

Takeaways From PTAB's Fiscal Year Statistics

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Since the creation of the Patent Trial and Appeal Board as part of the America Invents Act on Sept. 16, 2012, the PTAB trial proceedings have become an increasingly popular venue for parties seeking to challenge patents. Fiscal year 2015 statistics, recently published by the United States Patent and Trademark Office,[1] indicate continued trends that track closely with the first two fiscal years: sustained growth in PTAB trials, increased settlements and dismissal of proceedings prior to issuance of final written decisions, and continued adverse outcomes for many patent owners. This article summarizes some key takeaways from the USPTO data.

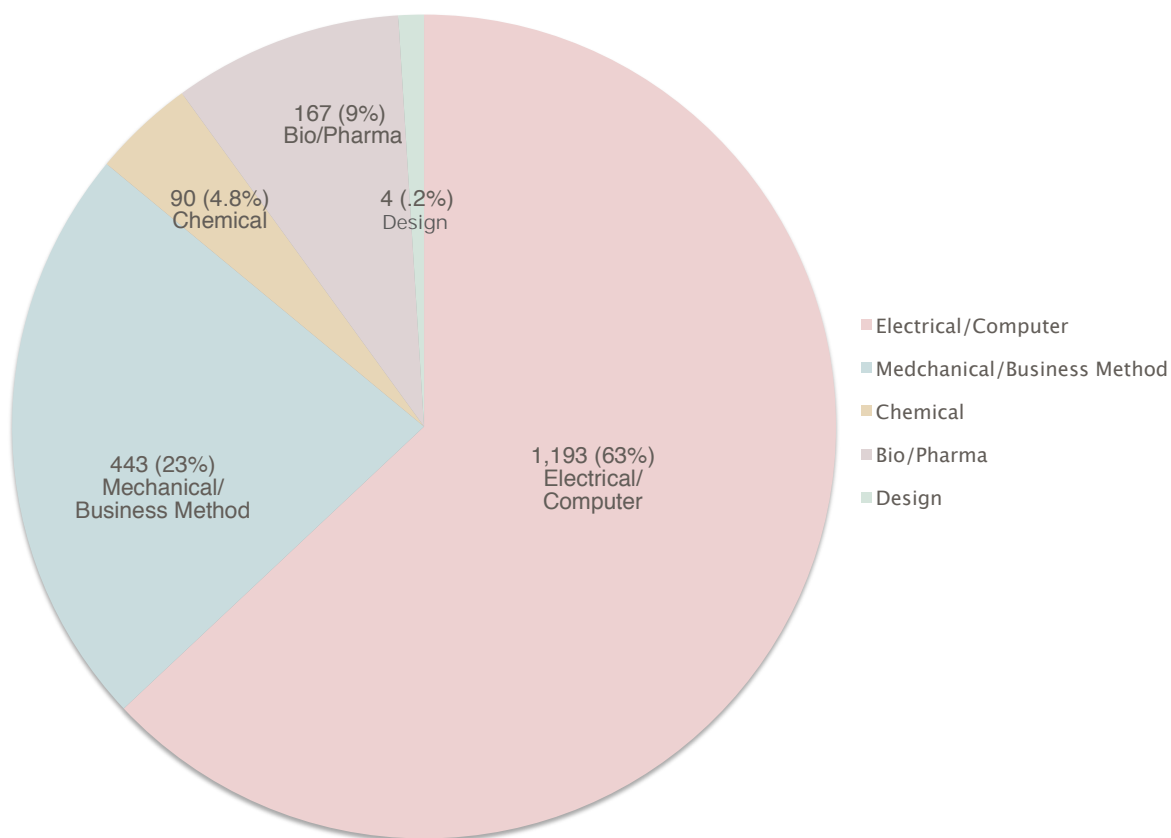
Computer and Business Method Patents Still Receive the Lion's Share of Scrutiny

USPTO FY 2015 ran from Oct. 1, 2014 to Sept. 30, 2015. During this time, the overwhelming majority of inter partes review, covered business method and post-grant review petitions challenged patents in computer and business method technology fields, continuing trends seen during FY 2013 and FY 2014. For FY 2015, the USPTO reported 1,897 new PTAB trial petitions distributed across patent technology centers at the USPTO, which are organized into the following general technology fields:

- 63 percent Electrical/Computer (TCs 2100, 2400, 2600, 2800)
- 23 percent Mechanical/Business Method (TCs 3600, 3700)
- 9 percent Bio/Pharma (TC 1600)
- 4.8 percent Chemical (TC 1700)
- 0.2 percent Design (TC 2900)

USPTO Patent Technology Centers	
1600	Biotechnology and Organic Chemistry
1700	Chemical and Materials Engineering
2100	Computer Architecture, Software, and Information Security
2400	Computer Networks, Multiplex communication, Video Distribution, and Security
2600	Communications
2800	Semiconductors, Electrical and Optical Systems and Components
2900	Designs
3600	Transportation, Construction, Electronic Commerce, Agriculture, National Security and License Review
3700	Mechanical Engineering, Manufacturing, Products

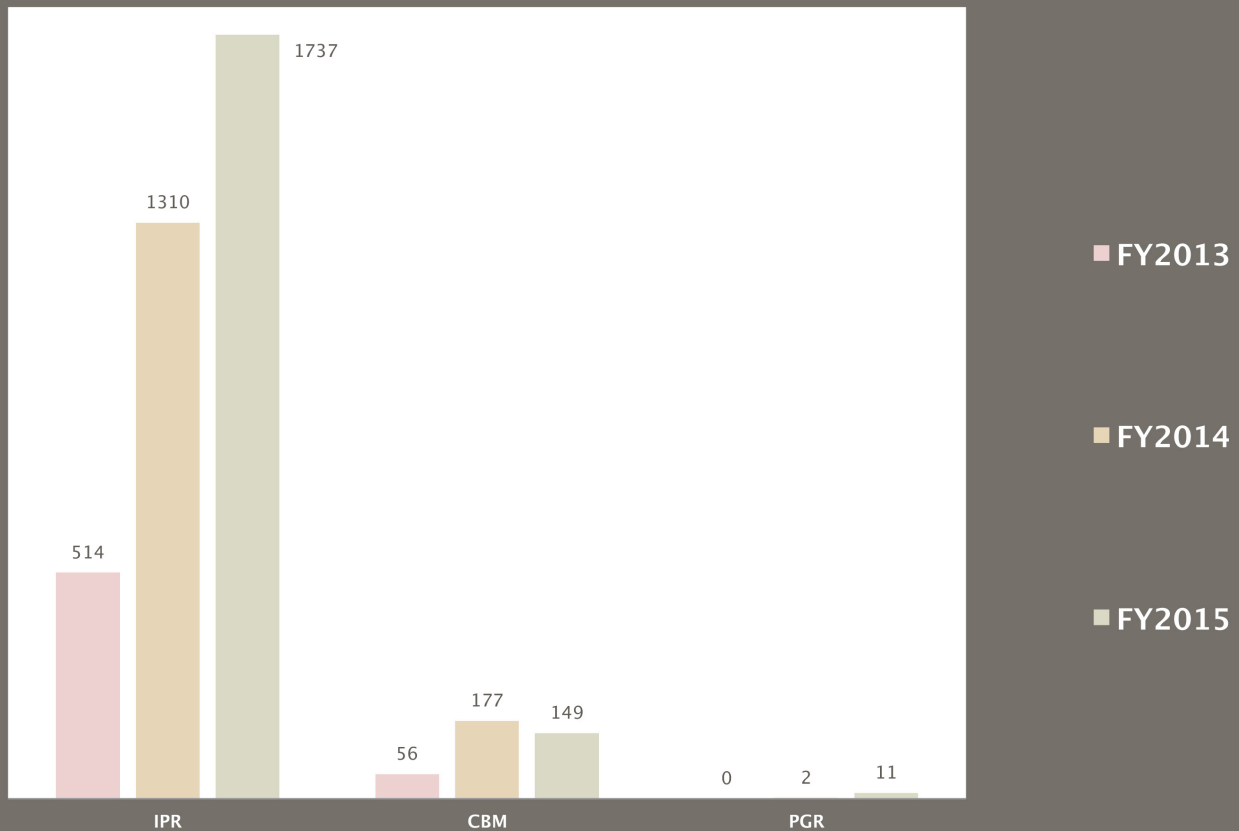
1,897 TOTAL AIA PETITIONS IN FY2015 (TECHNOLOGY BREAKDOWN)



PTAB Trial Petitions Continue to Grow

The USPTO reported sustained growth in FY 2015 for PTAB trial petitions as a whole, confirming continued interest in this forum for parties challenging patent eligibility and validity. FY 2015 saw an increase in IPR and PGR petitions, with a slight decrease in CBM petitions. That said, the overall average trend for CBM petitions is upward over three years. The following figure and data below illustrates these trends beginning with the creation of the PTAB in 2012 and continuing through FY 2015.

PTAB Trial Petitions Filed by USPTO Fiscal Year



- Significant increase in IPR petitions filed in FY 2015
 - Total of 1,737 IPR petitions filed in FY 2015, up from 1,310 in FY 2014, and 514 in FY 2013
- Slight decrease in CBM petitions filed
 - Total of 149 CBM petitions filed in FY 2015, down from 177 in FY 2014, but still up from 56 in FY 2013
- Continued growth in PGR petitions filed, though still infrequent
 - Total of 11 PGR petitions filed in FY 2015, up from two in FY 2014, and zero in FY 2013

PTAB Trial Institution Rates Are Decreasing, Possibly Due in Part to an Increase in Settlements

FY 2015 statistics indicate a decrease in PTAB trial institution rates for both IPR and CBM petitions.

The decrease in institution rates may be partially due to a substantial increase in the number of pre-institution settlements reported in PTAB trials for FY 2015. For example, increasing settlements on

petitions raising patent-eligible subject matter and other validity issues may weed out some of the stronger petitions that might otherwise have been instituted by the board.

PTAB Trials Instituted in FY2015				
	Year	Percentage of Petitions Instituted (includes joinders)	% Denied	Total
IPR	2013	87% (177)	13% (26)	203
	2014	75% (572)	25% (193)	765
	2015	68% (917)	32% (426)	1,343
CBM	2013	82% (14)	18% (3)	17
	2014	75% (92)	25% (30)	122
	2015	70% (101)	30% (43)	144
PGR	2013	N/A	N/A	0
	2014	N/A	N/A	0
	2015	100%	0%	3

Pre- and Post-Institution Settlements Are Playing an Increasingly Significant Role

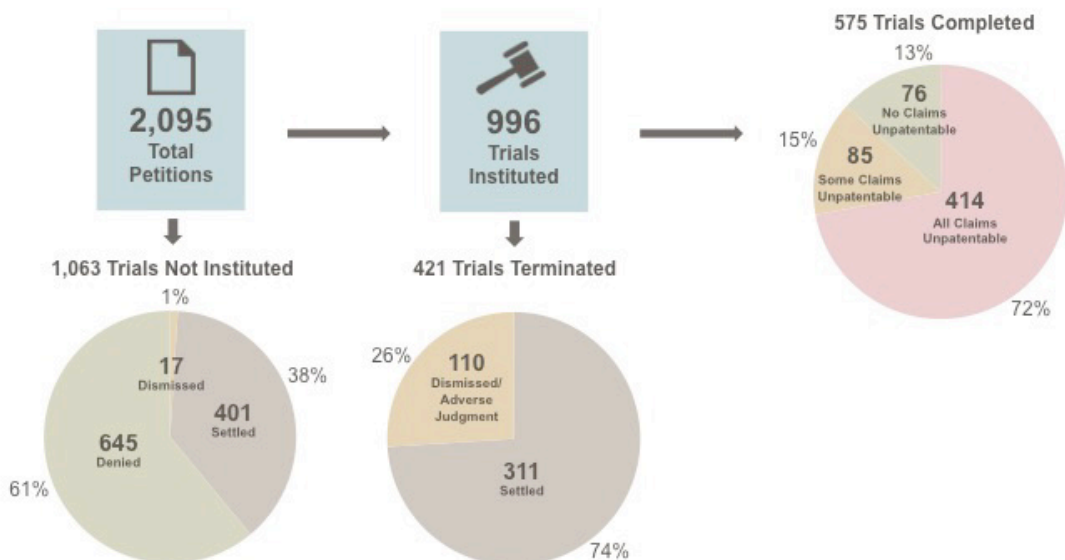
Parties are increasingly opting to settle PTAB proceedings, rather than reach a final written decision, with the exception of CBM settlements before institution. Prior to institution, IPR and CBM settlements are up 160 percent and down 33.3 percent respectively over FY 2014. And after institution (but before final written decision), IPR and CBM settlements are up 82 percent and over 400 percent respectively over FY 2014. Some key takeaways regarding settlements for FY2015 are:

- IPR settlements are increasing, both prior to and during trial
 - Pre-Institution: 275 petitions settled in FY 2015, representing 26 percent of all trials not instituted since 2012
 - Post-Institution: 189 trials settled in FY 2015, representing 45 percent of all terminated trials since 2012, and 19 percent of all trials instituted since 2012
- CBM settlements are increasing, especially during trial
 - Pre-Institution: 14 petitions settled in FY 2015, representing 12 percent of all trials not instituted since 2012
 - Post-Institution: 32 trials settled in FY 2015, representing 65 percent of all terminated trials since 2012, and 25.4 percent of all trials instituted since 2012

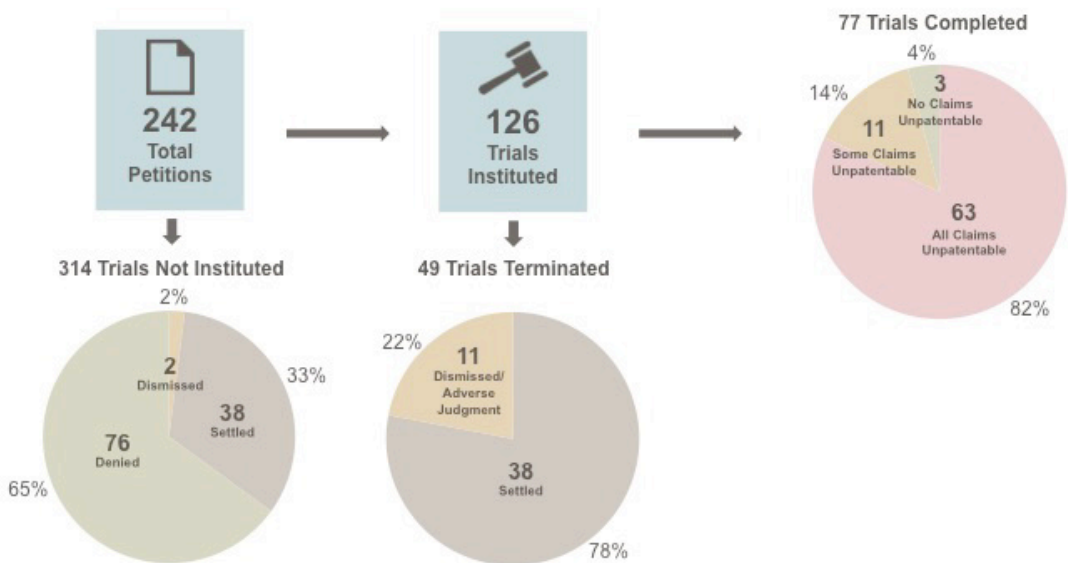
One-Third of IPRs and CBMs Completed to Date Have Settled

The following figures illustrate how pre- and post-institution settlements have impacted IPR and CBM petitions that have reached final disposition to date. Importantly, although settlements may terminate proceedings without the potential adverse impact of a final written decision, the practical, real-world impact of a settlement on a challenged patent can be significant.

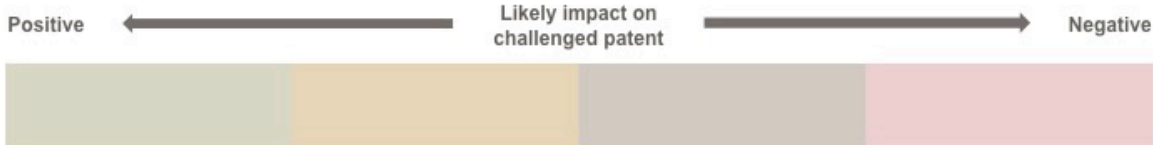
2,095 IPR Petitions Completed Through FY2015



242 CBM Petitions Completed Through FY2015



KEY



Only two PGRs had reached final disposition by the end of FY 2015 (not depicted above), and both settled prior to institution.

Adverse Outcomes Continue for Patents That Reach a Final Decision

By the end of FY 2015, 2,303, or 58 percent of the 3,973 PTAB trial petitions filed since the creation of the PTAB had reached final disposition. The USPTO considers a petition to have reached final disposition when trial is completed, institution is denied or dismissed, or the parties reach settlement and the PTAB terminates proceedings. The USPTO considers a settlement prior to an institution decision as a “trial not instituted.”

As the above figures show, for the 575 IPRs that did not settle and had reached a final written decision during FY 2013-2015, an overwhelming 87 percent canceled at least one claim, with 72 percent canceling all challenged claims. And for the 77 CBMs that had reached a final written decision during FY 2013-2015, 96 percent canceled at least one claim, with 82 percent canceling all challenged claims.

Sustained Growth in PTAB Petitions Will Likely Continue

The USPTO’s FY 2015 statistics underscore a sustained trend of growth in PTAB petitions, including nearly a 33 percent increase in IPR petitions over the prior year. Although the percentage of instituted petitions has continued to drop, this is likely attributable in part to the growing number of pre-institution settlements. Post-institution settlements continue to increase, and for those petitions that reach final written decision, the probability of canceling at least one — if not all — challenged claims remains very high. At the time of writing, October and November 2015 statistics indicate that these trends are likely to continue into FY 2016.

—By Cyrus Morton, Bryan Mechell and Shui Li, Robins Kaplan LLP

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[1] Patent Trial and Appeal Board Statistics, FY2015, United States Patent and Trademark Office, available at <http://www.uspto.gov/patents-application-process/appealing-patent-decisions/statistics/aia-trial-statistics>.

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