

## David McCombs, Eugene Goryunov, Jonathan Bowser Author Reuters 'IPR Tricks of the Trade' Article

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May 10, 2022 David McCombs, Jonathan Bowser

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**PRACTICES** Intellectual Property, Patents, Trademark and Advertising, Patent Office Trials, Intellectual Property Litigation

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Haynes Boone Partners [David McCombs](#) and [Eugene Goryunov](#) and Counsel [Jonathan Bowser](#) published an article in *Reuters* titled "IPR Tricks of the Trade: Updates to Director Review Expected."

On April 13, 2022, Kathi Vidal was sworn in as the Under Secretary of Commerce for Intellectual Property and the Director of the U.S. Patent and Trademark Office (USPTO). One of Director Vidal's first initiatives is to increase transparency in the Director review procedure that was established in response to the Supreme Court's decision in *United States v. Arthrex, Inc.*

In *Arthrex*, the Court held that Administrative Patent Judges (APJs) of the Patent Trial and Appeal Board (PTAB) were unconstitutionally acting as principal officers, rather than inferior officers. This is because APJs were issuing unreviewable, final decisions on behalf of the USPTO.

In PTAB post-grant validity challenges — inter partes review (IPR) or post-grant review (PGR) — the PTAB issues a final written decision at the conclusion of an instituted trial indicating whether or not the petitioner proved that the challenged claims are invalid. Thus, the Court found that APJs have "the final word within the Executive Branch on the validity of a challenged patent." (141 S.Ct. 1970, 1976 (2021)). The Court explained that "[o]nly an officer properly appointed to a principal office may issue a final decision binding the Executive Branch in the [IPR or PGR] proceeding." As a remedy, the Court held that "[d]ecisions by APJs must be subject to review by the Director," a principal officer. (*Id.* at 1986).

The USPTO created an interim Director review process in response to *Arthrex*. According to the interim procedure, the Director may review any final written decision of the PTAB sua sponte or at the request of a party. The Director's review "may address any issue, including issues of fact and issues of law, and will be de novo."

On April 22, 2022, the USPTO announced that it intends to issue a Request for Comments (RFC) "in the coming weeks" to formalize the Director review process. To increase transparency, the USPTO also created a new website that provides the status of Director review requests and has continued to update guidance on the interim Director review process website.

Excerpted from *Reuters*. Read more [here](#).