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# Review of Patent Owner Estoppel Under 37 C.F.R. § 42.73(d)

DANIEL SLOAN, SARAH GEERS, JACK GRAVES, SABRINA BELLANTONI AND  
MATT JOHNSON

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## INTRODUCTION

Statutory estoppel against a petitioner in a post-grant challenge under 35 U.S.C. § 315(e) or § 325(e) is frequently discussed by Patent Trial and Appeal Board (“PTAB”) practitioners. Regarding *inter partes* reviews (“IPRs”), practitioners know that the “petitioner in an inter partes review of a claim . . . that results in a final written decision . . . may not assert [] in a civil action . . . that the claim is invalid on any ground that the petitioner raised or reasonably could have raised during that IPR<sup>1</sup>” Petitioner estoppel, in the post-grant review context, is essentially the same although, consistent with post-grant review’s broader scope, it applies to a broader range of statutory bases.<sup>2</sup>

In contrast, patent owner estoppel (“POE”), codified at 37 C.F.R. § 42.73(d)(3), has not received the same attention. This is likely due to various reasons, including the time the estoppel attaches. For example, petitioner estoppel is immediate upon issuance of a Final Written Decision, which can have an instant impact on co-pending litigation.<sup>3</sup> In contrast, POE applies only after all appeals (if any) are concluded, and its effects are mostly felt in downstream patent prosecution (but can apply elsewhere).<sup>4</sup>

This article will review (1) POE under § 42.73(d)(3) and its possible consequences; and (2) the treatment of POE by tribunals including district courts and the PTAB, as well as during patent examination and reexamination. Practitioners should take note that POE under this provision may extend beyond the prosecution context, including to subsequent post-grant challenges and *ex parte* reexaminations. Thus, there may be opportunities for practitioners to use § 42.73(d)(3) to complement and expand on traditional collateral estoppel arguments.

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1. 35 U.S.C. § 315(e)(2).

2. 35 U.S.C. § 325(e)(2).

3. See § 315(e) (petitioner estoppel applies to an *inter partes* review petition “that results in a final written decision under section 318(a)”; accord § 325(e) (post-grant review petitioner estoppel).

4. Before POE can apply, an “adverse judgment” must attach. See *SDI Techs., Inc., v. Bose Corp.*, No. IPR2014-00346, 2015 WL 3749669, at \*5 (P.T.A.B. June 11, 2015) (“[W]e agree with Patent Owner that Rule 42.73(d)(3) does not apply in this case, at least because Patent Owner’s appeal rights in IPR-465 have not been exhausted.”). 37 C.F.R. § 42.73(b) provides a nonexclusive list of the actions that the PTAB construes as a request for adverse judgment: “(1) Disclaimer of the involved application or patent; (2) Cancellation or disclaimer of a claim such that the party has no remaining claim in the trial; (3) Concession of unpatentability or derivation of the contested subject matter; and (4) Abandonment of the contest.” 37 C.F.R. § 42.73(b). In *Apple Inc. v. Softview* the PTAB further clarified that § 42.73(b) is non-inclusive and that § 42.73(d)(3) was not limited to requested adverse judgments, but more expansively applied to claims “not patentably distinct from a ‘finally refused claim,’ when the adverse judgment is under either § 42.73(a) or § 42.73(b).” See *Apple Inc. v. Softview LLC*, No. 2021-05530, 2022 WL 1210851, at \*17 (P.T.A.B. Apr. 6, 2022) (relying on comments in the federal register commentary to conclude reexamination confirming a previously issued claim is an adverse judgment). Accordingly, a Final Written Decision finding claims unpatentable or a party’s request for judgment against itself both constitute an adverse judgment and allow § 42.73(d)(3) to attach. See *SDI Techs.*, 2015 WL 3749669, at \*5. Following an adverse Final Written Decision, POE would not attach until all appeal rights have been exhausted. See *id.*

## BACKGROUND

Unlike traditional collateral estoppel, POE under § 42.73(d)(3) was implemented as a United States Patent and Trademark Office (“USPTO”) rule. Estoppel against a patent owner can still arise under traditional principles of collateral estoppel applying to the litigation of identical issues that have been actually litigated.<sup>5</sup> In contrast, POE under § 42.73(d) applies to a potentially broader category of actions: those “inconsistent with [an] adverse judgment.”<sup>6</sup>

The USPTO first introduced POE in a notice of proposed rulemaking in 2012.<sup>7</sup> In its proposal, the USPTO explained that this new provision “would apply estoppel against a party whose claim was cancelled or who requested an amendment to the specification or drawings that was denied.”<sup>8</sup> Relevant to the scope of the regulation, the USPTO published rules providing “guidance as to the conditions under which the Board would infer a request for adverse judgment.”<sup>9</sup> And by its own terms, Part 42 of Title 37 of the Code of Federal Regulations applies to and governs post-grant trial proceedings before the PTAB.<sup>10</sup>

As will be discussed, a few key provisions of 37 C.F.R. § 42.73(d)(3) changed between the USPTO’s initial proposal and the final rule:

## (d) Estoppel—

...

(3) *Patent applicant or owner.* A patent applicant or owner ~~whose claim is canceled~~ is precluded from taking action inconsistent with the adverse judgment, including obtaining in any patent:

(i) A claim ~~to substantially the same invention as the~~ that is not patentably distinct from a finally refused or canceled claim;

5. See *Google LLC v. Hammond Dev. Int’l, Inc.*, 54 F.4th 1377, 1380 (Fed. Cir. 2022) (finding collateral estoppel rendered a claim unpatentable from an *inter partes* review final written decision). See *id.* at 1381 (stating that a “party seeking to invoke collateral estoppel must show: (1) the issue is identical to one decided in the first action; (2) the issue was actually litigated in the first action; (3) resolution of the issue was essential to a final judgment in the first action; and (4) [the party against whom collateral estoppel is being asserted] had a full and fair opportunity to litigate the issue in the first action.”) (citing *In re Freeman*, 30 F.3d 1459, 1465 (Fed. Cir. 1994)). For the sake of clarity, where this article refers to “patent owner estoppel” or “POE,” it refers to estoppel under 37 C.F.R. § 42.73(d) and not to traditional common law collateral estoppel.

6. Compare *Google LLC*, 54 F. 4th at 1381, with 37 C.F.R. § 42.73(d).

7. See Rules of Practice for Trials Before the Patent Trial and Appeal Board and Judicial Review of Patent Trial and Appeal Board Decisions (Proposed), 77 Fed. Reg. 6879, 6890 (Feb. 9, 2012).

8. *Id.* Unlike other provisions included in § 42.73(d), the USPTO cited no statutory authority as a specific basis for the POE rule. When the POE regulation was finalized, the USPTO stated that the provision’s basis was “35 U.S.C. 316(a)(4), as amended, and 326(a)(4), which require that the Office prescribe regulations establishing and governing the reviews and the relationship of such reviews to other proceedings under title 35.” Rules of Practice for Trials Before the Patent Trial and Appeal Board and Judicial Review of Patent Trial and Appeal Board Decisions (Final), 77 Fed. Reg. 48612, 48625 (Aug. 14, 2012).

9. 77 Fed. Reg. at 48624.

10. 37 C.F.R. § 42.1(a).

~~(ii) A claim that could have been filed in response to any properly raised ground of unpatentability for a finally refused or cancelled claim; or~~  
~~([[iii]]ii) An amendment of a specification or of a drawing that was denied during the trial proceeding, but this provision does not apply to an application or patent that has a different written description.~~<sup>11</sup>

While the proposed rulemaking was pending, several commenters questioned the statutory basis for the POE provision.<sup>12</sup> The comments argued that the proposed rule was inconsistent with the America Invents Act (“AIA”), was inconsistent with other statutory provisions, and exceeded the scope of the traditional doctrines of claim and issue preclusion.<sup>13</sup> In response, the USPTO removed originally proposed subsection (d)(3)(ii).<sup>14</sup> The USPTO also changed language in subsection (d)(3)(i) from preventing claims to “substantially the same invention” to preventing claims that are “not patentably distinct from” a finally refused or canceled claim.<sup>15</sup> The USPTO explained that the final rule “merely provides estoppel against claims that are patentably indistinct from those claims that were lost, and claim amendments that were presented and denied, during a trial.”<sup>16</sup> In its explanation, the Office stated that the final rule was consistent with the common law recapture rule, which prevents a patentee from regaining subject matter surrendered in an effort to obtain allowance of a claim.<sup>17</sup>

When proposing amendments to its Rules of Practice in 2015, the USPTO revisited POE.<sup>18</sup> One series of comments suggested rescinding the provision because commenters believed the rule precluded patent owners from obtaining claims that could have been filed in response to properly raised grounds of unpatentability for finally refused or canceled claims.<sup>19</sup> The USPTO rejected this suggestion, stating that the provision “does not expressly preclude a patent owner from obtaining, in another proceeding, all patent claims that could have been filed in response to any properly raised ground of unpatentability for a finally refused or canceled claim.”<sup>20</sup>

Another commenter suggested that the scope of the POE provision was too broad because it encompassed finally refused or canceled claims in an

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11. Compare 77 Fed. Reg. at 6913, with 77 Fed. Reg. at 48676-77, and 37 C.F.R. 42.73(d)(3).

12. 77 Fed. Reg. at 48649.

13. *Id.*

14. *See id.* (“In view of the comments, the Office modified the proposed rule. As adopted in this final rule, § 42.73(d)(3) does not contain the provision that a patent applicant or owner may not obtain in a patent ‘[a] claim that could have been filed in response to any properly raised ground of unpatentability for a finally refused or cancelled claim.’ Additionally, the Office modified the provision that was proposed in § 42.73(d)(3)(i) to ‘[a] claim that is not patentably distinct from the finally refused or cancelled claim.’”).

15. *Id.*; 77 Fed. Reg. at 6913.

16. 77 Fed. Reg. at 48649.

17. *Id.*

18. *See* 80 Fed. Reg. 50720 (Aug. 20, 2015).

19. *Id.* at 50724.

20. *Id.*

AIA proceeding and might not allow owners to pursue narrower claims in separate reissue, reexamination, or continuing applications.<sup>21</sup> Commenters also sought clarification that estoppel does not arise when a claim amendment is proposed but denied in an AIA review.<sup>22</sup> The USPTO declined to propose any changes in response to these comments, stating that the regulation “appropriately precludes an applicant or owner from obtaining a claim that is not patentably distinct from a finally refused or canceled claim.”<sup>23</sup> This implies that POE may apply against a failed motion to amend a claim on the basis that it was “finally refused.” The USPTO provided no additional guidance on how “patentably distinct” should be interpreted,<sup>24</sup> leaving to the courts how this language should be applied, as discussed further below.

#### PATENT OWNER ESTOPPEL IN PRACTICE

In sum, the final version of 37 C.F.R. § 42.73(d)(3) states that a patent owner cannot “tak[e] action inconsistent with [an] adverse judgment,” including (i) obtaining claims that are not “patentably distinct” from finally refused or canceled claims; or (ii) amending a specification or drawing that was denied during the trial proceeding.<sup>25</sup> Whether § 42.73(d)(3) extends beyond the example scenarios provided in subsections (i) and (ii) is still being explored. While some decisions, and many practitioners, interpret the application of the rule as limited to the two items listed in § 42.73(d)(3)(i)-(ii), others have applied § 42.73(d)(3) as a general prohibition against any action inconsistent with an adverse judgment. Additionally, the PTAB and district courts have grappled with how to determine if claims are patentably distinct from those in a prior adverse decision.

##### A. POE Under § 42.73(d)(3)(i) Regarding “Patentably Distinct” Claims

Despite originating in the rules governing trial practice before the PTAB,<sup>26</sup> § 42.73(d)(3)(i) has been applied outside the PTAB by at least one

21. *Id.* at 50739.

22. *Id.*

23. *Id.*

24. *See id.*

25. *Id.* Note that the latter does not apply if a patent or application has a different written description. *See id.*

26. At least one district court has remarked that POE under 37 C.F.R. § 42.73(d)(3) is not applicable to district court proceedings. *Clearlamp, LLC v. LKQ Corp.*, No. 12-CV-2533-JHL, 2016 WL 4734389, at \*6 n.8 (N.D. Ill. Mar. 18, 2016) (“The scope of 37 C.F.R. § 42.73(d)(3) is limited to proceedings before the PTAB.”) (citing 37 C.F.R. § 42.1(a)). Other district courts have evaded § 42.73 by deciding the case on other grounds. *See Music Choice v. Stingray Digital Grp. Inc.*, No. 16-CV-00586-JRG-RSP, 2019 WL 6114688, at \*2 n.3 (E.D. Tex. Oct. 18, 2019) (“Since this matter was decided for other reasons, this court does not reach the issue of whether estoppel pursuant to 37 C.F.R. § 42.73 is applicable in district court litigation.”); *Stragent, LLC v. BMW of N. Am., LLC*, No. 20-CV-510-LPS, 2021 WL 1147468, at \*7 (D. Del. Mar. 25, 2021) (“Plaintiff responds that 37 C.F.R. § 42.73(d)(3) does not apply to district court proceedings . . . Because, again, the Court has agreed with Plaintiff on [separate point] . . . the outcome on the motion would not change *even assuming* 37 C.F.R. § 42.73(d)(3) applies here.” (emphasis added)).

district court. In *Choon's Design v. Zenacon*, Choon's Design owned two utility patents with claims covering the structure of loom kits and methods of using the same.<sup>27</sup> Prior to district court litigation, a third party had challenged certain claims of the two patents in an *inter partes* review at the PTAB, and the PTAB instituted the proceedings.<sup>28</sup> Before a Final Written Decision issued, Choon's Design elected to disclaim the challenged claims, and the PTAB subsequently entered an adverse judgment against Choon's Design on those claims.<sup>29</sup> Choon's Design then asserted non-disclaimed claims of the same two patents against Zenacon in district court.<sup>30</sup> Zenacon filed a motion to dismiss based on the affirmative defense of POE.<sup>31</sup> Specifically, Zenacon argued that the infringement of the claims was implausible because POE precluded the patent owner from asserting infringement, as that would be an action inconsistent with the PTAB ruling.<sup>32</sup> Choon's Design did not contest whether an "action inconsistent with the adverse judgment" under § 42.73(d)(3)(i) would include action taken in a federal lawsuit, arguing instead that its claims were patentably distinct from the claims adjudged by the Board.<sup>33</sup> Although the Court was unsure of this novel argument, the Court chose to consider whether POE applied because neither party contested the application of § 42.73(d)(3)(i) to district court actions.<sup>34</sup> The Court determined that the asserted claims were patentably distinct from those adjudged by the PTAB and therefore denied the motion to dismiss.<sup>35</sup> Regarding the meaning of "patentably distinct" in § 42.73(d)(3)(i), the *Zenacon* Court applied the "patentably distinct" analysis used in obviousness-type double patenting ("OTDP"), although the Court had doubts about its appropriateness for determining POE.<sup>36</sup>

More recently, in *Apple Inc. v. Softview*, the PTAB addressed the standard that should be applied to determine whether a claim is "patentably distinct."<sup>37</sup> The patent owner argued that the PTAB should apply the common law of collateral estoppel to § 42.73(d) and that "not patentably distinct" meant "substantially the same."<sup>38</sup> The Board rejected the argument that it should undertake the same analysis in applying § 42.73(d)(3) as used in the

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27. *Choon's Design, LLC v. Zenacon, LLC*, No. 13-CV-13568, 2015 WL 539441, at \*1 (E.D. Mich. Feb. 9, 2015).

28. *Id.* at \*3.

29. *Id.*

30. *Id.* at \*1-4.

31. *Id.* at \*1.

32. *Id.* at \*8.

33. *Id.* at \*7.

34. *See id.* at \*8.

35. *Id.* at \*18.

36. *Id.* at \*7.

37. *Apple Inc. v. Softview LLC*, No. 2021-05530, 2022 WL 4398056, at \*6 (P.T.A.B. Sep. 22, 2022).

38. *Id.* at \*11-12.



common law.<sup>39</sup> The PTAB instead concluded that “patentably distinct” means that “the claim at issue is more than simply an obvious variation over a prior patent claim,” as in the double patenting context.<sup>40</sup>

The consequences of POE in the context of a failed motion to amend in a post-grant proceeding, though relatively unexplored in the case law, could be particularly troublesome for patent owners. For example, it is conceivable that a proposed claim in a motion to amend could be deemed “finally refused”<sup>41</sup> even if the motion is denied only for procedural reasons—i.e., other than for reasons of patentability. A “finally refused” claim in the motion to amend context is necessarily narrower than the unamended claim. If POE were applied using OTDP principles, the “finally refused” claim would be considered prior art against any of the patent owner’s future claims in the § 42.73(d)(3)(i) analysis. Applying an OTDP analysis to POE would likely require further claim narrowing in future prosecution, beyond of the various procedural requirements of a motion to amend, to satisfy § 42.73(d)(3)(i).<sup>42</sup> Given the low historical success rates for motions to amend in AIA trials, this possibility could counsel patent owners to pursue amendments outside of a PTAB trial, such as via reexamination, reissue, or in a continuation application.<sup>43</sup>

#### B. Potentially Broader (Unenumerated) POE Under § 42.73(d)(3)

*Ex parte Nelson* shows that POE may have teeth beyond merely preventing the procurement of patentably indistinct claims from those canceled or finally refused.<sup>44</sup> There, the PTAB addressed an *ex parte* reexamination where the Examiner applied § 42.73(d)(3)(i) and determined that the patent

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39. *Id.* at \*12-13. See also *Ex parte King*, No. 2021-002695, 2021 WL 4050576, at \*12 (P.T.A.B. Sept. 1, 2021) (“To the extent Appellant is suggesting that the Office Action provides no legal basis for rejecting claims 6 and 11 under Rule 42.73(d)(3), the Examiner has explicitly taken the position that a reissue claim directed to an obvious modification of a cancelled issued claim is a reissue claim that is not patentably distinct from a cancelled issued claim under Rule 42.73(d)(3)(i).”). Other courts have suggested that “patentably distinct” might be analyzed under a substantial identity test. See *Cisco Sys., Inc. v. Capella Photonics, Inc.*, No. 20-CV-01858-EMC, 2020 WL 4923697, at \*5 (N.D. Cal. Aug. 21, 2020) (citing 37 C.F.R. § 42.73(d)(3) as part of a collateral estoppel analysis); *Capella Photonics, Inc. v. Ciena Corp.*, No. 20-CV-08628-EMC, 546 F. Supp. 3d 977, 985 (N.D. Cal. June 29, 2021) (citing *Cisco Sys.*, 2020 WL 4923697 at \*9-10).

40. *Apple Inc. v. Sofitview*, 2022 WL 4398056, at \*10.

41. The meaning of “finally refused” in § 42.73(d)(3) has not been directly addressed in the case law. Legislative history indicates that this language targets “claim amendments that were presented and denied, during a trial” (i.e., in a motion to amend), see 77 Fed. Reg. at 48649, which is consistent with this provision appearing in Part 42 governing “Trial Practice Before the Patent Trial and Appeal Board.” Case law does make clear, however, that all avenues of appeal or reconsideration must have been exhausted for a claim to be “finally refused.” See *SDI Techs.*, 2015 WL 3749669 at \*5 (“Nevertheless, we agree with Patent Owner that Rule 42.73(d)(3) does not apply in this case, at least because Patent Owner’s appeal rights in IPR-465 have not been exhausted.”).

42. “Patentability grounds” include §§ 101, 102, 103, and 112. A motion to amend must meet the procedural requirements set forth in 37 C.F.R. § 42.121(a)-(b).

43. See USPTO, *Motion to Amend Studies*, at \*3 (last updated March 2023), <https://www.uspto.gov/patents/ptab/motions-amend-study>, archived at <https://perma.cc/9W9Q-XGJ2>.

44. *Ex parte Nelson*, No. 2020-004978, 2020 WL 8186425, at \*5 (P.T.A.B. Dec. 31, 2020).

owner's claims were "not patentably distinct" from claims previously canceled in an *inter partes* review.<sup>45</sup> The patent owner argued that § 42.73(d)(3)(i) did not apply because they were "not 'obtaining' any claims."<sup>46</sup>

The PTAB held that regardless of whether the scenario in § 42.73(d)(3)(i) (i.e., the "patentably distinct" analysis) applied, the broader prohibition in § 42.73(d)(3) precluded the patent owner's argument. The PTAB stated that § 42.73(d)(3) "is not limited to the example in sub-section (i) of obtaining . . . [a] claim that is not patentably distinct from a finally . . . canceled claim."<sup>47</sup> Instead, the PTAB interpreted the § 42.73(d)(3) POE rule to prevent "any action in subsequent reexamination proceedings that are inconsistent with a prior adverse judgment," including making inconsistent *ex parte* reexamination arguments.<sup>48</sup> Accordingly, the patent owner was estopped from making certain arguments related to obviousness combinations deemed inconsistent with the prior adverse decision.<sup>49</sup>

*Ex parte Nelson* potentially expands § 42.73(d)(3) beyond the prosecution context where POE has been most frequently applied. The expansive nature of POE described in *Ex parte Nelson* contrasts with earlier decisions, such as the IPR decision *Apple v. Contentguard*, in which the Board stated that the rule does not preclude a patent owner from defending the patentability of existing challenged claims, even patentably indistinct ones, in AIA trials (as opposed to attempting to obtain new claims).<sup>50</sup> There, the patent owner had requested cancellation of certain claims and entry of adverse judgment as to those claims in a prior IPR.<sup>51</sup> The petitioner in a subsequent IPR against the same patent argued that the patent owner was estopped from contending that the challenged claims, which used different wording than the previously canceled claims, were patentable over the prior art because the differences between the previously canceled and currently challenged claims were "inconsequential."<sup>52</sup> The PTAB disagreed, finding POE inapplicable, and stated the rule was "intended to preclude recapturing in another USPTO proceeding—e.g., prosecuting a continuation or reissue application—subject matter that was lost in an AIA proceeding."<sup>53</sup> Accordingly, the PTAB held that the "rule does not preclude Patent Owner from defending the

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45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *See id.* at \*11.

50. *Apple Inc. v. Contentguard Holdings, Inc.*, No. IPR2015-00458, 2015 WL 4760573, at \*4-5 (P.T.A.B. July 15, 2015).

51. *Id.* at \*4.

52. *Id.*

53. *Id.* at \*5.

patentability of the challenged claims” in a subsequent IPR even if the claims in question are obvious variants of each other.<sup>54</sup>

Patent owners should be aware of these competing decisions, lest POE be used against them outside prosecution. But the lack of clarity here may make this an area ripe for attempts at broader application in the near future.

#### CONCLUSION

POE under 37 C.F.R. § 42.73(d)(3) is perhaps understood less than it should be. While its effects are felt less frequently than petitioner estoppel, its repercussions can be significant. Once an AIA trial is concluded, unsuccessful patent owners are forbidden from pursuing claims that are patentably indistinct from the claims that they lost. This could be particularly devastating in instances where a patent owner unsuccessfully pursued a motion to amend in a post-grant proceeding. Worse still, the logic applied in *Ex parte Nelson* may imply that, in some instances, the patent owner may be wholly estopped from pursuing any arguments inconsistent with the prior adverse judgment. PTAB practitioners should be aware that POE is separate from and arguably more expansive than traditional collateral estoppel. Given the varied interpretations of the rule, further judicial and administrative guidance seems likely, and helpful.

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54. *Id.*