

THE IMPLEMENTATION AND EFFECTIVENESS OF TRADEMARK EXPUNGEMENT AND REEXAMINATION PROCEEDINGS

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I. INTRODUCTION: The Intent and Purpose of the Creation of Expungement and Reexamination Proceedings	2
II. An Overview: What are the Ex Parte Expungement and Reexamination Proceedings, and What are the Best Practices for Successful Implementation?	6
A. Petitioners: Who Can File These Petitions?.....	7
B. Third Party Instituted versus USPTO Director Instituted Proceedings	9
C. Proceedings: Which Type of Proceeding Should You Choose?.....	13
1. Reexamination Proceedings.....	13
2. Expungement Proceedings.....	15
D. Minimum Petition Requirements	16
E. Evidentiary Standard: What is a “Reasonable Investigation”	18
III. Post-Institution Procedure.....	21

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A. Responding to a Notice of Institution and Non-Final Office Action	24
B. Consolidated Proceedings	26
IV. The Tricks of Estoppel: When it Does and Does Not Apply.....	26
A. Estoppel Before the United States Patent and Trademark Office.....	27
1. Co-Pending Proceedings and Their Exceptions	27
2. Estoppel and Notices of Non-Institution	29
3. Estoppel Between Expungement Proceedings and Reexamination Proceedings.....	32
B. Estoppel Before the Trademark Trial and Appeal Board.....	34
V. Why Not a Cancellation Proceeding?	38
VI. Three Years Out: How Effective have these Proceedings Proven to be?	41
A. Petition for Expungement Statistics.....	41
B. Petition for Reexamination Statistics.....	44
VII. Conclusion	47

I. INTRODUCTION: THE INTENT AND PURPOSE OF THE CREATION OF EXPUNGEMENT AND REEXAMINATION PROCEEDINGS

One of the longest-running battles in trademark law has been the integrity of the United States federal trademark register. As of March 2025, there were over 3,353,716 active trademark registrations on the federal trademark

The Implementation and Effectiveness of Trademark Expungement and Reexamination Proceedings 3

register.¹ This number has risen dramatically over the past few years—from 2019 to June 2020 alone, there was a 63% increase in U.S. trademark applications.² This increase, coupled with a growth in fraudulent behavior, has made it difficult for the United States Patent and Trademark Office (“USPTO”) to filter out fake documents and applications.

The USPTO has identified a wide variety of fraudulent behavior from digitally altered specimens, mockup specimens, and false assertions of use of the mark, to applications filed in the name of an entirely fake registrant.³

Digitally altered and created specimens alone have flooded the trademark register despite the USPTO’s best efforts. The most common ones are digitally altered specimens—the “digital alteration of an existing image of goods . . . that purports to show the mark used on the goods or in the sale, performance, or rendering of services”—and mockup specimens or renderings “created solely for submission with the application.”⁴ These specimens take the

¹ USPTO, *Trademarks Data Q1 2025 at a glance*, USPTO, <https://www.uspto.gov/dashboard/trademarks/> [<https://perma.cc/URU3-X6B6>].

² David Gooder, *What a huge surge in trademark filings means for applicants*, USPTO (June 23, 2021, 13:47 PM), <https://www.uspto.gov/subscription-center/2021/what-huge-surge-trademark-filings-means-applicants> [<https://perma.cc/P8X9-NXU2>].

³ U.S. DEP’T OF COM., OFF. OF THE INSPECTOR GEN., OIG-21-033-A, USPTO SHOULD IMPROVE CONTROLS OVER EXAMINATION OF TRADEMARK FILINGS TO ENHANCE THE INTEGRITY OF THE TRADEMARK REGISTER (Aug. 11, 2021).

⁴ USPTO, EXAMINATION GUIDE 3-19 EXAMINATION OF SPECIMENS FOR USE IN COMMERCE: DIGITALLY CREATED/ALTERED OR MOCKUP SPECIMENS (July 2019, Rev. Oct. 2020), <https://www.uspto.gov/sites/default/files/documents/TM-ExamGuide-3-19.pdf> [<https://perma.cc/4QKJ-DKMJ>].

form of printed labels on plain boxes, digitally altered marks, floating marks, and screenshots of specimen farms.⁵

In a recent report, the Office of the Inspector General estimated that 37% of new applications approved for publication contained at least one indicator that a specimen was digitally altered or a mockup.⁶ Moreover, 46.7% of these specimens contained more than one indicator, and an estimated 8% of all approved maintenance filings contained suspect specimens.⁷

Despite the prevalence of altered specimens, the USPTO did not issue a single Office Action based on a digitally altered specimen until 2012.⁸ Although current estimates maintain that between 37% to 46.7% of all applications have digitally altered specimens,⁹ in 2017, only 2.12% of all applications received an Office Action due to a digitally altered or mockup specimen.¹⁰

Recognizing the rapidly rising level of fraud and deadwood on the trademark register, the United States government began to take a series of steps to address the issue. In 2014, the USPTO piloted a proof of use auditing program.¹¹ The program randomly selected 500 registrations and required trademark owners to submit additional proof of use.¹² Of the random 500 registrations,

⁵ *Id.* at 2 (detailing the full list of commonly identified characteristics for digitally created/altered and mockup specimens).

⁶ U.S. DEP'T OF COM., OFF. OF THE INSPECTOR GEN., *supra* note 3.

⁷ *Id.* at 6–7.

⁸ Barton Beebe & Jeanne C. Fromer, *Fake Trademark Specimens: An Empirical Analysis*, 120 COLUM. L. REV. 217, 237 (2020); *see also* Non-Final Office Action dated July 7, 2017, ALTER EGO, U.S. Trademark Serial No. 85/549,660.

⁹ U.S. DEP'T OF COM., OFF. OF INSPECTOR GEN., *supra* note 3, at 6–7.

¹⁰ Beebe & Fromer, *supra* note 8.

¹¹ USPTO, POST REGISTRATION PROOF OF USE PILOT STATUS REPORT (2014),

http://www.uspto.gov/trademarks/notices/Post_Registration_Proof_of_Use.doc [<https://perma.cc/4PK9-9Z2Z>].

¹² *Id.* at 1.

50% of them failed the audit.¹³ Up until October 25, 2024, the program continued to conduct random audits of approximately 10% of all Section 8 and Section 71 affidavits and declarations.¹⁴ Subsequently, in 2019, the Register Protection Office was created to allow anyone to report alleged scams and fraudulent applications to the Trademark Office.¹⁵

The primary attempt to build a bulwark against the influx of fraudulent filings plaguing the trademark register was the Trademark Modernization Act of 2020 (“TMA”) (effective December 2021).¹⁶ With the enactment of the TMA, Congress intended to increase the USPTO’s ability to respond to potentially fraudulent activity.¹⁷ For the purposes of this article, the most important aspect of this update to the Lanham Act was the creation of the two new *ex parte* expungement and reexamination proceedings.¹⁸ These proceedings operate as a mechanism to remove deadwood

¹³ *Id.* at 1.

¹⁴ Changes in Post-Registration Audit Selection for Affidavits or Declarations of Use, Continued Use, or Excusable Nonuse in Trademark Cases, 89 Fed. Reg. 85435 (Oct. 28, 2024) (to be codified at 37 C.F.R. pts. 2, 7) (While the USPTO has ceased its randomized audits, the audit system itself is still in effect. The system has simply shifted to directed audits rather than randomized audits); Beebe & Fromer, *supra* note 8, at 243.

¹⁵ U.S. GOV’T ACCOUNTABILITY OFF., GAO-24-106533, REPORT TO CONGRESSIONAL COMMITTEES, INTELLECTUAL PROPERTY: STRONGER FRAUD RISK MANAGEMENT COULD IMPROVE THE INTEGRITY OF THE TRADEMARK SYSTEM (2024).

¹⁶ Trademark Modernization Act of 2020, Pub. L. No. 116-260, 134 Stat. 1182, 2200–2210 (2020).

¹⁷ U.S. DEP’T OF COM., OFF. OF THE INSPECTOR GEN., *supra* note 3, at 2.

¹⁸ Changes to Implement Provisions of the Trademark Modernization Act of 2020; Delay of Effective Date and Correction, 87 Fed. Reg. 62032 (2022) (to be codified at 37 C.F.R. pts. 2, 7).

and fraudulent registrations from the trademark register through simple and straightforward ex parte petitions.¹⁹

This article will break down and explain ex parte expungement and reexamination proceedings in several parts. First, what are these proceedings, which registrations are eligible, and who can file them? Next, what is the minimum standard to institute an ex parte expungement or reexamination proceeding? We will also review the procedural quirks that have emerged over the past few years and any issue preclusion that arises from a petitioner's use of these proceedings. Finally, we will take a brief statistical look at how effective these proceedings have been thus far.

II. AN OVERVIEW: WHAT ARE THE EX PARTE EXPUNGEMENT AND REEXAMINATION PROCEEDINGS, AND WHAT ARE THE BEST PRACTICES FOR SUCCESSFUL IMPLEMENTATION?

What are these proceedings? When are registrations vulnerable to them? What are the minimum standards for institution? How do these proceedings work?

These are all questions that petitioners, registrants, and attorneys have been asking since the TMA passed. While the TMA provides most of the answers in extreme detail, not everything is so cut and dry, and the answers cannot all be found in the same place. Some of the most important standards, such as the reasonable investigation and evidence requirements for a bare minimum prima facie case of nonuse, are just beginning to see some guidance.

¹⁹ *Id.* (stating that the new expungement and reexamination proceedings will be “more efficient and more effective at clearing applications” for marks not properly in U.S. commerce).

The Implementation and Effectiveness of Trademark Expungement and Reexamination Proceedings 7

A. *Petitioners: Who Can File These Petitions?*

The first step in determining whether a registration is vulnerable to an expungement or reexamination proceeding is to determine whether the filing party (“petitioner”) *can* institute such a proceeding. In almost every case, the answer will be yes.

Any person, whether an identifiable natural or juristic person, may become a petitioner for the purpose of initiating an ex parte reexamination or expungement proceeding against a trademark registration.²⁰ The primary condition is that they must file the petition against a third party’s registration.²¹ Only some pre-existing restrictions remain, such as the requirement for a U.S. licensed attorney to file the proceeding when the petitioner is a foreign domiciled person.²²

This is a very loose standard unlike anything previously available for trademark enforcement on the register. Unlike a cancellation or opposition proceeding before the Trademark Trial and Appeal Board, the petitioner does not need to believe that it will be damaged by the registration.²³

²⁰ 15 U.S.C. § 1066a(a) (stating, “any person may file a petition to expunge a registration”); 15 U.S.C. § 1066b(a) (stating, “any person may file a petition to reexamine a registration”); 37 C.F.R. § 2.91(a); TMEP § 1716.02 (Rev. Nov. 2024); *see also* 15 U.S.C. § 1127 (defining a “person” under the Lanham Act as any natural or juristic person).

²¹ *See* USPTO, EXAMINATION GUIDE 1-21, EXPUNGEMENT AND REEXAMINATION PROCEEDINGS UNDER THE TRADEMARK MODERNIZATION ACT OF 2020 (2021), <https://www.uspto.gov/sites/default/files/documents/TM-ExamGuide-1-21.pdf> [<https://perma.cc/5UTB-F7F6>].

²² 37 C.F.R. § 2.91(c)(5).

²³ TBMP § 303.01 (Rev. June 2024).

Moreover, petitioners may remain anonymous if they so choose.²⁴ Although the petitioner’s identification and contact information is listed as a requirement for a complete petition,²⁵ there is no corresponding requirement that the petition identify the real party in interest.²⁶ While the “anonymous” path is an option,²⁷ the USPTO retains the discretion to require that the real party in interest, “be identified in connection with any petition filed.”²⁸ As of January 2025, there has been no report of this discretion being utilized.

Another question petitioners need to answer prior to filing a Petition for Expungement or a Petition for Reexamination is who should sign the required declarations for these proceedings. Whether the petition is filing a Petition for Expungement or a Petition for Reexamination, the petition requires two signatories. The first signature is for a signed verification, under oath, that “the facts set forth above [in the Petition] are true; all statements made of his/her own knowledge are true; and all statements made on information and belief are believed to be true.”²⁹ This verification must be signed by the individual who undertook

²⁴ Changes To Implement Provisions of the Trademark Modernization Act of 2020, 86 Fed. Reg. 64300, 64301 (2022) (to be codified at 37 C.F.R. pts. 2, 7).

²⁵ 37 C.F.R. § 2.91(c)(4).

²⁶ Changes To Implement Provisions of the Trademark Modernization Act of 2020, 86 Fed. Reg. 64300, 64301 (2022) (to be codified at 37 C.F.R. pts. 2, 7).

²⁷ *See, e.g.*, Petition for Expungement or Reexamination form, KJET, Registration No. 6,632,406 (filed Nov. 10, 2023) (Reexam. Petition No. 2023-100875); Petition for Expungement or Reexamination form, XINYA BAO, Registration No. 5,385,577 (filed Dec. 22, 2023) (Exp. Petition No. 2023-100917) (providing examples of how a petitioner may remain anonymous).

²⁸ 37 C.F.R. § 2.91(h).

²⁹ USPTO, PETITION FOR EXPUNGEMENT OR REEXAMINATION FORM, 12 (2024); *see also* 15 U.S.C. §§ 1066a(b)(3), 1066b(c)(3) (outlining what the text of the verified statement should set forth).

the reasonable investigation and drafted the petition.³⁰ The second signatory is the signatory for filing the petition itself (e.g., the petitioner or its attorney).³¹ Both signatories may be the same if the filer is the individual who ran the investigation and compiled the documentary evidence.³²

***B. Third Party Instituted versus USPTO
Director Instituted Proceedings***

Although all expungement and reexamination proceedings are *ex parte* proceedings,³³ there are two methods through which they may be initiated: first, at the request of a third party (“Non-Director Initiated”), or second, *sua sponte* at the direction and discretion of the USPTO’s Director (“Director Initiated”).³⁴

Once initiated, there is only one procedural difference between a Non-Director Initiated and a Director Initiated proceeding. In a Non-Director Initiated proceeding, the registrant receives a Notice of Submission that a Petition for Expungement or a Petition for Reexamination form has been filed against its registration.³⁵

³⁰ USPTO, *supra* note 29.

³¹ *See id.* (suggesting a petitioner may only remain anonymous if an authorized representative act as the signatory for both required statements).

³² *Id.*

³³ Changes To Implement Provisions of the Trademark Modernization Act of 2020, 86 Fed. Reg. 64300, 64300 (2022) (to be codified in 37 C.F.R. pts. 2, 7).

³⁴ 15 U.S.C. §§ 1066a(a), 1066a(h), 1066b(a), 1066b(h); *see also infra* Section VI (discussing the statistics for the popularity of each type of initiation for each type of proceeding).

³⁵ *See, e.g.,* Petition for Expungement or Reexamination form, HIMALAYA, Registration No. 6,161,046 (filed Nov. 22, 2023) (Reexam. Petition No. 2023-100883); Notice of Submission of Petition for Expungement or Reexamination of Trademark Registration, HIMALAYA, Registration No. 6,161,046 (issued Nov. 23, 2023) (Reexam. Petition No. 2023-100883); Notice of Non-Institution,

They then have a few months while the USPTO examines the Petition for validity to begin compiling potential evidence of use.³⁶ If a proceeding is a Director Initiated proceeding, however, the first notification the registrant receives of the proceeding is the Notice of Institution.³⁷

As of January 2025, there is no public guidance or statements as to how the USPTO determines which registrations will be the subject of Director Initiated expungement or reexamination proceedings. The only written guidance available is the text of the TMA itself, which states, “[t]he Director may, on the Director’s own initiative, institute an ex parte reexamination proceeding if the Director discovers information that supports a prima facie case of the mark having not been used in commerce on

HIMALAYA, Registration No. 6,161,046 (issued May 28, 2024) (Reexam. Petition No. 2023-100883) (detailing a Non-Director Initiated ex parte petition where the registrant had 6 months before a determination was made as to whether to institute a proceeding); *Contra* Combined Notice of Institution and Nonfinal Office Action, RELAHOGAR, Registration No. 6,962,447 (Oct. 17, 2024) (Reexam. No. 2024-102136R) (detailing a Director Initiated reexamination proceeding with no prior notice to the Registrant).

³⁶ See, e.g., Petition for Expungement or Reexamination form, HIMALAYA, Registration No. 6,161,046 (filed Nov. 22, 2023) (Reexam. Petition No. 2023-100883); Notice of Submission of Petition for Expungement or Reexamination of Trademark Registration, HIMALAYA, Registration No. 6,161,046 (issued Nov. 23, 2023) (Reexam. Petition No. 2023-100883); Notice of Non-Institution, HIMALAYA, Registration No. 6,161,046 (issued May 28, 2024) (Reexam. Petition No. 2023-100883) (demonstrating a Non-Director Initiated ex parte petition where the registrant had 6 months before a determination was made as to whether to institute a proceeding).

³⁷ See Combined Notice of Institution and Nonfinal Office Action, RELAHOGAR, Registration No. 6,862,447 (Oct. 17, 2024) (Reexam. No. 2024-102136R) (detailing a Director Initiated reexamination proceeding with no prior notice to the Registrant); see also 15 U.S.C. §§ 1066a(h)(1), 1066b(h)(1) (stating that the Director “shall promptly notify the registrant” of a Director Instituted proceeding) (emphasis added).

or in connection with some or all of the goods or services covered by the registration”³⁸

The USPTO’s behavior in choosing which registrations to select, however, is very telling. It appears the USPTO is taking the initiative to use the TMA to clear fraudulent registrations from the register. This aligns with one of the stated purposes of creating these ex parte proceedings—to combat the rise of fraudulent registrations and expand the USPTO’s “authority to reconsider applications after registration.”³⁹

There are several tells in the USPTO’s pattern of behavior that indicate this possible intention. First, the USPTO appears to have developed the habit of self-correcting failed Non-Director Initiated proceedings. In multiple instances, a Non-Director Initiated Petition for Reexamination or Petition for Expungement received a Notice of Non-Institution for failing to provide adequate evidence of a reasonable investigation.⁴⁰ The USPTO then took it upon itself to conduct additional research and initiate a Director Initiated proceeding.⁴¹ Each of the initial failed

³⁸ 15 U.S.C. § 1066b(h)(1), *see also* 15 U.S.C. § 1066a(h)(1) (for expungement proceedings).

³⁹ H.R. REP. NO. 116-645, at 10–11 (2020).

⁴⁰ *See, e.g.*, Notice of Non-Institution, OKYDOKY, Registration No. 5,517,635 (May 2, 2024) (Exp. Petition No. 2024-100953); Notice of Non-Institution, MAKE WAVES, Registration No. 6,021,439 (July 12, 2023) (Exp. Petition No. 2023-00441); Notice of Non-Institution, Ü & Design, Registration No. 5,715,750 (July 12, 2023) (Exp. Petition No. 2023-100486).

⁴¹ *See, e.g.*, Combined Notice of Institution and Nonfinal Office Action, OKYDOKY, Registration No. 5,517,635 (May 7, 2024) (Exp. No. 2024-101311E); Combined Notice of Institution and Nonfinal Office Action, MAKE WAVES, Registration No. 6,021,439 (July 18, 2023) (Exp. No. 2023-100527E); Combined Notice of Institution and Nonfinal Office Action, Ü & Design, Registration No. 5,715,750 (July 17, 2023) (Exp. No. 2023-100524E).

petitions was just short of the evidence required to meet the minimum reasonable predicate.⁴²

The USPTO has also initiated Director-Initiated proceedings where an initial *ex parte* (*i.e.* Non-Director Initiated) expungement or reexamination proceeding was filed against only a portion of a registration's identification.⁴³ In these situations, the petitioner provided enough information for the USPTO to question the validity of the entire registration with minimal additional evidence.⁴⁴

The USPTO is not guaranteed, however, to treat similar situations in accordance with this pattern of behavior. For example, there was at least one instance where a Non-Director Initiated Petition for Expungement against one registration identified a second registration by the same registrant with identical, unique specimens.⁴⁵ The only difference between the specimens was that different marks were photoshopped on the products.⁴⁶ The USPTO issued a Notice of Institution against the first registration, the subject of the Petition for Expungement, but did not institute a

⁴² See *infra* Section II.D (discussing the minimum requirements for these petitions); see also, *e.g.*, Notice of Non-Institution, Û & Design, Registration No. 5,715,750 (July 12, 2023) (Exp. Petition No. 2023-100486) (indicating that the petition was refused, as the provided third-party investigative report was submitted “without any supporting documentary evidence”).

⁴³ See, *e.g.*, Notice of Institution, GALAVAVA, Registration No. 5,513,424 (Feb. 11, 2022) (Exp. No. 2021-100001E); Combined Notice of Institution and Nonfinal Office Action, GALAVAVA, Registration No. 5,513,424 (Mar. 14, 2022) (Exp. No. 2021-100001E).

⁴⁴ See, *e.g.*, Combined Notice of Institution and Nonfinal Office Action, GALAVAVA, Registration No. 5,513,424 (Mar. 14, 2022) (Exp. No. 2021-100001E).

⁴⁵ Petition for Expungement or Reexamination form, KGG & Design, Registration No. 5,082,079 (Jan. 4, 2024) (Petition No. 2024-100921).

⁴⁶ *Id.*

Director-Initiated proceeding against the second registration.⁴⁷

**C. *Proceedings: Which Type of Proceeding
Should You Choose?***

While these proceedings operate similarly to each other, they are very different. Choosing the wrong proceeding means that not only will the petition fail, but collateral estoppel may bar a petitioner from future actions.⁴⁸

1. Reexamination Proceedings

Reexamination proceedings are the trickier of the two new options, solely due to the very strict requirements regarding eligible registrations.⁴⁹ The definition of this proceeding is relatively straightforward on its face: a proceeding to reexamine a registration “on the basis that the mark was not in use in commerce on or in connection with some or all of the goods or services recited in the registration on or before the relevant date.”⁵⁰

These proceedings are only available against registrations that are registered under Section 1 of the Lanham Act and are within the first five years of registration.⁵¹ An eligible registration can only be

⁴⁷ Combined Notice of Institution and Nonfinal Office Action, KGG & Design, Registration No. 5,082,079 (Mar. 7, 2024) (Exp. No. 2024-100921E); S SALIENT & Design, Registration No. 5,082,092 (As of January 2025, the registration’s extract in TSDR does not reflect any pending Director-Instituted expungement or reexamination proceedings against this registration even though the third-party petitioner identified this registration as containing questionable specimens in its Petition for Expungement against KGG & Design’s registration).

⁴⁸ See *infra* Section IV (discussing when collateral estoppel applies).

⁴⁹ See 15 U.S.C. §§ 1066b(a), (b).

⁵⁰ 15 U.S.C. § 1066b(a).

⁵¹ 15 U.S.C. §§ 1066b(b), (i); see also USPTO, *supra* note 21, at 3.

challenged under a reexamination proceeding before the registration receives incontestable status.⁵²

The required evidence of a reexamination proceeding does not consider the entire life of the registration. Rather, it is centered upon one specific date: the Relevant Date. This date is very important—the vast majority of Petitions for Reexamination that fail to receive a Notice of Institution do so because the petitioner failed to provide evidence relating to nonuse of the trademark in correlation with the Relevant Date. What the Relevant Date is depends on the initial filing basis of the subject registration. If a registration had an intent-to-use filing basis (1(b)), the Relevant Date is the later of *either* the filing date of the amendment to allege use or the expiration of the deadline to file a statement of use.⁵³ If a registration had a use-based filing basis (1(a)), the Relevant Date is the *filing date of the registration*.⁵⁴

Essentially, a Petition for Reexamination argues that the registrant provided incorrect information to the USPTO, as the mark was not in use despite their sworn statements to the contrary. This is not a fraud claim, however, as there is no requirement to prove that the registrant knowingly and intentionally made false statements to the USPTO.⁵⁵

Requirements for Reexamination Eligibility	
Filing Time Period	Within 5 Years of Registration Date
Filing Basis	Section 1

⁵² See 15 U.S.C. § 1065.

⁵³ 15 U.S.C. § 1066b(b)(2).

⁵⁴ 15 U.S.C. § 1066b(b)(1).

⁵⁵ *Fraud*, BLACK’S LAW DICTIONARY (12th ed. 2024) (defining fraud as a “knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment” or a “reckless misrepresentation made without justified belief in its truth to induce another person to act.”).

Scope of Evidence Required	On or Before “Relevant Date”	
	Relevant Date for 1(a)	Filing Date of Application
	Relevant Date for 1(b)	Filing Date of Amendment to Allege Use <i>Or</i> Expiration of Deadline for Statement of Use (the later)

2. Expungement Proceedings

In theory, expungement proceedings are simpler to understand than reexamination proceedings. An expungement proceeding is a request to remove a trademark registration, or portion thereof, “on the basis that the mark has never been used in commerce on or in connection with some or all of the goods or services recited.”⁵⁶

An expungement proceeding is available against all filing bases for registrations (i.e., Sections 1, 44, and 66) as long as there is evidence that the goods/services were not used in commerce, with the only restriction being that the proceeding must be requested between three and ten years from the subject registration’s date of registration.⁵⁷ The three-year block from registration against these proceedings is not arbitrary. Rather, the three-year mark acts as a grace period for Section 44 and Section 66 based registrations to

⁵⁶ 15 U.S.C. § 1066a(a).

⁵⁷ 15 U.S.C. § 1066a(i)(1); USPTO, *supra* note 21; *contra* 15 U.S.C. § 1066a(i)(2) (while the TMA does contain an exception to this rule removing the maximum period in which a proceeding may be instituted, this exception expired in 2023).

initiate use of the mark in the U.S.⁵⁸ This deadline is not only when a registration becomes potentially eligible for an expungement proceeding but also serves as *prima facie* evidence of abandonment should the registrant never commence use.⁵⁹

Most importantly, an expungement proceeding encompasses both the entire life of the registration and the entire period during which the registrant has claimed use of the mark. As the text of the law states, the mark must have “never been used.”⁶⁰ The petitioner must therefore provide evidence of non-use over the *entire* applicable time. This includes by any previous registrants in the public record.

Requirements for Expungement Eligibility	
Filing Time Period	Within 3–10 Years of Registration Date
Filing Basis	Any Filing Basis
Scope of Evidence Required	Up to Petition Filing Date

D. Minimum Petition Requirements

While the definitions of expungement and reexamination proceedings are relatively straight forward and logical, successfully instituting them can be tricky. An *ex parte* Petition for Reexamination or Petition for Expungement has a laundry list of very specific details that need to be included. Missing even one of these details triggers a Notice of Incomplete Petition, delaying the proceeding.

⁵⁸ See TMEP § 1904.01(d) (Rev. Nov. 2024); TMEP § 1009 (Rev. Nov. 2024) (§ 4 and § 66(a) based registrations do not need to provide evidence of use in U.S. commerce at the time of registration).

⁵⁹ 15 U.S.C. § 1127.

⁶⁰ 15 U.S.C. § 1066a(a).

As the USPTO wants to remove fraudulent registrations from the register, missing one or more of these details should not act as a fatal flaw against a petition.⁶¹ Rather, a Notice of Incomplete Petition will give the petitioner thirty days to perfect the Petition, if appropriate.⁶² Responding to this Notice does not allow the addition of more evidence or elements of the reasonable investigation.⁶³ It is solely intended to fix errors in procedural minimum petition requirements.

The most important of these details appear in the checklist below:⁶⁴

- Registration number for subject registration
- Whether it is an expungement or reexamination petition
- Identification of goods/services subject to the registration
- Petitioner's name, domicile address, and email address
- If petitioner is domiciled outside of the United States, its qualified attorney designation
- Petitioner's attorney information
- Clear and legible copy of *all* documentary evidence
- Verified statement "signed by someone with firsthand knowledge of the facts"
- Reasonable investigation elements *set forth in numbered paragraphs*

⁶¹ See discussion *supra* Section II.B.

⁶² USPTO, *supra* note 21.

⁶³ *Id.*

⁶⁴ 37 C.F.R. § 2.91(c); USPTO, *supra* note 21.

***E. Evidentiary Standard: What is a
“Reasonable Investigation”***

The most important part of initiating any ex parte reexamination or expungement proceeding is researching, compiling, and detailing a reasonable investigation of non-use. No definitive definition of “reasonable investigation of non-use” is contained within the actual text of the TMA.⁶⁵ The best guidance available is that this investigation should consist of an “appropriately comprehensive search . . . calculated to return information about the underlying inquiry from reasonably accessible sources where evidence concerning use of the mark during the relevant time period on or in connection with the relevant goods and/or services would normally be found.”⁶⁶

This search needs to be more than a single search using search engines,⁶⁷ but it does not need to show or cover all potentially available sources of evidence.⁶⁸ These sources can be traditional (i.e., Internet searches, the registrant’s existing trademark records, or the registrant’s webpage and social media accounts) or non-traditional (i.e., federal licensing authorizations or previous litigation proceedings).⁶⁹

When deciding which pieces of evidence to search for, the petitioner must keep in mind the type of proceeding they are trying to institute and the time frame they must cover. For instance, if they want to institute a reexamination proceeding against a registration with a Section 1(a) filing basis, the petitioner needs evidence of a lack of use originating on or before the “Relevant Date”.⁷⁰

⁶⁵ See 15 U.S.C. § 1066a; *see also* 15 U.S.C. § 1066b.

⁶⁶ 37 C.F.R. § 2.91(d)(1).

⁶⁷ H.R. REP. NO. 116-645, at 15.

⁶⁸ USPTO, *supra* note 21.

⁶⁹ *Id.* at 6.

⁷⁰ *Id.* at 9.

Alternatively, documentation after the date that announces the launch of the product or that the product is “coming soon” would also work.⁷¹ The reasonable investigation needs to prove a negative: that the mark was not in use as of the relevant period.⁷² Archival systems, such as cached web pages, the Wayback machine, or social media account histories, are useful in this regard.⁷³

Moreover, if the registration has a Section 1 filing basis, and the targeted goods or services are depicted in a provided specimen, petitioners need to ensure that they have sufficient evidence to attack the provided specimen.⁷⁴ This can be through a wide variety of possible characteristics such as pixelization, digital renderings, identical images displaying different marks, or indicia that the mark was not in use in U.S. commerce.⁷⁵

How the reasonable investigation is described in the Petition for Reexamination or Petition for Expungement is just as important as the elements and comprehensiveness of the search. The petitioner must explicitly lay out every step of the investigation and what was found.⁷⁶ Specifically, in numbered paragraphs, the petitioner must detail each source of information, how the search was conducted, when the search was conducted, and what the search disclosed.⁷⁷

Petitioners must also provide “clear and legible cop[ies] of all documentary evidence supporting a prima

⁷¹ BEMORE Petition for Reexamination, BEMORE & Design, Registration No. 7,140,478 (Oct. 16, 2024) (Reexam. Petition No. 2024-102169), at 3; Combined Notice of Institution and Nonfinal Office Action, BEMORE & Design, Registration No. 7,140,478 (Jan. 10, 2025) (Reexam. No. 2024-102169R).

⁷² USPTO, *supra* note 21, at 5.

⁷³ *Id.* at 5–6.

⁷⁴ USPTO, *supra* note 4.

⁷⁵ *Id.*

⁷⁶ *Id.* at 4.

⁷⁷ 37 C.F.R. § 2.91(c)(8)(i).

facie case of nonuse” and an itemized index.⁷⁸ The inclusion of documentary evidence is key to successfully receiving a Notice of Institution. This evidence can only be included in the initial petition.⁷⁹ While replacement pieces of evidence may be provided in response to a Notice of an Incomplete Petition, a petitioner may not include additional or new evidence.⁸⁰

The documentary evidence should be carefully collected and treated as an exhibit. For instance, excerpts from press releases, journals, and magazines should not only include the article but also the publication name and title.⁸¹ Similarly, screenshots from web searches or web pages should include the URL and access date.⁸² The petition is not automatically refused if a few pieces of documentary evidence are compiled or submitted incorrectly.⁸³ The USPTO will instead issue a Notice of Incomplete Petition or a Petition Inquiry Letter to give the petitioner thirty days to cure the defect.⁸⁴

⁷⁸ 37 C.F.R. § 2.91(c)(9).

⁷⁹ Changes to Implement Provisions of the Trademark Modernization Act of 2020, 86 Fed. Reg. 64300, 64302 (2022) (to be codified at 37 C.F.R. pts. 2, 7) (stating that the Director can only consider “complete petitions for expungement or reexamination.”).

⁸⁰ *Id.*

⁸¹ 37 C.F.R. § 2.91(c)(9)(iv).

⁸² 37 C.F.R. § 2.91(c)(9)(iii).

⁸³ Changes to Implement Provisions of the Trademark Modernization Act of 2020, 86 Fed. Reg. 64300, 64309 (2022) (to be codified at 37 C.F.R. pts. 2, 7).

⁸⁴ *See, e.g.*, Petition Inquiry Letter, PETSIMPLE, Registration No. 5,800,051 (Aug. 23, 2024) (Exp. Petition No. 2024-101550) (requesting additional information from the petitioner as several webpages submitted as documentary evidence were missing URL and access dates); Petition Inquiry Letter, AEMIRY, Registration No. 6,272,936 (Feb. 15, 2024) (Reexam. Petition No. 2023-100913) (requesting, in part, the labeling of exhibits through the re-submission of originally submitted evidence); Petition Inquiry Letter, SHE & Design, Registration No. 5718433 (Oct. 12, 2023) (Exp. Petition No. 2023-100512) (requesting an index of exhibits).

Failure to include documentary evidence altogether, however, means the petitioner will receive a Notice of Non-Institution.⁸⁵ Take, for example, Exp. Petition No. 2023-100486 against Û & Design (Registration No. 5715750).⁸⁶ The evidence provided to support this petition included a comprehensive third-party investigative report.⁸⁷ This report only provided partial documentary evidence for its conducted searches.⁸⁸ There was no documentary evidence detailing the majority of the report, including its internet database searches, third-party website searches, and USPTO records searches.⁸⁹ As a result, the USPTO stated that the “investigation was not appropriately comprehensive and, therefore, does not set forth a reasonable predicate for nonuse of the mark in commerce.”⁹⁰ Subsequently, the USPTO issued a Notice of Non-Institution.⁹¹

III. POST-INSTITUTION PROCEDURE

Although these proceedings are instituted with different prima facie evidence and standards, once instituted, they proceed in the same fashion.⁹² *Figure 1* details the most common procedural structure for expungement and reexamination proceedings. The initial response periods for these various steps varies between thirty days (to respond to

⁸⁵ USPTO, *supra* note 4.

⁸⁶ Petition for Expungement or Reexamination form, Û & Design, Registration No. 5,715,750 (May 24, 2023) (Exp. Petition No. 2023-100486).

⁸⁷ *Id.*

⁸⁸ Notice of Non-Institution, Û & Design, Registration No. 5,715,750 (July 12, 2023) (Exp. Petition No. 2023-100486).

⁸⁹ *Id.*

⁹⁰ *Id.* (While there was a subsequent Director-Initiated proceeding against this registration, this outcome is not guaranteed).

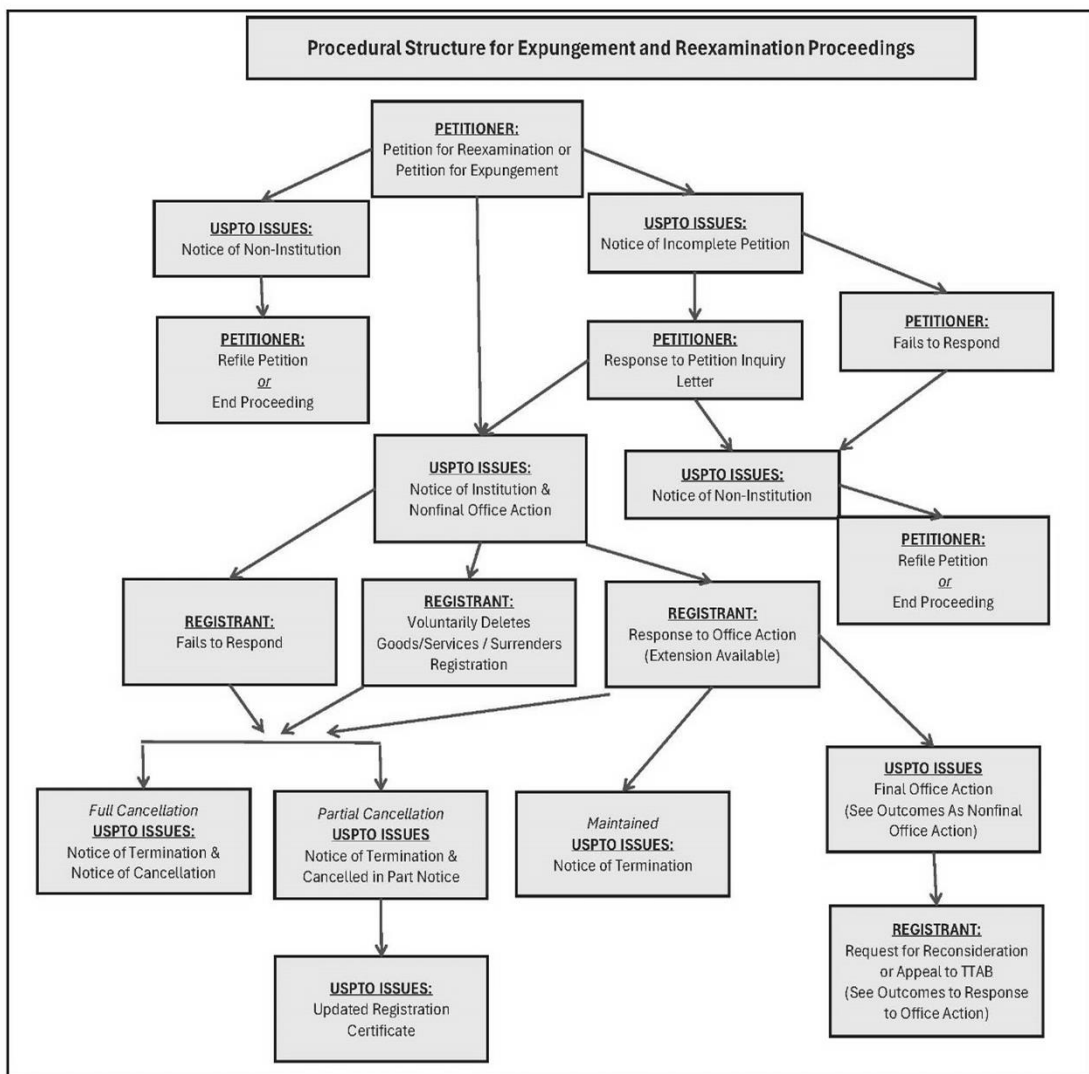
⁹¹ Notice of Non-Institution, Û & Design, Registration No. 5,715,750 (July 12, 2023) (Exp. Petition No. 2023-100486).

⁹² 37 C.F.R. § 2.93(c).

a Notice of Incomplete Petition) to three months (for response to Office Actions).⁹³ While there are additional, potential steps in these proceedings (i.e., Notice of Incomplete Response sent to registrants), these steps are incredibly uncommon.⁹⁴

⁹³ 37 C.F.R. § 2.93(b)(1) (detailing the three-month period to respond to a Non-Final Office Action, extendable by one month upon request); Petition Inquiry Letter, PETSIMPLE, Registration No. 5800051 (Aug. 23, 2024) (Exp. Petition No. 2024-101550) (stating the response period is thirty days from issuance of the inquiry letter).

⁹⁴ USPTO, TRADEMARK DECISIONS AND PROCEEDINGS, <https://developer.uspto.gov/tm-decisions/search/expungement> [https://perma.cc/GZ3Z-WHHB] (Between December 18, 2021 and January 1, 2025, only nine total registrants have received a Notice of Incomplete Response from the USPTO: eight for reexaminations, one for expungements. The author calculated these numbers by reviewing documents available in the USPTO's public database for expungement and reexamination proceedings issued as of January 1, 2025).



*Figure 1*⁹⁵

⁹⁵ See generally 15 U.S.C. §§ 1066a, 1066b; Changes to Implement Provisions of the Trademark Modernization Act of 2020, 86 Fed. Reg. 64300, 64300 (2022) (to be codified in 37 C.F.R. pts. 2, 7).

A. *Responding to a Notice of Institution and Non-Final Office Action*

When a Notice of Institution is issued against a registration, the registrant has three paths available to them: (1) they ignore the proceeding, and the challenged goods and services are removed from the registration;⁹⁶ (2) they voluntarily remove some or all the challenged goods and services;⁹⁷ or (3) they file a Response to Office Action, arguing the marks were in use or had excusable nonuse in U.S. commerce for the relevant time frame.⁹⁸

If a registrant chooses to file a response, it must provide sufficient evidence of use reflecting the use of the mark in U.S. commerce, for the targeted goods and services, and for the specified time.⁹⁹ For a reexamination proceeding, this use needs to be on or before the Relevant Date.¹⁰⁰ For an expungement proceeding, it can be any time prior to the first filing in the expungement proceeding.¹⁰¹ As with the documentary evidence required for the institution of these proceedings, evidence submitted in a response must be labeled and itemized.¹⁰²

The response must also include a verified statement.¹⁰³ This statement should set forth, in numbered paragraphs, detailed information about how the mark is used in commerce, describe the new supporting evidence, and

⁹⁶ 37 C.F.R. § 2.93(b)(1).

⁹⁷ 37 C.F.R. § 2.93(d).

⁹⁸ 15 U.S.C. § 1066a(e)–(f); 15 U.S.C. § 1066b(e)–(f). *See also* 37 C.F.R. § 2.93(b)(5)(ii) (explaining that excusable nonuse is not available as an argument for any registrations with a § 1 filing basis).

⁹⁹ 37 C.F.R. § 2.93(b)(6)(i).

¹⁰⁰ *Id.*

¹⁰¹ 37 C.F.R. § 2.93(b)(5)(i).

¹⁰² 37 C.F.R. § 2.93(b)(7).

¹⁰³ *Id.*

detail how it demonstrates use in commerce for the relevant date.¹⁰⁴

Any evidence of use must be specifically tailored to the challenged goods and services in the identification and wording of the identification itself. Even seemingly insignificant terms such as “are” and “for” in an identification can change the evidence required to keep the goods or services in the registration.

This was made explicitly clear through a 2024 precedential Trademark Trial and Appeal Board (“TTAB”) opinion.¹⁰⁵ On July 12, 2022, a Non-Director Instituted expungement proceeding was filed against the SMARTLOCK and SMARTLOCK & Design registrations.¹⁰⁶ These proceedings requested the expungement of “[c]omponents for air conditioning and cooling systems, namely, evaporative air coolers” and were subsequently initiated.¹⁰⁷ In its Response to Office Action, the registrant submitted evidence featuring connector links for air cooling systems, not evaporative air conditioners.¹⁰⁸ The USPTO rejected this evidence, as the targeted clause of the expungement proceeding read “namely, evaporative air conditioners.”¹⁰⁹ The refusal was eventually appealed to the TTAB.¹¹⁰

Upon review, the TTAB sided with the USPTO and determined that the clause covers “evaporative air coolers that *are* components of air cooling systems. It does not identify or encompass component parts *for* evaporative air

¹⁰⁴ *Id.*

¹⁰⁵ *In re Locus Link USA*, Exp. No. 2022-100137E, Exp. No. 2022-100138E (T.T.A.B. July 1, 2024) (precedential).

¹⁰⁶ *Id.* at 2.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 7.

¹⁰⁹ *Id.* at 7–8.

¹¹⁰ Notice of Appeal SMARTLOCK, Registration No. 5,376,466 (T.T.A.B. May 1, 2023).

coolers.”¹¹¹ Since the registrant never used the mark in connection with fully manufactured evaporative air coolers, it had not used the mark in commerce for the targeted goods.¹¹² The TTAB subsequently affirmed the decision and cancelled the registration.¹¹³

B. Consolidated Proceedings

The TMA contains one last procedural quirk, which has the potential to take both petitioners and registrants by surprise. Namely, there is a remote possibility that multiple expungement and reexamination proceedings might be consolidated into a single proceeding.¹¹⁴

This consolidation can only be initiated if one or more petitions have been submitted against the same registration for different goods and services, *and* neither petition has been instituted.¹¹⁵ Once one of the petitions has received a Notice of Institution, the USPTO can no longer consolidate these into a single proceeding.¹¹⁶

IV. THE TRICKS OF ESTOPPEL: WHEN IT DOES AND DOES NOT APPLY

Determining whether a registration is vulnerable to a Petition for Reexamination or a Petition for Expungement is not always as straightforward as finding grounds and preparing the petition. There are some complex and detail-

¹¹¹ *In re Locus Link USA*, Exp. No. 2022-100137E, Exp. No. 2022-100138E, at 12.

¹¹² *Id.* at 9.

¹¹³ *Id.* at 14.

¹¹⁴ 37 C.F.R. § 2.92(e)(1).

¹¹⁵ USPTO, *supra* note 21.

¹¹⁶ *See* 37 C.F.R. § 2.92(e)(2).

oriented rules concerning collateral estoppel¹¹⁷ set forth in the TMA and by the TTAB. If not followed properly, these rules and their exceptions have the potential to undermine, or destroy altogether, trademark enforcement or trademark prosecution strategies.

**A. *Estoppel Before the United States Patent
and Trademark Office***

**1. Co-Pending Proceedings and Their
Exceptions**

The first rule of estoppel in expungement and reexamination proceedings is obvious on its face. It is prohibited for there to be co-pending proceedings against the same registration for the same goods or services.¹¹⁸ While an expungement proceeding is pending, another Petition for Expungement cannot be filed against the same registration and the same goods or services that are the subject of the pending proceeding.¹¹⁹

There is an exception to this seemingly straightforward rule, however, buried in the TMA's text. Specifically, the portion of the prohibition of co-pending proceedings section which states that the prohibition applies to proceedings against the "same goods or services that are the subject of a pending ex parte proceeding."¹²⁰ As previously mentioned, there is no requirement that a Petition for Expungement or a Petition for Reexamination is filed against a registration's entire identification.

¹¹⁷ *Collateral Estoppel*, BLACK'S LAW DICTIONARY (12th ed. 2024) ("[a] doctrine barring a party from relitigating an issue determined against that party in an earlier action.").

¹¹⁸ 15 U.S.C. §§ 1066a(j)(1), 1066b(j)(1); *see also* 37 C.F.R. § 2.92(d)(3)–(4).

¹¹⁹ 15 U.S.C. § 1066a(j)(1).

¹²⁰ 15 U.S.C. §§ 1066a(j)(1), 1066b(j)(1).

A subsequent Petition for Expungement or a Petition for Reexamination is allowed to become a co-pending proceeding only if it identifies goods or services in the registration's identification that are not subject to the existing and ongoing proceeding.¹²¹ It is not fatal for the subsequent petition to encompass goods and services that are part of the pre-existing proceeding.¹²² The Director of the USPTO has the discretion to institute a proceeding for fewer goods and services than identified in the initial petition.¹²³

The perfect example of authorized co-pending proceedings happened with U.S. Registration No. 5513424 for the mark GALAVAVA (“GALAVAVA Registration”)—the subject of the very first expungement proceeding.¹²⁴ The first ex parte Petition for Expungement was filed on December 21, 2021 (Exp. Petition No. 2021-100001) for a portion of the GALAVAVA Registration's identified goods—namely, coverings for existing floors; floor coverings; floor coverings made of PVC, rubber, plastic, textiles; and rugs, mats, and matting for covering existing floors.¹²⁵ After a Notice of Incomplete Petition was resolved, the expungement proceeding was ultimately instituted.¹²⁶ Based on the information provided in this

¹²¹ *Id.*; USPTO, *supra* note 21; *see also* 37 C.F.R. § 2.92(d)(3)–(4).

¹²² 37 C.F.R. § 2.92(c)(2).

¹²³ *Id.* Also note that the Director may institute a proceeding for more goods and services than identified in the original petition.

¹²⁴ *See* Eric Perrott, LINKEDIN (Dec. 21, 2021), https://www.linkedin.com/posts/ericperrott_trademarks-uspto-activity-6879178618791174144-wRXc/ [<https://perma.cc/XGV6-Y9N7>] (providing screenshots of email correspondence between Eric Perrott and the USPTO confirming the Petition No. 2021-100001 was the first Petition for Expungement filed under the TMA).

¹²⁵ Petition for Expungement or Reexamination Form, GALAVAVA, Registration No. 5,513,424 (Dec. 21, 2021) (Exp. Petition No. 2021-100001).

¹²⁶ Notice of Incomplete Petition, GALAVAVA, Registration No. 5,513,424 (Jan. 25, 2022) (Exp. Petition No. 2021-100001); Response to Petition Inquiry Letter, GALAVAVA, Registration No. 5,513,424 (Jan.

petition and additional research, the USPTO decided to institute a second Director-Instituted proceeding (Exp. No. 2022-100049E) against the remainder of the goods identified in the GALAVAVA Registration.¹²⁷ This second proceeding was instituted while the first petition was still pending a response from the registrant. As the second petition was solely for the “remaining goods in the registration,” these proceedings were allowed to coexist and move forward simultaneously.¹²⁸

It is worth noting that there is no statutory language in the TMA that explicitly precludes the possibility of a co-pending expungement proceeding and reexamination proceeding for the same goods and services if the registration has a Section 1 filing basis and is between three and five years from the registration date.¹²⁹ As of the time of writing, however, this situation has not yet occurred to determine its validity.

2. Estoppel and Notices of Non-Institution

Another important quirk of collateral estoppel with expungement and reexamination proceedings before the USPTO is when the collateral estoppel becomes effective. As detailed above, once an ex parte proceeding has received a Notice of Termination—and at least some of the

25, 2022) (Exp. Petition No. 2021-100001); Notice of Institution, GALAVAVA, Registration No. 5,513,424 (Feb. 11, 2022) (Exp. No. 2021-100001E).

¹²⁷ Combined Notice of Institution and Nonfinal Office Action, GALAVAVA, Registration No. 5,513,424 (Mar. 14, 2022) (Exp. No. 2022-100049E).

¹²⁸ *Id.* at 2.

¹²⁹ Registrations with Section 1 filing bases are vulnerable to reexamination and expungement proceedings. *See* 15 U.S.C. §§ 1066a(a), 1066b(a). Similarly, as reexaminations can be filed in the first five years of a registration’s term, and expungements between years three and ten, there is an eligibility overlap between years three and five. *See* 15 U.S.C. §§ 1066a(i)(1), 1066b(i).

challenged goods and services are not deleted or voluntarily removed—collateral estoppel takes effect.¹³⁰ Aside from the prohibition against co-pending proceedings,¹³¹ collateral estoppel does not take effect at any other stage of the proceeding.

This is due to the very deliberate wording in the clauses surrounding the ex parte proceeding estoppel rules. Both applicable clauses state that there is only estoppel “[u]pon termination of a . . . proceeding . . . where it has been determined that the registered mark was used in commerce on or in connection with any of the goods and/or services at issue”¹³² The salient words in this sentence are “where it has been determined.”

The only time in an ex parte proceeding where a determination is made as to whether a mark is in use is in the Notice of Termination. These notices memorialize the outcome of the proceedings (e.g., deletion of the goods or no change).¹³³ The phrase “the USPTO *determined* that registrant has demonstrated use of the mark in commerce” is even included.¹³⁴

In short, a Notice of Non-Institution of an expungement or reexamination proceeding does not create collateral estoppel. This means that petitioners potentially have two bites at the apple. If a Petition for Expungement or a Petition for Reexamination does not contain sufficient

¹³⁰ See, e.g., 15 U.S.C. §§ 1066a(j)(2), 1066b(j)(2); 37 C.F.R. § 2.92(d)(1)–(2).

¹³¹ Note that this section explicitly *excludes* the co-pending proceeding collateral estoppel discussed in Section IV(A)(1) above. Co-pending proceeding collateral estoppel is about the institution of multiple proceedings at the same time and is therefore inapplicable to the estoppel upon determination clause of the TMA discussed herein.

¹³² 37 C.F.R. § 2.92(d)(1)–(2); 15 U.S.C. §§ 1066a(j)(2), 1066b(j)(2).

¹³³ 37 C.F.R. § 2.94.

¹³⁴ Notice of Termination of Proceeding, QUINLAN, Registration No. 6,171,529 (May 15, 2023) (Reexam. No. 2022-100227R) (emphasis added).

grounds or evidence to institute a proceeding, it will receive a Notice of Non-Institution. Such a notice is insufficient to stop the petitioner from trying again with more evidence.¹³⁵

Take, for example, the Petition for Reexamination filed against U.S. Registration No. 5795348 for the mark OPPOSITION TO TYRANNY BEGINS WITH CONTEMPT FOR DICTATORS. \$ \$ BUNS WILL CERTAINLY REVEAL THEIR FILLINGS (& Design) (“OPPOSITION Registration”). On September 20, 2022, the petitioner filed a Petition for Reexamination (Reexam. Petition No. 2022-100181).¹³⁶ It subsequently received a Notice of Non-Institution on November 3, 2022, as the petition did not provide sufficient evidence to establish a reasonable predicate and prima facie case of nonuse.¹³⁷ The petitioner then re-conducted its reasonable investigation and filed a new Petition for Reexamination on November 22, 2022 (Reexam. Petition No. 2022-100232).¹³⁸ This second petition was successful and ultimately received a Notice of Institution.¹³⁹

As the initial Notice of Non-Institution did not contain a determination as to whether the mark was in use, only a statement that there was insufficient evidence for a

¹³⁵ Presuming, for arguments sake, that the USPTO does not then sua sponte institute a Director-Instituted proceeding.

¹³⁶ Petition for Expungement or Reexamination form, OPPOSITION TO TYRANNY BEGINS WITH CONTEMPT FOR DICTATORS. \$ \$ BUNS WILL CERTAINLY REVEAL THEIR FILLINGS (& Design), Registration No. 5,795,348 (Sept. 20, 2022) (Reexam. Petition No. 2022-100181) [hereinafter “OPPOSITION (& Design)”].

¹³⁷ Notice of Non-Institution, OPPOSITION (& Design), Registration No. 5,795,348 (Nov. 3, 2022) (Reexam. Petition No. 2022-00181).

¹³⁸ Petition for Expungement or Reexamination form, OPPOSITION (& Design), Registration No. 5,795,348 (Nov. 22, 2022) (Reexam. Petition No. 2022-100181).

¹³⁹ Notice of Institution, OPPOSITION (& Design), Registration No. 5,795,348 (Apr. 4, 2023) (Reexam. No. 2022-100232R).

prima facie case of nonuse,¹⁴⁰ the proceeding did not meet the minimum standard to create estoppel. This allowed the petitioner to attempt the proceeding again and ultimately succeed.

3. Estoppel Between Expungement Proceedings and Reexamination Proceedings

On a more complex level, in some instances, collateral estoppel occurs between expungement and reexamination proceedings. This preclusive effect is not explicitly written in the Trademark Modernization Act.¹⁴¹ Rather, it stems from the base rules and definitions of expungement and reexamination proceedings. This estoppel operates similarly to the concept that every square is a rectangle, but not every rectangle is a square.

The rule: a terminated reexamination proceeding prohibits a subsequent Petition for Expungement, but a terminated expungement proceeding does not automatically preclude a Petition for Reexamination for the same goods/services. To understand what this means, the rule must be broken down into its individual parts.

As a reminder, a Petition for Reexamination is based on the allegation that the mark was not in use in United States commerce for the specified goods and/or services as of the Relevant Date.¹⁴² If a reexamination proceeding has received a Notice of Termination, at least one of several things has occurred: the registrant voluntarily deleted goods/services, the USPTO deleted goods/services, and/or the USPTO issued a determination that the mark was in use

¹⁴⁰ Notice of Non-Institution, OPPOSITION (& Design), Registration No. 5,795,348 (Nov. 3, 2022) (Reexam. Petition No. 2022-00181).

¹⁴¹ Changes to Implement Provisions of the Trademark Modernization Act of 2020, 86 Fed. Reg. 64300 (2022) (to be codified at 37 C.F.R. pts. 2 and 7).

¹⁴² See 15 U.S.C. § 1066b(a).

in commerce and the specified goods/services can remain in the registration.¹⁴³ For a Notice of Termination in a reexamination proceeding to issue a determination and keep goods/services active in the subject registration, the registrant needed to demonstrate use of the mark in commerce as of the Relevant Date.¹⁴⁴ Acceptable evidence of use of the mark in commerce for those specific goods/services is, therefore, in the record and acknowledged.

Due to this accepted evidence, no potential petitioner can subsequently sign the verified statement required for a Petition for Expungement against those specific goods/services in the subject registration's identification.¹⁴⁵ A Petition for Expungement is based on the allegation that the mark has never been used in United States commerce for the specified goods and/or services.¹⁴⁶ As there is accepted evidence in the record that the mark *was* in use at some point for those goods/services,¹⁴⁷ all eligibility for an expungement proceeding against those specific goods/services disappears.¹⁴⁸ A Petition for Expungement is then precluded. This does not always work the other way.

¹⁴³ See *supra* Section III.

¹⁴⁴ 15 U.S.C. § 1066b(f).

¹⁴⁵ USPTO, PETITION FOR EXPUNGEMENT OR REEXAMINATION FORM, 12 (2024). See 15 U.S.C. §§ 1066a(b)(3), 1066b(c)(3) (outlining what the text of the verified statement should set forth).

¹⁴⁶ See 15 U.S.C. § 1066a(a).

¹⁴⁷ To create a preclusive effect, the accepted evidence needs to be evaluated as part of a reexamination or expungement proceeding—previously submitted and accepted specimens of alleged use are not sufficient to create preclusion.

¹⁴⁸ Changes to Implement Provisions of the Trademark Modernization Act of 2020, 86 Fed. Reg. 64300, 64306 (2022) (to be codified at 37 C.F.R. pts. 2, 7) (stating that if a reexamination proceeding established the mark was used in commerce, “it would be unnecessary for the registrant to be subjected to a later-instituted [expungement] proceeding alleging the mark was never used in commerce when the USPTO had already determined that the mark was used in commerce on or before the relevant date.”). As detailed in *supra* note 147, this statement does not

To receive a Notice of Termination in an expungement proceeding and retain goods/services in the registration, a registrant just needs to prove that the mark was in use in commerce at some point prior to the Petitioner filing the Petition for Expungement.¹⁴⁹ If this evidence proves use *after* the registration's Relevant Date, there is no estoppel against a subsequent Petition for Reexamination. A reexamination proceeding is only precluded if the evidence proved use *before* the Relevant Date. In essence:

[U]pon termination of an expungement proceeding where it was established that the registered mark was used in commerce [s]ubsequent reexamination proceedings for marks registered under section 1 of the [Lanham] Act are not barred under these circumstances Proof of use sufficient to rebut a prima facie case of nonuse in an expungement proceeding might not establish use in commerce as of a particular relevant date.¹⁵⁰

B. Estoppel Before the Trademark Trial and Appeal Board

One of the other pressing questions that trademark lawyers face with these proceedings is whether to pursue a cancellation proceeding for lack of bona fide use or abandonment before the TTAB, or an expungement or reexamination proceeding before the USPTO.¹⁵¹

preclude a petitioner from attacking the validity of previously submitted specimens of use as part of its reasonable investigation. Estoppel solely precludes the attack of proof of use submitted by the registrant during a reexamination or expungement proceeding.

¹⁴⁹ 15 U.S.C. § 1066a(e).

¹⁵⁰ Changes to Implement Provisions of the Trademark Modernization Act of 2020, 86 Fed. Reg. 64300 (2022) (to be codified at 37 C.F.R. pts. 2, 7); *see also* USPTO, *supra* note 21.

¹⁵¹ See Section V for a breakdown as to the benefits and drawbacks of cancellation proceedings versus expungement or reexamination proceedings.

The Implementation and Effectiveness of Trademark Expungement and Reexamination Proceedings 35

At the time of the TMA's passage, whether parties needed to choose one of the two options was unknown. These proceedings operate on a similar factual basis—assertions that the mark in question is not, or never has been, in use in United States commerce.¹⁵² Therefore, there was a potential for issue preclusion.¹⁵³ The actual text of the TMA is silent on the topic.

For the first two years of these proceedings, the only information available about the potential for collateral estoppel between these proceedings was the USPTO's response to a public comment during the public comment period for amending its rules of practice to implement the TMA. The USPTO stated the following:

[T]he extent to which, or whether, termination of an expungement or reexamination proceeding in favor of the registrant may bar future nonuse cancellation actions before the TTAB with respect to the registration, the USPTO clarifies here that the termination of an expungement or reexamination proceeding in favor of the registrant does not bar future nonuse cancellations under § 2.111 with respect to the registration.¹⁵⁴

Such a comment response by an agency is merely informational—it is not a binding rule, nor is it considered precedential.¹⁵⁵ This uncertainty has since been cleared up.

On May 19, 2023, the TTAB issued a precedential opinion in the cancellation proceeding *Common Sense Press Inc. d/b/a Pocket Jacks Comics v. Ethan Van Sciver and*

¹⁵² See 15 U.S.C. §§ 1064(3), (6); 15 U.S.C. §§ 1066a(a), 1066b(a).

¹⁵³ *Collateral Estoppel*, BLACK'S LAW DICTIONARY (12th ed. 2024).

¹⁵⁴ Changes to Implement Provisions of the Trademark Modernization Act of 2020, 86 Fed. Reg. 64300, 64316 (2022) (to be codified at 37 C.F.R. pts. 2, 7).

¹⁵⁵ See generally 5 U.S.C. §§ 551–59.

Antonio J. Malpica.¹⁵⁶ In October 2020, Common Sense Press Inc. (“Common Sense”) filed a Petition to Cancel against U.S. Registration No. 6102744 for the mark COMICS GATE (“COMICS” disclaimed) (the “COMICS GATE Registration”).¹⁵⁷ Subsequently, on March 23, 2022, Common Sense filed a Petition for Reexamination with the USPTO against the COMICS GATE Registration and simultaneously requested the suspension of the cancellation proceeding pending the resolution of the reexamination proceeding.¹⁵⁸

The registration’s owners, Ethan Van Sciver and Antonio J. Malpica (the “COMICS GATE Registrants”), successfully responded in the reexamination proceeding and established use of all the registration’s identified goods.¹⁵⁹ Once they received a Notice of Termination for the reexamination proceeding, they filed a Motion for Judgment in the cancellation proceeding arguing collateral estoppel.¹⁶⁰

The TTAB’s response was very clear and unequivocal. It stated that reexamination and expungement proceedings are *ex parte*, as the petitioner cannot appeal the outcome of the proceeding.¹⁶¹ As such, the petitioner of a Petition for Expungement or a Petition for Reexamination is not considered a party to the resultant reexamination or expungement proceeding.¹⁶² Therefore, “*as a matter of law*

¹⁵⁶ *Common Sense Press Inc. d/b/a/ Pocke Jacks Comics v. Ethan Van Sciver and Antonio J. Malpica*, 2023 WL 3596333 (T.T.A.B. May 19, 2023) (precedential).

¹⁵⁷ *Id.* at *1.

¹⁵⁸ *Id.*; *see also* 37 C.F.R. § 2.117(a) (stating that proceedings before the TTAB may be suspended pending the termination of an expungement or reexamination proceeding).

¹⁵⁹ *Common Sense Press Inc.*, 2023 WL 3596333, at *2–3.

¹⁶⁰ *Id.* at *2.

¹⁶¹ *Id.* at *4; *see also* 15 U.S.C. §§ 1066a(c)(3), 1066b(d)(3) (stating that any determination by the office as to whether a proceeding is instituted is final and non-reviewable).

¹⁶² *Common Sense Press Inc.*, 2023 WL 3596333, at *4.

... the termination of a reexamination or expungement proceeding in favor of a registrant cannot be the basis for the registrant's assertion of claim or issue preclusion in a proceeding before the Board to cancel that registration."¹⁶³

Although the TTAB has stated there is no issue preclusion between these proceedings, attorneys must remain aware of the potential ethical concerns of concurrently utilizing these proceedings. Petitions for Expungement and Petitions for Reexamination require a signed verification that states that all statements made by the signatory's own knowledge and own information and belief are true.¹⁶⁴ Should a cancellation proceeding reveal credible evidence that supports use of the mark prior to filing these petitions, the potential signatory for the expungement or reexamination proceeding may be placed in a difficult ethical position. Similarly, an expungement or reexamination proceeding may reveal credible evidence of use that jeopardizes a cancellation proceeding based on lack of bona fide use or abandonment.

In addition to the potentiality of being unable to sign the verification, all practitioners who attempt to initiate expungement and reexamination proceedings remain bound by the ethical rules for practicing before the USPTO.¹⁶⁵ These rules include candor to the adjudicating tribunal.¹⁶⁶ This means that a "practitioner *shall* inform the [USPTO] of all material facts known to the practitioner that will enable the [USPTO] to make an informed decision, whether or not the facts are adverse."¹⁶⁷

¹⁶³ *Id.* (emphasis added).

¹⁶⁴ USPTO, *supra* note 29; see 15 U.S.C. §§ 1066a(b)(3), 1066b(c)(3) (outlining what the text of the verified statement should set forth).

¹⁶⁵ Changes to Implement Provisions of the Trademark Modernization Act of 2020, 86 Fed. Reg. 64300, 64303 (2022) (to be codified at 37 C.F.R. pts. 2, 7).

¹⁶⁶ *Id.*

¹⁶⁷ 37 C.F.R. § 11.303(d); see also 37 C.F.R. § 11.18(b)(2) (stating that all allegations and factual contentions in a filing to the USPTO must have

V. WHY NOT A CANCELLATION PROCEEDING?

So why would a petitioner choose to initiate an expungement or reexamination proceeding instead of filing a Petition for Cancellation of a registration? There are several intriguing reasons why a petitioner may choose this path.

First and foremost, it is potentially significantly cheaper for a party to institute an expungement or reexamination proceeding rather than a cancellation proceeding. The official filing fee for a Petition for Cancellation is \$600 per class.¹⁶⁸ In contrast, the official filing fee of a Petition for Expungement or a Petition for Reexamination is \$400 per class.¹⁶⁹ Moreover, as discussed in Section II above, these proceedings are *ex parte*. There is no mechanism available for a petitioner to appeal the determination once it has been made.¹⁷⁰ As such, the work and filing fees to prepare and file a Petition for Expungement or a Petition for Reexamination are the only filings and costs incurred by the petitioner.¹⁷¹

The requirements for who can file a Petition for Expungement or a Petition for Reexamination are less stringent than is required for a Petition for Cancellation. To file a Petition for Cancellation, the requesting party must be

evidentiary support and are accurate to the best of the party's knowledge, information, and belief).

¹⁶⁸ 37 C.F.R. § 2.6(a)(16)(i).

¹⁶⁹ 37 C.F.R. § 2.6(a)(26).

¹⁷⁰ *Common Sense Press Inc. v. Van Sciver*, 2023 WL 3596333 (T.T.A.B. May 19, 2023) (precedential); *see also* 15 U.S.C. §§ 1066a(c)(3), 1066b(d)(3) (stating that any determination by the office as to whether a proceeding is instituted is final and non-reviewable).

¹⁷¹ Presuming that, e.g., the Petition was drafted correctly and the USPTO does not need to issue a Notice of Incomplete Petition, that the petitioner has not re-filed a Petition due to the non-institution of a previous petition, or that the petitioner is not undertaking these proceedings concurrently with another proceeding.

a “person who believes that he is or will be damaged . . . by the registration of a mark.”¹⁷² This “person” must be an identifiable natural or juristic person that has legal standing and is “capable of suing and being sued in a court of law.”¹⁷³ In contrast, as discussed in Section II above, there is no requirement that a petitioner prove that they will be damaged by the continued registration of a fraudulent registration.¹⁷⁴ There is not even a requirement that the petitioner identify itself.¹⁷⁵

Further, as discussed in Section IV above, filing a Petition for Cancellation based on abandonment or nonuse does not preclude the subsequent filing of a Petition for Expungement or a Petition for Reexamination against the same registration. There is simply no collateral estoppel.¹⁷⁶ Due to this, there is potential strategical interplay between a cancellation proceeding and an expungement or reexamination proceeding. Specifically, there are explicit grounds for a petitioner to suspend a cancellation proceeding before the TTAB for the duration of an expungement or reexamination proceeding against the same registration.¹⁷⁷

A chart breaking down the differences between these proceedings is detailed below. There are noticeable differences between these proceedings that attorneys and filing parties must account for. Each proceeding may not be the best fit for each situation. Yet, as the guidelines around

¹⁷² 15 U.S.C. §§ 1064, 1092; TBMP § 303.01 (Rev. June 2024).

¹⁷³ 15 U.S.C. § 1127; TBMP § 303.02 (Rev. June 2024).

¹⁷⁴ See 15 U.S.C. §§ 1066a(a), 1066b(a) (stating that “any person may file a petition” of expungement or reexamination).

¹⁷⁵ See 37 C.F.R. § 2.91(h) (stating that a petitioner need only be identified should the Director in their discretion require the identification of the real party or parties in interest).

¹⁷⁶ *Common Sense Press Inc. v. Van Sciver*, 2023 WL 3596333 (T.T.A.B. May 19, 2023) (precedential).

¹⁷⁷ 37 C.F.R. § 2.117(a). Note that a prosecution matter may also be suspended for the duration of an expungement or reexamination proceeding.

the expungement and reexamination proceedings become clearer, there are notable benefits to these proceedings that will ultimately increase their popularity.

Differences Between Cancellation Proceedings and Expungement or Reexamination Proceedings	
Cancellation Proceedings	Expungement / Reexamination Proceedings
\$600/Class Filing Fee	\$400/Class Filing Fee
Petitioner Needs to be Identified	Petitioner May Remain Anonymous Unless Required by the Office
Petitioner Needs to Have a Belief They Will be Damaged	No Standing Requirement
Does Not Preclude an Expungement or Reexamination Proceeding	Does Not Preclude a Petition to Cancel
Approximately 24 Hours Between Filing and Institution	Approximately 3–3.5 Months Between Filing and Institution or Non-Institution
Approximately 3–4 Months for Proceeding to Complete Assuming a Notice of Default is Issued	Approximately 3–4 Months for Proceeding to Complete Post Institution Assuming No Extensions nor Responses to Office Action Are Issued
Potential Active Oppositional Proceeding	Ex Parte Proceeding
Can be Suspended Pending Completion of an Expungement or Reexamination Proceeding	Cannot Be Suspended by Petitioner Once Filed

**VI. THREE YEARS OUT: HOW EFFECTIVE HAVE THESE
PROCEEDINGS PROVEN TO BE?**

Statistically speaking, the immediate impact of these proceedings is underwhelming. It has taken three years for 25,000 goods and services clauses to be canceled under either Section 16(a) or Section 16(b) of the TMA.¹⁷⁸ At first glance, that seems to be an impressive number. But when taken in the broad scheme of things, it is not that weighty. As of January 1, 2025, there are only 145 completed expungement proceedings and 850 completed reexamination proceedings.¹⁷⁹ These numbers are likely to increase over the next few years as attorneys begin to untangle the strict regulations around successfully instituting these proceedings.

A. *Petition for Expungement Statistics*

Of the two new proceedings, Petitions for Expungements are the least popular. Between December 18, 2021 and January 1, 2025, 294 total Petitions for Expungement were filed.¹⁸⁰ The vast majority (271) of these petitions were filed by ex parte petitioners.¹⁸¹

¹⁷⁸ *Successfully clearing the trademark register using TMA proceedings*, USPTO (Dec. 13, 2024, 9:07 AM), <https://www.uspto.gov/subscription-center/2024/successfully-clearing-trademark-register-using-tma-proceedings> [<https://perma.cc/VL92-K3KR>]; see also 15 U.S.C. §§ 1066a(g), 1066b(g) (setting forth that the Director shall order the cancellation of all goods and services for which the mark is not in use in commerce as determined by the expungement or reexamination proceeding).

¹⁷⁹ USPTO, *supra* note 94 (The author calculated these numbers by reviewing documents available in the USPTO's public database for expungement and reexamination proceedings and issued as of January 1, 2025.).

¹⁸⁰ *Id.*

¹⁸¹ *Id.*; see Fig. 2.

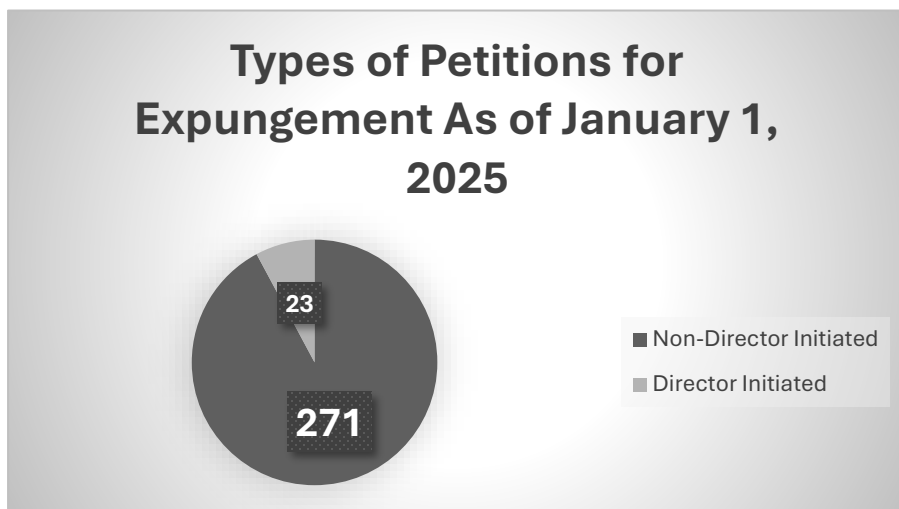


Fig. 2

While there is no publicly available explanation as to the lower number of these proceedings, the most likely cause is the larger amount of evidence required to successfully receive a Notice of Institution. Overall, the probability of receiving a Notice of Institution for a Petition for Expungement is approximately 65%.¹⁸² However, when only the ex parte Petitions for Expungement are reviewed, it decreases to 60%.¹⁸³ Despite the additional amount of evidence required for an expungement proceeding, this is only 1.25% higher than the current initiation rate for an ex parte reexamination proceeding.¹⁸⁴

¹⁸² USPTO, *supra* note 94.

¹⁸³ *Id.*; see *Fig. 3*.

¹⁸⁴ USPTO, *supra* note 94; *id.*; see *supra* Section VI.B.

Ex Parte Petitions for Expungement Success of Institution As of January 1, 2025

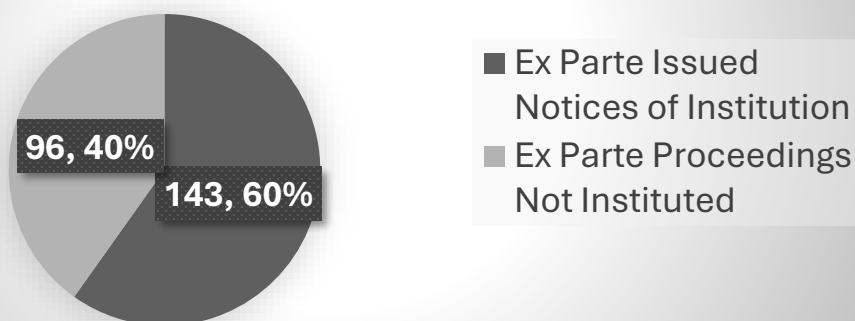


Fig. 3

Like the reexamination proceedings, discussed below, once a petitioner succeeds in receiving a Notice of Institution, expungement proceedings are typically partially successful. Of the 180 initiated expungement proceedings (i.e., received a Notice of Institution) between December 18, 2021 and January 1, 2025,¹⁸⁵ 145 of these have subsequently received a final Notice of Termination. The USPTO fully sustained 17.93% of these registrations with no deletions to

¹⁸⁵ Procedurally, Director Initiated Petitions for Expungement are automatically granted a Notice of Institution. 37 C.F.R. § 2.92(f)(2) (2023). When the 143 instituted Ex Parte Petitions for Expungement noted in Figure 3 are added to the 23 Director Initiated Petitions noted in Figure 2, a total of 180 expungement proceedings were initiated between December 18, 2021 and January 1, 2025.

their identification of goods and services.¹⁸⁶ The rest had at least some of the challenged goods and services cancelled.¹⁸⁷

Petitions for Expungement - Status Upon Notice of Termination As of January 1, 2025

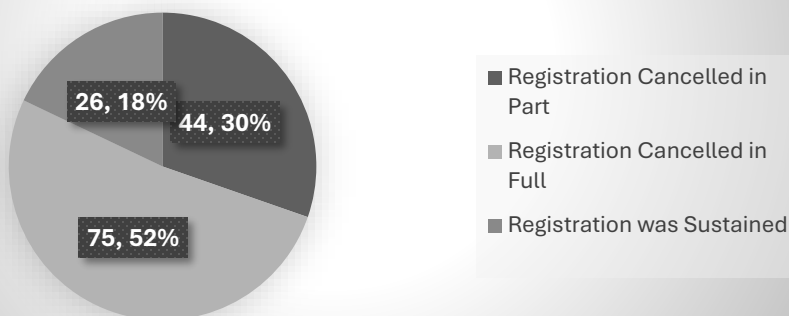


Fig. 4

B. Petition for Reexamination Statistics

At first glance, it appears that thousands of petitioners have taken advantage of the reexamination proceedings over their first three years of existence. However, only 286 of the 2,439 Petitions for Reexamination

¹⁸⁶ USPTO, *supra* note 94.

¹⁸⁷ See Fig. 4. These statistics include all instances where a good or service was deleted from the registration, whether by the registrant or by the USPTO. Even if the registrant voluntarily deletes clauses from the registration's challenged identification, the USPTO will still issue a Cancel in Part or Cancel in Whole Notice. See, e.g., Response to Office Action, WORN WEAR, Registration No. 4,955,520 (Jan. 27, 2023) (Exp. No. 2022-100189); Cancel in Part Notice, WORN WEAR, Registration No. 4,955,520 (Feb. 23, 2023) (Exp. No. 2022-100189).

were filed *ex parte*.¹⁸⁸ The rest of the proceedings were instituted *sua sponte* by the USPTO.¹⁸⁹

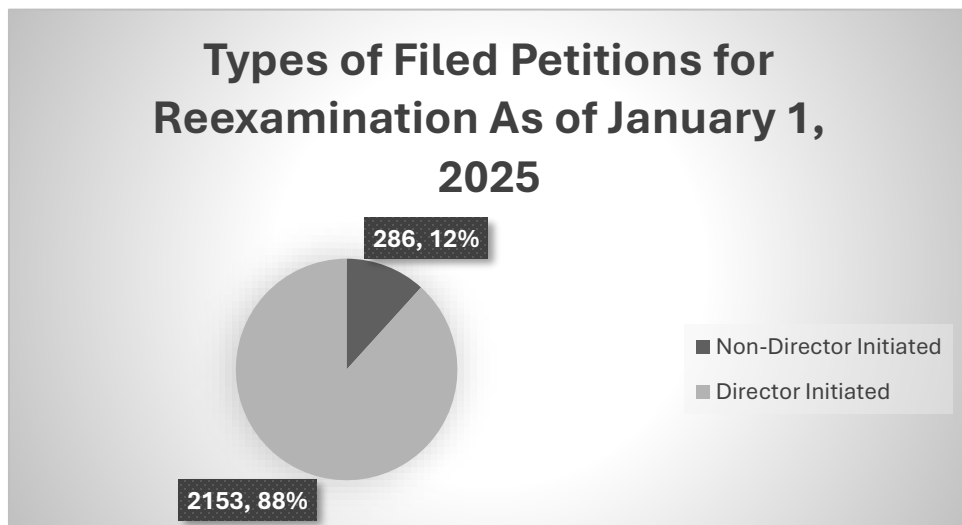


Fig. 5

Once the Director-Initiated Petitions for Reexaminations are filtered out, the probability of receiving a Notice of Institution is 58.75%.¹⁹⁰ This number is approximately equivocal to the successful initiation rate of the *ex parte* Petitions for Expungement (60%)—despite the lower amount of evidence required to satisfy the reasonable investigation burden of a reexamination proceeding.¹⁹¹

¹⁸⁸ USPTO, *supra* note 94.

¹⁸⁹ *Id.*; see *Fig. 5*.

¹⁹⁰ USPTO, *supra* note 94.

¹⁹¹ *Id.*; see *Fig. 6*.

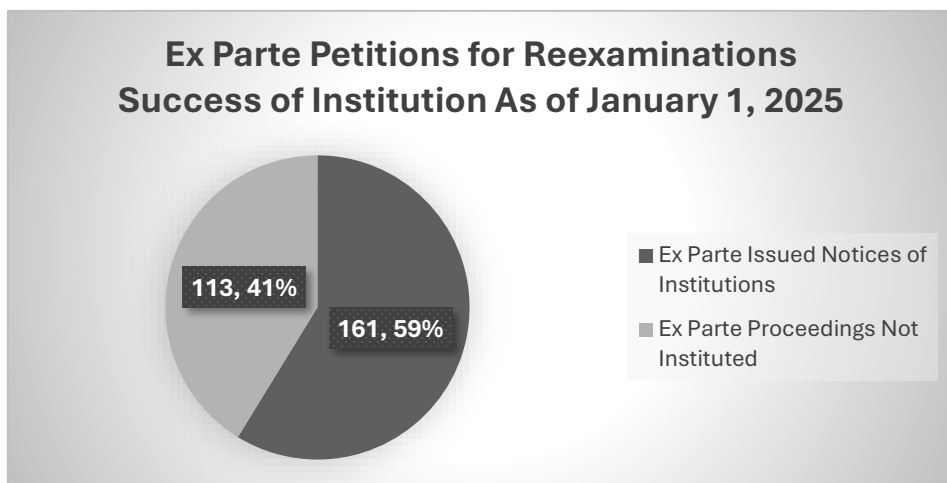


Fig. 6

In the long run, reexamination proceedings tend to be more successful than the corresponding expungement proceedings. 1,050 instituted reexamination proceedings have already received a final Notice of Termination.¹⁹² Of these, the USPTO only sustained 4% of the registrations with no deletions from their identifications of goods and services.¹⁹³

¹⁹² USPTO, *supra* note 94.

¹⁹³ *Id.*; see Fig.7.

Petitions for Reexamination - Status Upon Notice of Termination As of January 1, 2025

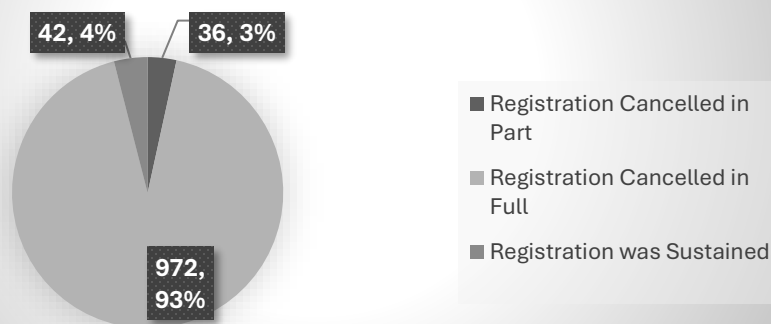


Fig. 7

VII. CONCLUSION

Expungement and reexamination proceedings provide petitioners and the USPTO direct, low-risk methods to target and remove fraudulent registrations from the register. As of 2021, an estimated 37% to 46.7% of all trademark applications with a Section 1(a) filing basis contained specimens with indications of being digitally altered or mocked up.¹⁹⁴ This suggests that there are many more potentially fraudulent registrations that need to be removed to protect the integrity of the trademark register.

As the statistics in Section VI suggest, these proceedings are likely to grow in popularity as petitioners

¹⁹⁴ Beebe & Fromer, *supra* note 8, at 226–28; *see also* U.S. DEP’T OF COM. OFF. OF THE INSPECTOR GEN., *supra* note 3, at 6–7.

gain a better understanding of them. Furthermore, as these proceedings are *ex parte* proceedings, petitioners can reduce, or outright eliminate, their own risk and incur lower costs as they try to clear the register for their valid trademark registrations. Once initiated, these proceedings have an 82% to 96% success rate of canceling at least a portion of the targeted registration.¹⁹⁵

While there are some drawbacks to these proceedings—e.g., some registrations may be time-barred from the ten-year maximum placed on expungement proceedings—these drawbacks are ultimately minimal when compared to the benefits of these proceedings and the overall state of the trademark register. Ultimately, expungement and reexamination proceedings are efficient, affordable, and user-friendly tools that, when used properly, allow petitioners to remove fraudulent trademark registrations from the register. These removals, in turn, create more space on the trademark register for the ultimate registration of legitimate trademarks. As these proceedings grow in popularity, so too will their benefits to all trademark owners.

¹⁹⁵ The final success rate of these petitions depends on the type of proceeding. 82% of instituted expungement proceedings result in some or all the goods/services in a registration being removed. *See* USPTO, *supra* note 94. Similarly, reexamination proceedings currently stand at 96%. *See id.*