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PRECEDENTIAL OPINION PANEL RESOLVES CONFLICTS IN PTAB OPINIONS ON JOINDER: THE ROLE OF AMICUS BRIEFS

JIHONG LOU, MATTHEW W. JOHNSON, CHRIS Z. LIU*

INTRODUCTION

Since its inception through the Leahy-Smith America Invents Act ("AIA"), the proper role and function of the Patent Trial and Appeal Board ("PTAB") of the U.S. Patent and Trademark Office ("PTO") in adversarial post-grant proceedings has been continually under debate. 1 Different stakeholders tend to align differently on issues according to their perspective on the role of patents in today’s economy, leading to interesting debates on nearly every aspect of PTAB practice. 2 These debates at times take place within the PTAB itself, between different panels in deciding different cases. 3 For a tribunal that has hundreds of administrative patent judges, hears thousands of cases, and issues three-judge-panel opinions that by default are not binding in subsequent cases, the PTAB has inevitably produced opinions that disagree on some of the recurring issues in post-grant AIA proceedings. 4

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3. See 35 U.S.C. § 6(c) (2011) ("3-MEMBER PANELS.—Each appeal, derivation proceeding, post-grant review, and inter partes review shall be heard by at least 3 members of the Patent Trial and Appeal Board . . . . ").
4. Many PTAB panels have also declined to decide certain questions as beyond their authority to decide, such as constitutional questions. See, e.g., Askeladden LLC v. N5 Techs., LLC, No. IPR2017-00083, Paper 36 at 25–26 (P.T.A.B. Apr. 18, 2018) ("Patent Owner argues that inter partes review proceedings are unconstitutional. We decline to consider the constitutional challenge as, generally,
Prior procedures for imbuing particular PTAB opinions with precedential value were limited in their ability to create binding authority to resolve panel conflicts.5

In September 2018, the PTAB revised its Standard Operating Procedure No. 2 (“SOP2”) to create a Precedential Opinion Panel (“POP”).6 Under the revised SOP2, the PTAB may convene a “POP” to rehear a PTAB decision on issues of exceptional importance, such as constitutional questions, important issues regarding statutes and regulations, and other issues of broad applicability to the PTAB, or to resolve conflicts between previous PTAB opinions.7 The revised SOP2 also provides that the POP may invite amicus briefs from interested stakeholders to gather their input into a single adjudicative proceeding, encouraging an airing of different perspectives on an important topic.8

The convening of the first ever POP in Proppant Express Investments, LLC v. Oren Technologies, LLC (“PropX”) in November 2018 provides a window into this new vehicle for centralized debate and resolution of PTAB topics of particular import.9 In PropX, the POP assumed jurisdiction over a case before a panel of the PTAB for the limited purposes of considering issues relating to same-party joinder under 35 U.S.C. § 315(c) and resolving conflicts in prior PTAB opinions on those issues.10 The POP solicited amicus briefs and received six briefs in which the amici took divergent positions on the issues identified by the POP.11 After an oral hearing, the POP issued a precedential opinion in which it extensively addressed many arguments


7. Id. at 4.

8. Id. at 4, 7.


11. See infra Part IV.
raised in the amicus briefs, indicating that those briefs substantially shaped its decision.¹²

This article analyzes the positions that different amici took in their briefs in the POP proceeding to illuminate the practical implementation of the first POP and to illustrate the expanded opportunity for debate enabled by the newly implemented SOP2. Part I reviews the previous and current procedures for designating PTAB opinions precedential. Part II reviews the procedures for convening a POP under the revised SOP2. Part III summarizes the background of the PropX case and the joinder issues the case presents. Part IV analyzes the POP proceeding in PropX and the party and amicus briefs in that proceeding. Part V reviews the POP’s opinion in PropX, in which it addressed many arguments raised by amici, demonstrating the substantial utility of the amicus briefs. The Conclusion explores the future of the POP procedure at the PTAB.

I. PRIOR AND CURRENT PROCEDURES FOR DESIGNATING PRECEDENTIAL DECISIONS

The PTAB designates its opinions as one of four categories: (1) precedential; (2) informative; (3) representative; and (4) routine.¹³ Among those, only precedential opinions are binding PTAB authority.¹⁴ Informative opinions, though not binding, also carry significant persuasive weight.¹⁵ By default, a PTAB opinion is a routine opinion unless designated otherwise.¹⁶


¹⁴. SOP2 Rev. 9, supra note 13, at 3–4 (“A precedential opinion is binding authority in subsequent matters involving similar facts or issues.”); see also SOP2 Rev. 10, supra note 6, at 11 (same). Such precedential opinions may, however, be “overcome by subsequent binding authority.” SOP2 Rev. 9, supra note 13, at 3; see also SOP2 Rev. 10, supra note 6, at 12 (same).

¹⁵. SOP2 Rev. 9, supra note 13, at 3 (“Considerations [for designating an opinion informative] include: [p]roviding Board norms on recurring issues, [p]roviding guidance on issues of first impression, and [p]roviding guidance on Board rules and practices.”); see also SOP2 Rev. 10, supra note 6, at 11 (“Informative decisions set forth Board norms that should be followed in most cases, absent justification, although an informative decision is not binding authority on the Board.”).

¹⁶. SOP2 Rev. 9, supra note 13, at 4; see also SOP2 Rev. 10, supra note 6, at 3.
Under prior versions of SOP2, an opinion could be designated precedential “for any reason, but particular emphasis [was] placed on opinions resolving conflicts or addressing novel questions.” Any member of the PTAB could recommend designating an opinion precedential, and a party to the PTAB proceeding or a member of the public could submit a request for precedential designation to the Chief Judge of the PTAB. If the Chief Judge considered a nominated opinion to be an appropriate candidate, each member of the PTAB was invited to vote within a preset period of time. The PTAB made an opinion precedential only if “a majority of the Board’s voting members agree that the opinion should be made precedential” and “the Director concurs that the opinion should be designated precedential.” Under these procedures, however, only a small number of decisions were designated precedential.

In addition, Standard Operating Procedure No. 1 (“SOP1”) allows the PTAB in rare circumstances to convene expanded panels consisting of more than three judges to decide issues of exceptional importance and to resolve conflicts in PTAB decisions. But an opinion of an expanded panel must go through the designation process to become precedential.

Since the enactment of the AIA in 2012, the PTAB has received over 9,700 petitions for AIA trials, and “[t]he Board enters thousands of

17. SOP2 Rev. 9, supra note 13, at 2.
18. Id.
19. Id.
20. Id.
21. See supra note 5.


decisions every year.”

The large number of cases, typically decided by three-judge panels constituted from over 200 judges of the PTAB, have inevitably led to conflicts in panel decisions on certain recurring issues. Therefore, designating an opinion precedential can be an effective tool for resolving conflicts. But the previous procedures may not have effectively served this important objective.

In September 2018, the PTAB revised its SOP2, which sets forth a revised procedure for designating an opinion precedential. Under the revised SOP2, “[a]ny person,” including “members of the public,” may nominate a PTAB opinion for precedential designation. A Screening Committee considers the nominated opinions, and the screened nominations are then “further reviewed” by an Executive Judges Committee, which submits its recommendations to the Director. No decision may be designated precedential without the Director’s approval.

Using this revised procedure, the PTAB recently designated ten decisions precedential over a period of two months (from March 7, 2019 to May 7, 2019), suggesting that the revised SOP2 may lead to more precedential designations.

24. See, e.g., SOP2 Rev. 10, supra note 6, at 3; see also SOP2 Rev. 9, supra note 13, at 1.
25. SOP2 Rev. 10, supra note 6, at 9–11.
26. Id. at 9.
27. Id. at 9–10. The Executive Judges Committee may solicit comments from all members of the Board to determine whether to recommend the nominated decision for designation. Id. at 1. The Director may consult with others, such as members of the POP and the Office of the General Counsel. Id. at 10–11.
28. Id. at 8, 11. Additionally, the Director may designate any PTAB decision by any panel as precedential in his or her sole discretion, even if it has not been nominated for such designation via the above procedures, and the Director has sole discretion in de-designating precedential decisions. Id. at 8, 11 n.4.
II. Precedential Decisions By POPs Under the Revised SOP2

The revised SOP2 not only changed the PTAB procedure for designating an opinion precedential but also created a new POP process for issuing precedential opinions directly. SOP2 explains that the purpose of the POP review is for “creating binding norms for fair and efficient Board proceedings, and for establishing consistency across decision makers.” Thus, the POP may be used to decide issues of exceptional importance or to resolve conflicts in PTAB decisions.

The PTO Director selects the POP members, which by default consist of the Director, the Commissioner for Patents, and the PTAB Chief Judge. The PTO initiates a POP review in one of three ways. First, the Director may convene a POP in his or her discretion to review a PTAB decision and determine whether to order *sua sponte* rehearing. Second, any party to a proceeding may recommend POP review of a decision in that proceeding. Third, the Commissioner for Patents, the Chief Judge, or other members of the PTAB may recommend POP review. For a review recommended by a party or a PTAB member other than the Director, a Screening Committee reviews the case and makes its recommendation to the Director. The Director then decides whether to order POP review. If the Director orders a POP review, the POP enters an order in the PTAB docket to notify the parties and the public and to identify the issues for review. The POP may

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30. SOP2 Rev. 10, supra note 6, at 2–3.
31. Id. at 2.
32. Id. at 3–4 (explaining that the POP may be used to “address constitutional questions; important issues regarding statutes, rules, and regulations; important issues regarding binding or precedential case law; or issues of broad applicability to the Board” or to “resolve conflicts between Board decisions, to promote certainty and consistency, or to rehear any case it determines warrants the Panel’s attention.”). One or more of the default members may be substituted, and the revised SOP2 details the process for substituting default members. Id. And the Director in appropriate cases may convene a POP of more than three members. Id.
34. Id. at 5–6.
35. Id. at 5.
36. Id. at 5–6.
37. Id. at 6. In PropX, the POP review was initiated by either the Director or a member of the PTAB, not by one of the parties, as the petition for rehearing did not request rehearing by the POP. See infra notes 57–58 and accompanying text.
38. SOP2 Rev. 10, supra note 6, at 6–7.
39. Id. at 7.
40. Id.
request additional briefing and, interestingly, may even authorize amicus briefs.\textsuperscript{41} This represents the first time that the PTAB has authorized amicus briefing in the agency’s adjudicative proceedings through a formal procedure.\textsuperscript{42}

III. BACKGROUND OF PropX AND SAME-PARTY JOINER UNDER SECTION 315(C)

Two months after implementing the revised SOP\textsubscript{2}, the PTAB convened its first POP in PropX to review issues relating to same-party joinder.\textsuperscript{43} The background of the PropX case is summarized as follows.

In September 2017, PropX petitioned for inter partes review ("IPR") of a patent owned by Oren within the one year period of 35 U.S.C. § 315(b).\textsuperscript{44} On March 16, 2018, the PTAB instituted review of all challenged claims except one because PropX’s petition failed to address all limitations of that claim.\textsuperscript{45} On April 16, 2018, PropX filed a second petition for IPR only challenging that denied claim but raising new issues of patentability relative to that claim, together with a motion for joinder seeking to join the instituted IPR (of which it is already a party) under 35 U.S.C. § 315(c).\textsuperscript{46} The second
petition was filed after the one-year period of § 315(b). Thus, without a granted joinder motion, the second petition would have been time-barred.

A three-judge panel of the PTAB denied joinder. While recognizing that several prior non-precedential PTAB opinions have interpreted § 315(c) as permitting same-party joinder of new issues, a majority of the PropX panel expressly disagreed with those prior decisions and interpreted the “join as a party” language of § 315(c) as only permitting joinder of a new party to existing proceedings without introducing new issues of patentability. Because PropX sought to join a proceeding in which it was already a party and to add new issues of patentability, the panel majority denied joinder. The panel also denied institution on the second petition as time-barred because the denial of the joinder motion negated the joinder exception to the § 315(b) one-year time limit on petitions.


§ 42.101(b) shall not apply when the petition is accompanied by a request for joinder.” Here, PropX’s request for joinder and second petition were filed no later than one month after the PTAB issued the institution decision in the first IPR, but outside the one-year statutory period of § 315(b).

47. PropX Initial Panel Decision, supra note 44, at 3, 6.


50. Id.; see also 35 U.S.C. § 315(b) (2011) (“The time limitation set forth in the preceding sentence shall not apply to a request for joinder under subsection (c).”). Most Board decisions addressing this issue before PropX agreed that § 315(b)’s exception to the one-year time bar applied only if the motion for joinder was granted. But see Sony Corp. of Am. v. Network-1 Securities Sols., Inc., No. IPR2013-00386, Paper 16 at 5 (P.T.A.B. July 29, 2013) (denying joinder but holding that § 315(b)’s one-year bar nevertheless “did not apply to Petitioners because they filed a motion for joinder with their Petition”); accord Sony Corp. of Am. v. Network-1 Security Sols., Inc., No. IPR2013-00386, Paper 15 at 5 (P.T.A.B. July 29, 2013) (same). The PropX POP decision held that unless “the Director exercises discretion to join pursuant to § 315(c) . . . there is no exception to the [§ 315(b)] time limitation,” thus effectively resolving this conflict. PropX POP Opinion, supra note 12, at 21.
permitted by § 315(c), but the PTAB may exercise its discretion to deny joinder.\textsuperscript{51} He would have denied joinder because PropX merely sought to correct its own mistakes in the first petition and delayed in doing so.\textsuperscript{52} Alternatively, he would also have denied joinder on the basis that all the \textit{General Plastic} factors favored denial of the second follow-on petition.\textsuperscript{53}

\textbf{IV. FIRST POP CONVENED IN \textit{PROP}X TO RESOLVE PTAB PANEL CONFLICTS}

The majority and concurring opinions in \textit{PropX} illustrate some of the differing views of different PTAB judges on same-party joinder under § 315(c).\textsuperscript{54} On November 30, 2018, the first PTAB POP was convened in \textit{PropX} to resolve these conflicts.\textsuperscript{55} The POP authorized further briefing by the parties, as well as from interested amici, to address the following three questions:

1. Under 35 U.S.C. § 315(c) may a petitioner be joined to a proceeding in which it is already a party?
2. Does 35 U.S.C. § 315(c) permit joinder of new issues into an existing proceeding?
3. Does the existence of a time bar under 35 U.S.C. § 315(b), or any other relevant facts, have any impact on the first two questions?\textsuperscript{56}

Notably, \textit{PropX} did not request the POP review under SOP2, as it only sought rehearing by an expanded panel under SOP1 in its rehearing request.\textsuperscript{57} The POP review was therefore either initiated by the Director himself or recommended by another member of the PTAB.\textsuperscript{58} The POP order explained

\begin{itemize}
\item \textsuperscript{51} PropX Initial Panel Decision, \textit{supra} note 44, concurring op. at 1–2 (Cherry, APJ., concurring).
\item \textsuperscript{52} \textit{Id.} at 3–4 (citing Amneal Pharm., LLC v. Endo Pharm., Inc., No. IPR2014-01365, Paper 13 (P.T.A.B. Feb. 4, 2015)).
\item \textsuperscript{54} \textit{See supra} note 48 (collecting cases).
\item \textsuperscript{55} PropX Order Convening POP, \textit{supra} note 9. The \textit{PropX} POP consisted of the default members as set forth in SOP2, namely, PTO Director Andrei Iancu, Commissioner for Patents Drew Hirshfeld, and PTAB then-Acting Chief Judge Scott Boalick.
\item \textsuperscript{56} PropX POP Order, \textit{supra} note 10, at 2.
\item \textsuperscript{57} Propellant Express Invvs., LLC v. Oren Techs., LLC, No. IPR2018-00914, Paper 22 at 2 (P.T.A.B. Nov. 27, 2018); \textit{see also supra} note 22 and accompanying text.
\item \textsuperscript{58} \textit{See SOP2 Rev. 10, supra} note 6, at 5–6.
\end{itemize}
that the POP review was appropriate because “Board decisions conflict on the proper interpretation of 35 U.S.C. § 315(c).”59

The POP received six amicus briefs from a collection of entities: (1) the Naples Roundtable (“Naples”)60; (2) IXI IP, LLC (“IXI”)61; (3) American Intellectual Property Law Association (“AIPLA”)62; (4) David Boundy (“Boundy”)63; (5) Biotechnology Innovation Organization (“BIO”)64; and (6) Microsoft Corporation (“Microsoft”).65 All the amicus briefs, except the brief by David Boundy, addressed the questions outlined in the POP order. As illustrated in the table below, the parties and amici took divergent positions on joinder and the impact of the one-year bar.66


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<th>Under § 315(c) may a petitioner be joined to a proceeding in which it is already a party?</th>
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<tr>
<td>Petitioner (PropX)</td>
<td>Yes.67</td>
<td>Yes.68</td>
<td>No, § 315(c) expressly permits same-party joinder and joinder of new issues.69</td>
</tr>
<tr>
<td>Patent Owner (Oren)</td>
<td>No.70</td>
<td>No.71</td>
<td>Yes, the time-bar further supports Oren’s position on the two questions.72</td>
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<tr>
<td>Naples</td>
<td>Yes.73</td>
<td>Yes.74</td>
<td>No, the Director should exercise discretion in granting or denying joinder to prevent abuse, while taking into account the time-bar as a factor.75</td>
</tr>
<tr>
<td>IXI</td>
<td>No.76</td>
<td>Yes, a timely joinder petition by a new party may add new issues.77</td>
<td>Yes, the one-year time bar is absolute, and it prohibits the use of a late-filed petition as the basis for joinder.78</td>
</tr>
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68. Id. at 1–9.
69. Id. at 9–14.
71. Id. at 7–10.
72. Id. at 10–14.
73. Naples Br., supra note 60, at 3–6.
74. Id. at 6–10.
75. Id. at 10–12.
76. IXI Br., supra note 61, at 6–9.
77. Id. at 9–10.
78. Id. at 11–14.
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<td><strong>AIPLA</strong></td>
<td>AIPLA did not answer these questions and, for purposes of answering the third question, assumed that same-party joinder and joinder of new issues were appropriate.(^{79})</td>
<td>Yes, the one-year time bar does not apply to a petition filed with a joinder motion; but the Director should exercise discretion to grant same-party joinder in only limited cases to prevent abuse.(^{80})</td>
<td></td>
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<tr>
<td><strong>BIO</strong></td>
<td>No.(^{81}) Yes, a timely joinder petition by a new party may add new issues in a limited manner.(^{82})</td>
<td>No, the one-year time bar is not directly relevant, because same-party joinder is prohibited in all circumstances, and because a late petitioner may not add any issue to an instituted IPR.(^{83})</td>
<td></td>
</tr>
<tr>
<td><strong>Microsoft</strong></td>
<td>Section 315(c) is ambiguous; the PTO should promulgate regulations through notice-and-comment rulemaking and adopt regulations that allow same-party joinder and joinder of new issues consistent with the intent of the AIA.(^{84})</td>
<td>Yes, the one-year time bar does not apply to a petition filed with a joinder motion; but it may inform the Director in exercising discretion to decide whether to grant joinder.(^{85})</td>
<td></td>
</tr>
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80. Id. at 4–13.
81. BIO Br., supra note 64, at 4–10.
82. Id. at 10–13.
83. Id. at 13–15.
84. Microsoft Br., supra note 65, at 3–8, 9–15.
85. Id. at 8–9.
Under § 315(c) may a petitioner be joined to a proceeding in which it is already a party? Does § 315(c) permit joinder of new issues into an existing proceeding? Does the existence of a time bar under § 315(b), or any other relevant facts, have any impact on the first two questions?

Boundy The POP is conducting improper rulemaking-by-adjudication in violation of the Administrative Procedure Act. For example, the POP did not provide sufficient public notice and time for interested amici to prepare their briefs.

V. PRECEDENTIAL OPINION IN PROPX RESOLVING CONFLICTS ON JOINDER

On March 13, 2019, three and half months after the POP convened, it issued a precedential decision addressing all three questions and reaffirming the denial of PropX’s joinder motion. The POP held that § 315(c) provides the Director discretion to allow joinder of not only a petitioner to a proceeding in which it is already a party but also new issues of patentability. The POP also held that the § 315(b) time bar is one of several factors that may be considered when exercising the discretion under § 315(c). The POP emphasized that in exercising this discretion, joinder of otherwise time-barred parties will be allowed only in limited circumstances, “namely, where fairness requires it and to avoid undue prejudice to a party.” For example, a patent owner asserting new claims after the one-year bar in a co-pending litigation may justify joinder. In contrast, the mistakes or omissions of a petitioner very likely will not raise fairness or prejudice concerns to warrant joinder. As applied in this case, the POP denied joinder because PropX requested joinder to correct its own mistakes, there were no

87. Id. at 5–6.
89. Id. at 4.
90. Id.
91. Id.
92. Id.
93. Id.
fairness or prejudice concerns, and the second petition was otherwise time-barred under § 315(b).94

As to the first question identified in the POP order (joinder of the same party), the POP relied on the language of § 315(c) that “any person who properly files a petition” may request joinder. The POP reasoned that “by using the expansive phrase ‘any person,’” Congress provided the Director discretion to join a person who is already a petitioner in a proceeding.95 The POP also explained that § 315(c) allows exercising this discretion to guard against gamesmanship of either side of the parties.96

As to the third question (effect of the time bar), the POP interpreted the second sentence of § 315(b) as exempting a petition accompanied by a joinder request from the one-year bar.97 But the POP also acknowledged the importance of the time bar.98 It emphasized that “when an otherwise time-barred petitioner requests same party and/or issue joinder, the Board will exercise this discretion only in limited circumstances—namely, where fairness requires it and to avoid undue prejudice to a party.”99 The POP suggested that when considering a joinder motion, the General Plastic factors may support exercise of discretion to deny institution under § 314(a).100

The POP in its decision addressed many arguments made by amici.101 For example, the POP emphasized the importance of exercising discretion under § 315(c) to guard against gamesmanship by any of the parties and to address fairness and prejudice concerns.102 This is an issue that several amici raised in their briefs.103 Some amici argued that the PTAB should guard against harassment and unfairness to patent owners. For example, instances where (1) a petitioner files serial petitions to challenge the same patent using earlier institution decisions as a roadmap for the later petitions, (2) a petitioner attempts to use joinder to correct deficiencies in prior petitions, and (3) a petitioner seeks to circumvent the one-year time bar, were cited as

94. Id.
95. Id. at 5–6, 9.
96. Id. at 11.
97. Id. at 17.
98. Id. at 18.
99. Id. at 19.
100. Id.
101. Id. at 5–19.
102. See, e.g., id. at 4, 10–11, 16, 18–19.
103. See, e.g., BIO Br., supra note 64, at 4–5, 9–10; AIPLA Br., supra note 62, at 4, 9–11, 13–14; Microsoft Br., supra note 65, at 3, 10–14.
problematic.\textsuperscript{104} In other cases, however, as some amici also argued, a patent owner may attempt to use the time bar to prevent a petitioner from challenging claims that are asserted in co-pending litigation after a PTAB petition is filed, and if so, discretion to grant joinder may be exercised to guard against prejudice and gamesmanship.\textsuperscript{105} The POP appeared to be moved by those arguments, as demonstrated by the questions it asked during the oral hearing and the analysis in its precedential opinion.\textsuperscript{106}

The POP also repeatedly cited the amicus briefs in its opinion: it cited the BIO brief 13 times, the IXI brief seven times, each of the Naples and Microsoft briefs three times, and the AIPLA brief once.\textsuperscript{107} This suggests that the arguments of amici helped shape the POP decision.

\textbf{CONCLUSION}

The PropX POP was a successful vehicle for providing a central hearing for interested views on an issue over which PTAB panels had disagreed in the past. The parties and amici were allowed to brief the three questions identified by the POP order, and the POP appeared to seriously consider each of those viewpoints in crafting its decision. Certain aspects of this first POP may be considered sub-optimal by some, such as the manner that notice of dissemination of the POP notice and the amount of time provided to amici for briefing. It is likely that the PTAB will improve on these issues going forward. Generally, based on a robust briefing of the issues, the POP permitted the setting of PTAB policy and resolution of PTAB conflicts on a number of questions where clarity was lacking, providing a successful exercise for both the PTAB and the bar.

\textsuperscript{104} See, e.g., AIPLA Br., supra note 62, at 9–10, 13; Microsoft Br., supra note 65, at 11–14.
\textsuperscript{105} See, e.g., BIO Br., supra note 64, at 9–10; AIPLA Br., supra note 62, at 10–11.
\textsuperscript{106} See, e.g., Hearing Transcript, supra note 66, at 10–11, 17, 19, 22–23, 25; PropX POP Opinion, supra note 12, at 4, 10–11, 16, 18–19.
\textsuperscript{107} Id. at 5–19.