalid.⁸ The plaintiff and defendant would put forward their best case, and ultimately a jury would then determine if the defendant was liable for infringement.⁹ This

*J.D. Candidate, 2021, Baylor University School of Law; B.A., Biology, 2017, Johns Hopkins University. Thank you to Professor David Henry for assisting me with this topic. To my parents and Julia, thank you for your endless love and support. The following is dedicated to the loving memory of my grandfathers. I would not have made it this far without you.

¹ U.S. CONST. art. I, § 8, cl. 8.

² *Id.*

³ *Graham v. John Deere Co. of Kan. City*, 383 U.S. 1, 6 (1966).

⁴ *Celgene Corp. v. Peter*, 931 F.3d 1342, 1359 (Fed. Cir. 2019).

⁵ *Id.* at 1361.

⁶ *See* 35 U.S.C. § 282(b).

⁷ *Id.* § 282(b)(1).

⁸ *Id.* § 282(b)(2)–(3).

⁹ *See Celgene Corp.*, 931 F.3d at 1359.

was the method by which most patent disputes were adjudicated for most of our country's history.¹⁰

In 2011, Congress passed the America Invents Act, which fundamentally changed how patent disputes were handled. The AIA established a process known as *inter partes* review (IPR), which could be used to invalidate a patent.¹¹ That power is significant because there is no liability for infringing on an invalidated patent.¹² However, despite both the speed¹³ and popularity¹⁴ of IPRs, they raise important constitutional issues.

IPRs are a method by which the government can take away a citizen's private property.¹⁵ This implicates the Fifth Amendment to the United States Constitution.¹⁶ The Fifth Amendment's Due Process Clause prevents the government from depriving citizens of their property without due process of law.¹⁷ The Fifth Amendment's Takings Clause prevents the government from taking a citizen's private property for public use without providing "just compensation."¹⁸ IPRs are unconstitutional because they deny citizens their right to due process and "just compensation" when the government takes their property.

II. BACKGROUND

This section explains why patents are property and examines the impact of the recent Supreme Court case, *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*.¹⁹

¹⁰ *See id.*

¹¹ 35 U.S.C. § 311(a).

¹² 35 U.S.C. § 282(b)(2)–(3).

¹³ Michael J. Flibbert & Maureen D. Queler, *5 Distinctions between IPRs and District Court Patent Litigation*, FINNEGAN (Dec. 16, 2015), <https://www.finnegan.com/en/insights/articles/5-distinctions-between-iprs-and-district-court-patent-litigation.html>.

¹⁴ *See id.*

¹⁵ 35 U.S.C. § 311(a).

¹⁶ *See* U.S. CONST. amend. V.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ 138 S. Ct. 1365 (2018).

A. *Are patents property?*

What is a patent? Two potential answers to this question provide vastly different outcomes with significant policy implications. The first answer is that patents are property.²⁰ The second answer is that patents are not property, but rather a franchise—something that has some of the rights of property, but that is not property in and of itself.²¹ Property rights are protected by the Constitution.²² The government cannot deprive citizens of their property without due process.²³ Furthermore, the government must pay “just compensation” when it takes private citizens’ property for public use.²⁴

Constitutional challenges to IPRs rely on the proposition that patents are private property. If patents are private property, they are subject to the constitutional protections outlined above.²⁵ However, if patents are not considered property, then a challenge to the constitutional validity of IPRs will likely fail. If patents are not private property, then the government has considerable latitude to interfere with the patent holder’s patent.²⁶

B. *Patents are still property despite the Supreme Court’s ruling in Oil States Energy Services, LLC v. Greene’s Energy Group, LLC.*

This Article contends that patents are property for two key reasons. First, the argument that patents are not property is unpersuasive. The Supreme Court’s decision in *Oil States* is the most persuasive argument for the proposition that patents are not property. However, in that decision, the Supreme Court explicitly stated that this decision was a narrow decision.²⁷ The Supreme Court determined that IPRs are not unconstitutional under Article III or the Seventh Amendment.²⁸ However, the Court also left open the possibility that patents are property for the purposes of the Due Process Clause and the Takings Clause.²⁹

²⁰ See *Brown v. Duchesne*, 60 U.S. 183, 197 (1856).

²¹ *Oil States*, 138 S. Ct. at 1375.

²² See U.S. CONST. amend. V.

²³ *Id.*

²⁴ *Id.*

²⁵ See, e.g., *Cont’l Paper Bag Co. v. E. Paper Bag Co.*, 210 U.S. 405, 425 (1908).

²⁶ See, e.g., *Oil States*, 138 S. Ct. 1365, 1375 (2018).

²⁷ See *id.* at 1379.

²⁸ *Id.* at 1370.

²⁹ *Id.* at 1379.

Second, there is an abundance of evidence that patents are property. The common definition of the word “patent” describes it as a type of private property.³⁰ Furthermore, the Supreme Court has already determined that “the rights of a party under a patent are his private property,” in a decision that has not been overturned.³¹ In fact, the Supreme Court has repeatedly reaffirmed this proposition. Twenty years after the decision in *Brown*, the Supreme Court stated that “[a] patent for an invention is as much property as a patent for land.”³² The Supreme Court again reaffirmed this proposition when it proclaimed that “patents are property, and entitled to the same rights and sanctions as other property.”³³

Thus, the Supreme Court has stated a number of times that patents are property. However, even if those decisions are disregarded, patents may still be considered property consistent with other Supreme Court precedent. The Supreme Court has adopted a long line of decisions that take a very expansive view of property.³⁴ In light of such decisions, it is reasonable to conclude that patents are property subject to the protections of the Fifth Amendment. Therefore, this Article will proceed on the basis that patents are in fact property.

III. THE DUE PROCESS CLAUSE

As previously stated, IPRs violate a patent holder’s right to due process. The following section will discuss in detail the various reasons why IPRs fail to provide a patent holder with sufficient due process protections.

A. *The differences between IPRs and litigation in federal district court.*

IPRs violate a patent holder’s Fifth Amendment right to due process. If IPRs did not exist, parties accused of patent infringement would litigate their

³⁰ See, e.g., *Patent*, Merriam-Webster Dictionary (11th ed. 2003).

³¹ *Brown v. Duchesne*, 60 U.S. 183, 197 (1856).

³² *Consol. Fruit-Jar Co. v. Wright*, 94 U.S. 92, 96 (1876).

³³ *Cont’l Paper Bag Co. v. E. Paper Bag Co.*, 210 U.S. 405, 425 (1908).

³⁴ See, e.g., *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925) (holding that the right to conduct schools was property); see also *Perry v. Sindermann*, 408 U.S. 593, 601 (1972) (holding that public employees who can only be fired for cause have a constitutional property interest in their tenure).

cases in federal court.³⁵ Federal courts abide by the Federal Rules of Civil Procedure³⁶ and the Federal Rules of Evidence.³⁷ Additionally, the outcome of patent disputes litigated in federal court can be determined by a jury.³⁸ Federal courts are an ideal forum to litigate patent disputes because they offer a wide array of procedural protections to protect the patent holder from an undue loss of his property.

IPRs are an inferior method to contest patent disputes. IPRs are conducted by the Patent Trial and Appeal Board (PTAB).³⁹ The PTAB is an administrative law body within the United States Patent and Trademark Office (USPTO).⁴⁰ The USPTO is an administrative agency.⁴¹ As such, many of the procedural safeguards that apply in federal court do not apply to the PTAB when it conducts IPRs.⁴² IPRs are not conducted by a federal judge,⁴³ and they are not always required to abide by the Federal Rules of Evidence.⁴⁴ The PTAB can at times depart from The Federal Rules of Civil Procedure, most notably during discovery.⁴⁵

The procedural problems with IPRs only grow worse from here. The standards used in IPRs when determining whether to invalidate a patent are unconstitutionally burdensome to the patent holder. Like a case held in federal district court, IPRs can invalidate a patent.⁴⁶ However, IPRs allow a petitioner to invalidate a patent claim by showing to a preponderance of the evidence that the claim was unpatentable.⁴⁷ This contrasts with litigation in a federal district court where the burden on the party challenging the validity of each patent claim is clear and convincing evidence.⁴⁸ On appeal, the PTAB

³⁵ See, e.g., 28 U.S.C. § 1400(b).

³⁶ FED. R. CIV. P. 1.

³⁷ FED. R. EVID. 1101(a).

³⁸ See U.S. CONST. amend. VII.

³⁹ 35 U.S.C. § 316(c).

⁴⁰ 35 U.S.C. § 6(a).

⁴¹ 35 U.S.C. § 1.

⁴² See 35 U.S.C. § 316(a).

⁴³ 35 U.S.C. § 316(c).

⁴⁴ See, e.g., 37 C.F.R. § 42.62(d).

⁴⁵ See Flibbert, *supra* note 13.

⁴⁶ 35 U.S.C. § 311(b).

⁴⁷ 35 U.S.C. § 316(e).

⁴⁸ Microsoft Corp. v. i4i Ltd. P'ship, 564 U.S. 91, 95 (2011).

is given the more deferential standard of “substantial evidence” rather than the “clear error” standard given to the district court.⁴⁹

B. Applying the Constitutional test for due process.

These procedural deficiencies with IPRs take on constitutional significance. The Fifth Amendment requires that the government provide procedural protections before depriving individuals of property.⁵⁰ The Supreme Court developed the framework for procedural due process in the seminal case *Mathews v. Eldridge*.⁵¹ The Court established a three-factor test to determine if the government had provided sufficient procedural safeguards such that the deprivation of property did not violate the Fifth Amendment.⁵² The three factors are:

- (1) the private interest that will be affected by the official action;
- (2) the risk of an erroneous deprivation of such interest through procedures used, and probable value, if any, of additional procedural safeguards; and
- (3) the Government’s interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail.⁵³

The first factor refers to the issued patent that is the subject of the IPR proceedings. The private interest at stake is monumental in this context. The loss of a patent is a uniquely harmful form of property loss that significantly impacts the patent holder.⁵⁴ Unlike more commonplace forms of property such as vehicles, patents cannot be readily replaced.⁵⁵ There is no patent dealership that can sell a nearly identical version of an invalidated patent to a patent holder once the original patent is invalidated.⁵⁶ Additionally, patents are typically the product of years of hard work and considerable economic investment. A patent’s “continued possession may become essential in the

⁴⁹ See Flibbert, *supra* note 13.

⁵⁰ See *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970).

⁵¹ See 424 U.S. 319, 334–35 (1976).

⁵² *Id.* at 321.

⁵³ *Id.*

⁵⁴ 3 Phases, LLC v. Parker, 2009 WL 10669748 at *7 (C.D. Cal. May 27, 2009).

⁵⁵ See *id.*

⁵⁶ See *id.*

pursuit of a livelihood.”⁵⁷ Overall, the magnitude of the private interest at stake in this case is such that this factor cuts in favor of requiring stronger procedural protections be in place than those offered by IPRs.

The second factor considers the risk of an erroneous deprivation of the individual’s patent.⁵⁸ As discussed above, IPRs present an elevated risk of an erroneous deprivation of a patent. IPRs are an easier method to invalidate a patent than traditional patent litigation in federal district court for several reasons. IPRs use a standard for invalidating a patent that is more favorable to the party challenging a patent’s validity.⁵⁹ The patent holder is not necessarily protected by the traditional rules of procedure or evidence that would govern litigation in federal district court.⁶⁰ IPRs can invalidate a patent without allowing the patent holder to present his case before a jury.⁶¹ This combination of factors indicates that IPRs lack the same safeguards present in traditional litigation in a federal district court. Therefore, it is more likely that IPRs will result in an erroneous deprivation of a patent holder’s property rights. The combination of these factors cuts in favor of requiring stronger procedural protections be in place than those offered by IPRs.

The final factor considers the government’s interest by looking to the cost that the additional or substitute procedure would entail.⁶² At the outset, it is worth stating that abolishing IPRs comes at a cost. IPRs take place regularly. And they are only increasing in frequency as more parties take advantage of their convenience. In comparison, trials are far more costly and time consuming than IPRs. If IPRs were abolished, then it is certainly true that many patent disputes that otherwise would have been handled outside the courtroom would ultimately be litigated in federal court. This is not ideal given the congestion that federal district courts are currently facing.

The fiscal and administrative burdens that would undoubtedly result from abolishing IPRs would not come without benefits. Recall the policy rationale that informed the Founders’ decision to allow the government to issue patents. If inventors were willing to invest time and resources into producing new and useful inventions for the country, then the government would reward

⁵⁷ See *Bell v. Burson*, 402 U.S. 535, 539 (1971).

⁵⁸ *Mathews*, 424 U.S. at 321.

⁵⁹ See *Microsoft Corp. v. i4i Ltd. P’ship*, 564 U.S. 91, 112 (2011).

⁶⁰ See 35 U.S.C. § 316(a).

⁶¹ *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1379 (2018).

⁶² *Mathews*, 424 U.S. at 321.

the inventors with a limited monopoly over their invention by way of a patent. Patents “secure to the inventor a just remuneration from those who derive a profit or advantage . . . from his genius and mental labors.”⁶³ This simple agreement between inventors and the country produced benefits for both parties.⁶⁴ The country would reap the benefits of technological advancement, while the inventor would gain economic benefit and control over the fruits of his intellectual labor.⁶⁵

IPRs undermine that agreement by substantially weakening the stability of patents by making them too easy to invalidate. Now future inventors must consider the risk of losing their patent to an IPR before they make the decision to potentially invest time and money into trying to get a patent. This will deter would-be inventors from making the investments necessary to keep America at the forefront of global technological innovation. Thus, abolishing IPRs would in some ways support the government’s interest even if it comes at a cost. Therefore, this final factor does not cut strongly in one way or the other for the analysis of the procedural sufficiency of IPRs. The three *Mathews* factors on balance therefore indicate that IPRs do not provide sufficient procedural safeguards to comport with the Due Process Clause of the Fifth Amendment.

IV. THE TAKINGS CLAUSE

IPRs violate the Takings Clause of the Constitution. The following section will demonstrate how IPRs constitute a taking of property without providing “just compensation” to the patent holder.

A. *How do IPRs constitute a taking?*

IPRs violate a patent holder’s Fifth Amendment right to “just compensation” for a government taking. The Supreme Court has already addressed the problem of the government taking away a patent holder’s patent without just compensation in *Brown v. Duchesne*.⁶⁶ As the Court said in *Brown*, “[f]or, by the laws of the United States, the rights of a party under

⁶³ *Brown v. Duchesne*, 60 U.S. 183, 195 (1856).

⁶⁴ *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 150–51 (1989).

⁶⁵ *Id.* (citing *United States v. Dubilier Condenser Corp.*, 289 U.S. 178, 186–87 (1933)).

⁶⁶ 60 U.S. at 197.

a patent are his private property; and by the Constitution of the United States, private property cannot be taken for public use without just compensation.”⁶⁷

Brown demonstrates how IPRs violate the Takings Clause.⁶⁸ IPRs can invalidate a patent, which takes that patent away from the patent holder.⁶⁹ If the IPR invalidates the patent, the government does not give the patent holder any compensation after taking the citizen’s property away.⁷⁰ On its face, this appears to be an unconstitutional violation of the Takings Clause.

However, the Federal Circuit Court of Appeals recently held that patents that become invalidated because of an IPR are not property for the purposes of the Takings Clause.⁷¹ The status of *valid* patents was not at issue in this case. Indeed, the Federal Circuit has acknowledged that the government taking of a valid patent implicates the Takings Clause.⁷²

Instead, the court relied heavily on the distinction between a valid patent and an invalid patent. The Federal Circuit’s holding rests on the proposition that IPRs are used to invalidate patents that never should have been granted in the first place.⁷³ Therefore, because the government is simply cancelling something that never should have been granted in the first place, the government has not engaged in a “taking” within the meaning of the Fifth Amendment.⁷⁴

There are three problems with this rationale. First, the court assumes without providing any justification that a patent canceled by an IPR was *necessarily* invalid.⁷⁵ This is unreasonable because the USPTO is not infallible. They are capable of mistakenly claiming that a valid patent is invalid. IPRs are appealable for that very reason.⁷⁶

⁶⁷ *Id.*

⁶⁸ *See id.*

⁶⁹ 35 U.S.C. § 311(b).

⁷⁰ *See* Matthew Rizzolo & Kathryn Thornton, *United States: Paying Just Compensation for “Taking” Patents?*, KLUWER PATENT BLOG (May 21, 2019), http://patentblog.kluweriplaw.com/2019/05/21/united-states-paying-just-compensation-for-taking-patents/?doing_wp_cron=1592705476.9611868858337402343750.

⁷¹ *Christy, Inc. v. United States*, 971 F.3d 1332, 1336 (Fed. Cir. 2020).

⁷² *See Celgene Corp. v. Peter*, 931 F.3d 1342, 1358 (Fed. Cir. 2019).

⁷³ *Id.* at 1361.

⁷⁴ *See id.* at 1362.

⁷⁵ *See id.*

⁷⁶ *See* 35 U.S.C. § 319.

Second, the ruling is not consistent with prior Supreme Court precedent. The Supreme Court has long stated that a patent “confers upon the patentee an exclusive property in the patented invention which cannot be appropriated or used by the government itself, without just compensation, any more than it can appropriate or use without compensation land which has been patented to a private purchaser.”⁷⁷ Once the government grants a patent, “the grantee is entitled to it as a matter of right, and does not receive it . . . as a matter of grace and favor.”⁷⁸ Thus, the government is not free to modify or make use of a patent without paying the grantee just compensation.⁷⁹

In this case, the government is “making use” of the patent by cancelling a patent that was improperly issued, thereby allowing the public to produce things that were previously covered by the invalidated patent.⁸⁰ The government erred in granting the patent in the first place and is now correcting its mistake for the benefit of the public.⁸¹ The government has the ability to cancel the patent, but it cannot do so without paying just compensation to the grantee.⁸²

Third, the Federal Circuit failed to consider the potential value of an improvidently issued patent. A patent can be a valuable asset regardless of whether the government should have granted it or not. The Federal Circuit may well disagree on this point.⁸³ However, it is clear that someone can lawfully obtain a property interest in something of value, even if they received the property by mistake.⁸⁴ The government may be able to regulate said property. However, at a certain point the governmental regulation rises to the level where the regulation constitutes a “taking” for the purposes of the Fifth Amendment.⁸⁵ Thus an IPR is the ultimate “taking” because it

⁷⁷James v. Campbell, 104 U.S. 356, 357–58 (1881).

⁷⁸*Id.* at 358.

⁷⁹Cammeyer v. Newton, 94 U.S. 225, 235 (1876).

⁸⁰*See Celgene Corp. v. Peter*, 931 F.3d 1342, 1361 (Fed. Cir. 2019) (quoting *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1353 (2018)).

⁸¹*Id.*

⁸²*See generally* *Cont’l Paper Bag Co. v. E. Paper Bag Co.*, 210 U.S. 405, 425 (1908) (“[P]atents are property and are entitled to the same rights and sanctions as other property.”).

⁸³*See Celgene Corp.*, 931 F.3d at 1361.

⁸⁴*See, e.g., Cesarini v. United States*, 296 F. Supp. 3, 7 (N.D. Ohio 1969) (holding that a married couple who had found \$4,467 mistakenly left in a piano by a prior owner had to pay income taxes on their valuable discovery).

⁸⁵*Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

invalidates a patent that has already been issued.⁸⁶ This would explain why the Supreme Court intentionally emphasized the “narrowness” of its holding that patents were not property solely for the purposes of Article III and the Seventh Amendment.⁸⁷ The Court then explicitly stated that it did not mean to suggest that its holding in any way indicated that patents were not property for the purposes of the Takings Clause.⁸⁸ The petitioners in *Oil States* did not raise a Takings Clause challenge to IPRs.⁸⁹ However, in light of Supreme Court precedent, an IPR that invalidates a patent should be viewed as a taking within the meaning of the Fifth Amendment.

B. What “public use” is achieved when IPRs invalidate a patent?

There is still one additional piece of the Takings Clause that must be analyzed. The Takings Clause reads: “nor shall private property be taken for public use, without just compensation.”⁹⁰ The “public use” piece of the Takings Clause plays an important part in deciding if IPRs are unconstitutional. IPR defenders may argue that even if patents are private property taken by the government, the property is not put to “public use.” If the private property taken by the government is not taken for public use, then there is no Takings Clause violation.⁹¹

This prompts an interesting question. What “public use” is achieved by an IPR invalidating a patent holder’s patent? Supreme Court precedent offers a great starting point to answer that question. First, the Supreme Court has clearly given a broad interpretation of the term “public use.” In *Hawaii Housing Authority v. Midkiff*, the Supreme Court “long ago rejected any literal requirement that condemned property be put into use for the general public.”⁹² The Supreme Court expanded upon that holding by declaring that “public use” (as used in the Takings Clause) simply refers to a “public purpose.”⁹³

⁸⁶ 35 U.S.C. § 311.

⁸⁷ See *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1379 (2018).

⁸⁸ *Id.*

⁸⁹ See *id.* at 1372.

⁹⁰ U.S. CONST. amend. V.

⁹¹ See *Berman v. Parker*, 348 U.S. 26, 31 (1954).

⁹² 467 U.S. 229, 244 (1984).

⁹³ See *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 161 (1896).

Given the broad language that the Supreme Court has given to the phrase “public use,” it is not difficult to see how IPRs constitute a government taking of private property for public use.⁹⁴ When an IPR invalidates a patent, it is cancelling a patent that should not have been issued in the first place.⁹⁵ Cancelling those patents serves an important public purpose.⁹⁶ It allows anyone to infringe on the now invalid patent without fear of liability, because there is no liability for infringing on an invalidated patent.⁹⁷ This frees up inventors who would freely experiment and produce their own potentially patentable invention that covers the same or similar claims as the now-cancelled patent.⁹⁸ This serves a “public purpose” and should therefore cover a party under the Takings Clause when its patent is invalidated by an IPR.

V. CONCLUSION

IPRs are unconstitutional because they violate the Due Process Clause and the Takings Clause of the Fifth Amendment. If the Supreme Court rules that IPRs are unconstitutional, a flood of unresolved issues will come to light. What will the PTAB’s future look like? What practical consequences will this have on the legal system?⁹⁹ What is the “just compensation” to pay to a patent holder whose patent was invalidated, when that patent should not have been granted in the first place? These questions do not have easy answers. However, there is a clear path to end an unconstitutional practice. The Supreme Court should rule that IPRs are unconstitutional and remain vigilant to resolve the new legal issues that will flow from the aftermath of that decision.

⁹⁴ *See id.*

⁹⁵ *Celgene Corp. v. Peter*, 931 F.3d 1342, 1361 (Fed. Cir. 2019).

⁹⁶ *Id.*

⁹⁷ 35 U.S.C. § 282(b)(2).

⁹⁸ *See id.*

⁹⁹ The legal system is already overtaxed and weighted down with many cases. The one good thing about IPRs is that they keep the system moving (by offering an extrajudicial mechanism to invalidate patents and thus freeing up the federal court system to hear other cases). IPRs are unconstitutional, and thus the Supreme Court may decide to end the practice. However, that comes with very real costs. The courts will undoubtedly become even more backlogged if IPRs are no longer permitted to continue.