

Injury in Fact: Establishing IPR Petitioner Standing on Appeal

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I. Introduction

As Justice Breyer obliquely observed in *Cuozzo Speed Technologies, LLC v. Lee*, a petitioner in an *inter partes* review (IPR) unsatisfied with a decision by the U.S. Patent Trial and Appeal Board (PTAB) may “lack constitutional standing” to appeal that decision to the Federal Circuit.² This is because while “Article III standing is not necessarily a requirement to appear before an administrative agency” like the PTAB³, Article III standing is required for an appellant to the Federal Circuit^{4,5}. In *Phigenix, Inc. v. ImmunoGen, Inc.*, the Federal Circuit articulated for the first time “the legal standard for demonstrating standing in an appeal from a final agency action,” such as a Final Written Decision (FWD) by the PTAB.⁶ This article explores that standard and its subsequent application by the Federal Circuit in appeals by IPR petitioners.

II. Phigenix: The Legal Standard

In *Phigenix*, the patent owner moved to dismiss the appeal, arguing the IPR petitioner, Phigenix, lacked standing. In assessing Phigenix’s standing, the Federal Circuit laid a framework for IPR petitioners—and others appealing final agency actions to the Federal Circuit—to establish standing to appeal.

The Federal Circuit first held, consonant with Supreme Court precedent, that “[a]s the party seeking judicial review, [the IPR petitioner] bears the burden of establishing that it has standing.”⁷ To establish standing, the Federal Circuit continued, the IPR petitioner must meet the “three elements” articulated in *Lujan v. Defenders of Wildlife*⁸: the IPR petitioner “must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct . . . , (3) that is likely to be redressed by a favorable judicial decision.”⁹ An “injury in fact,” the court explained, must be “both concrete and particularized.”¹⁰ An injury is “concrete” when it “actually exist[s]” and is not merely “conjectural or hypothetical.”^{11,12} An injury is “particularized” when “it affects an appellant ‘in a personal and individual way.’”¹³

The Federal Circuit then set forth “the burden of production; the evidence an appellant must produce to meet that burden; and when an appellant must produce that evidence.”¹⁴ Regarding the burden of production, the Federal Circuit drew on Supreme Court and other circuit court precedent to conclude that “the summary judgment burden of production applies.”¹⁵ To meet that burden, the Federal Circuit explained, “an appellant ‘must either identify . . . record evidence sufficient to support its standing to seek review or, if there is none because standing was not an issue before the agency, submit additional evidence to the court of appeals,’ such as ‘by affidavit or other evidence.’”¹⁶ An appellant’s evidence is “accept[ed] as true . . . for purposes of assessing its standing.”¹⁷ Finally, “[b]ecause standing involves threshold questions over a court’s authority to hear a dispute,” the court reasoned, “if there is no record evidence to support standing, the appellant must produce such evidence at the appellate level at the earliest possible opportunity.”¹⁸ Typically IPR

petitioners produce evidence of standing with their opening brief on the merits, though the Federal Circuit has, in its discretion, permitted such evidence to be produced (and arguments for standing to be made) in an IPR petitioner's responsive brief.¹⁹ The remainder of this article discusses, first, what constitutes an "injury in fact" and, then, what evidence serves to establish one.

III. What Constitutes an Injury in Fact

Since *Phigenix*, the Federal Circuit's IPR petitioner standing cases have focused on what constitutes an "injury in fact."²⁰ What *is* an injury in fact? The *Phigenix* court suggested "risk of infringing the [patent at issue]" or "otherwise plan[ning] to take any action that would implicate the patent" (though it found neither was the case for *Phigenix*).²¹ IPR petitioners since have identified as "injur[ies]" not only the risk of infringement suit, but also the risk of estoppel under 35 U.S.C. § 315(e), an economic interest in invalidation of the patent at issue, and—borrowing from other areas of law—economic competition. Each is discussed below.

A. Risk of Infringement Suit

Often, IPR petitioners assert that an injury in fact lies in the risk that a patent owner will bring suit. The Federal Circuit has asked in these cases whether the IPR petitioner is "engaged or will likely engage 'in an[] activity that would give rise to a possible infringement suit.'"²² To assess the risk of infringement suit, the court has examined both actions by the patent owner and potentially infringing products of the IPR petitioner.

1. Actions by the Patent Owner

Prior assertions of the patent at issue by the patent owner against the IPR petitioner can evidence standing, so long as the patent owner remains free to reassert the patent against the IPR petitioner. In *Grit Energy Solutions, LLC v. Oren Technologies, LLC*, for example, the Federal Circuit found IPR Petitioner Grit Energy had standing, observing "Grit Energy has engaged in acts that not only could give rise to a possible infringement suit, but *did* give rise to an infringement suit."²³ Notably, the prior litigation had been dismissed "without prejudice and the statute of limitations ha[d] yet to run, leaving [the patent owner] free to pursue its previous claims of infringement in the future."²⁴ Where a prior litigation has been dismissed *with* prejudice—as, for example, in *Apple Inc. v. Qualcomm Inc.*²⁵—the prior litigation likely does not support standing.

In general, the Federal Circuit has found irrelevant prior litigation unrelated to the patent at issue or the parties. In *Grit Energy*, for instance, the Federal Circuit "fail[ed] to see" how the dismissal with prejudice of a litigation "*unrelated* to the [patent at issue] bears any relation to its claims of infringement of that patent."²⁶ And in *Apple*, the Federal Circuit found assertions regarding the patent owner's "proclivity to assert its patent rights generally" to be only "conjecture."²⁷ The Federal Circuit has, however, found standing where the patent owner and IPR petitioner had directly competing products, the patent owner had asserted *other* patents against the IPR petitioner's product, and the patent owner had asserted the patent at issue against a third party with a similar competing product.²⁸

A patent owner's statements can also evidence standing. In *E.I. du Pont de Nemours & Co. v. Synvina C.V.*, for example, the Federal Circuit highlighted both the patent owner's "allegations of copying" by the IPR petitioner and "its refusal to grant [the IPR petitioner] a covenant not to sue."²⁹ In *Grit Energy*, the patent owner's counsel was asked during oral argument whether the patent owner would "stipulat[e] in open Court" not to sue the IPR petitioner. The court noted, in support of standing, that the patent owner "ha[d]n't made that stipulation."³⁰

2. Potentially Infringing Products of the IPR Petitioner

An IPR petitioner "need not face 'a specific threat of infringement litigation by the patentee'" to establish standing. Rather, "a controversy 'of sufficient immediacy and reality'" may exist where an IPR petitioner has produced, currently produces, or concretely plans to produce a potentially infringing product.

Past production of potentially infringing products can support standing so long as liability for infringement could still attach.³¹ "Indeed, disputes between parties frequently relate to actions that occurred in the past, and the mere fact that such actions have not continued to the present does not necessarily dissipate a controversy over those actions."³² So long as the patent owner "can still pursue those claims of infringement," past infringing activity can support standing.³³

Current production of a potentially infringing product can likewise support standing. This is likely the case even where an IPR petitioner is currently shielded from liability by a license to the patent.³⁴ But the IPR petitioner's payment of royalties for that license is not itself an "injury in fact," especially where the license covers patents beyond the patent in suit.³⁵

Future production of a potentially infringing product can create standing where the IPR petitioner "has concrete plans . . . that create a substantial risk of future infringement."³⁶ The Federal Circuit has found an IPR

petitioner's plans are not "concrete" where, for example, a potentially infringing product is not "finalized," such that the IPR petitioner "cannot definitively say whether or not it will infringe the [patent at issue]."³⁷ By contrast, "concrete" plans include "currently operat[ing] a plant capable of infringing" the patent at issue³⁸ and a tentatively approved Abbreviated New Drug Application.³⁹ To support standing, an IPR petitioner's plans must be ongoing, as the "termination of all potentially infringing activity" alters the potential for an infringement suit from "actual or imminent" to "conjectural or hypothetical."⁴⁰ Notably, to support standing, the IPR petitioner *itself* must be the potential defendant of an infringement suit involving a potentially infringing product.⁴¹

B. Section 315(e) Estoppel

In *Phigenix*, the IPR petitioner asserted an injury in fact based on the estoppel provision of § 315(e), arguing it would be "adversely impacted" by its potential inability to challenge validity of the patent at issue if sued in the future.⁴² The *Phigenix* court declined to find the potential estoppel significant absent the potential for a future infringement suit, and the Federal Circuit has maintained this stance since.⁴³ In *Momenta Pharmaceuticals, Inc. v. Bristol-Myers Squibb Co.*, for example, the court found potential estoppel of IPR petitioner Momenta to be "irrelevant now that Momenta has 'exited' its development of" a potentially infringing product.⁴⁴ "Estoppel cannot constitute an injury-in-fact," the court explained, "when [an IPR petitioner] 'is not engaged in any activity that would give rise to a possible infringement suit.'"⁴⁵

How exactly § 315(e) estoppel would play out for an IPR petitioner that lacked standing to appeal remains an open question, as the Federal Circuit observed in *AVX Corp. v. Presidio Components, Inc.* Noting there was no "possible infringement suit" linked to the estoppel concern AVX raised, the court found AVX lacked standing.⁴⁶ But the court acknowledged that it "has not decided whether the estoppel provision would have the effect that AVX posits—specifically, whether § 315(e) would have estoppel effect even where the IPR petitioner lacked Article III standing to appeal the Board's decision to this court."⁴⁷

C. Economic Interest in Invalidation of the Patent at Issue

An economic interest in the invalidation of a patent could be sufficient to create standing. In *Samsung Electronics Co., Ltd. v. Infobridge Pte. Ltd.*, for example, the Federal Circuit found IPR petitioner Samsung had standing because it licensed its own patents in a "pool" with the patent at issue, and it "st[oo]d to gain" increased

royalty payments if the patent at issue was invalidated.⁴⁸ The Federal Circuit has been unpersuaded by merely potential royalties, however.⁴⁹ As another example, an IPR petitioner's financial investment can evidence standing, but only if it is demonstrably tied to a potentially infringing product.⁵⁰ The Federal Circuit has also found standing where an IPR petitioner's product was "blocked" by the patent at issue and "invalidation of the patent would advance [the product's] launch."⁵¹

D. Economic Competition

In non-patent contexts, the Federal Circuit and other courts have found a party has so-called "competitor standing" to challenge certain government actions.⁵² Typically, competitor standing exists for a party challenging a government action that "provides benefits to an existing competitor or expands the number of entrants in the [party's] market."⁵³ This is distinguished from a government action "that is, at most, the first step in the direction of future competition."⁵⁴

Since *Phigenix*, many parties have argued for competitor standing, so far without success. In *AVX Corp.*, the court distinguished the PTAB's "upholding of specific patent claims" from the government actions at issue in competitor standing cases. In competitor standing cases, the court stated, "the challenged government action nonspeculatively threatened economic injury to the challenger by the ordinary operation of economic forces."⁵⁵ A decision of the PTAB, by contrast, "give[s] exclusivity rights over precisely defined product features."⁵⁶ "That sort of feature-specific exclusivity," the court held, "does not, by the operation of ordinary economic forces, naturally harm a firm just because it is a competitor in the same market as the beneficiary of the government action (the patentee)."⁵⁷ What is needed, the court reiterated, is a "present or nonspeculative interest in engaging in conduct even arguably covered by the patent claims at issue."⁵⁸

The Federal Circuit revisited competitor standing in *General Electric Company v. United Technologies Corporation*, where IPR petitioner GE claimed the PTAB's upholding of its competitor's patent was an injury in fact.⁵⁹ "For the competitor standing doctrine to apply," the court held, "the government action must change the competitive landscape by, for example, creating new benefits to competitors."⁶⁰ Finding no such change, the court held GE lacked standing.⁶¹ Judge Hughes wrote in concurrence that, "absent [the court's] holding in *AVX Corp.*, [he] would [have] conclude[d] that GE possesse[d] Article III standing."⁶² Judge Hughes disagreed that "a Board decision erroneously upholding a competitor's patent in an IPR is meaningfully different from the type of government actions held to invoke competitor standing."⁶³ Moreover, he highlighted, "[t]he

risk of a future infringement suit is not the only way an IPR petitioner can show injury-in-fact,” yet *AVX* holds as much by requiring, even for direct competitors, that an IPR petition “show concrete current or future plans to infringe the challenged patent.”⁶⁴ In his view, the court’s “patent-specific treatment of competitor standing is out of step with its application in other areas.”⁶⁵

IV. Evidence of an Injury in Fact

Typically, an IPR petitioner’s evidence of standing is provided through declarations. The Federal Circuit has measured these declarations against Federal Rule of Civil Procedure 56(c)(4), which requires declarations submitted as evidence to be “made on personal knowledge” and “set out *facts*”—not a “conclusion[] of law”—“that would be admissible in evidence.”⁶⁶

In many instances, the Federal Circuit has criticized IPR petitioners’ declarations for being “speculative,” “untethered to the” patent at issue, or otherwise “devoid of any of the specificity necessary to establish an injury in fact.”⁶⁷ In *United Technologies*, for example, the Federal Circuit found declarations from IPR petitioner GE’s general counsel failed to “show[] a concrete and imminent injury to GE related to the [patent at issue].”⁶⁸ The declarations “contend[ed] only that GE expended some unspecified amount of time and money to consider [products] that could *potentially* implicate the [patent at issue].”⁶⁹

By contrast, in *General Electric Company v. Raytheon Technologies Corporation*, the Federal Circuit found the declarations submitted by the IPR petitioner (again, GE) “show[ed] that it will likely engage in activity that would prompt an infringement suit.”⁷⁰ The court noted GE’s “concrete plans for future activity,” including “specific investment in continued development” of a potentially infringing product, “its avowed preference for” this product, and “its informal offer of this [product]” to a customer. The court also highlighted a statement from GE’s Chief IP Counsel that “GE fully expect[ed] that [Raytheon] would accuse this [product] of infringing the [patent at issue].”⁷¹ The Federal Circuit drew an express contrast with the *United Technologies* case: While “GE’s allegations of fact in the prior case left a great deal to the imagination,” the court observed, “GE’s factual allegations here address [the] specific deficiencies” raised in *United Technologies* and “provide overall much more support for its assertions that it has made concrete plans raising a substantial risk of infringement of the [patent at issue].”⁷²

V. Conclusion

The contours of IPR petitioner standing to appeal are still being shaped, with new cases continuing to come before the Federal Circuit.⁷³ But the cases so far provide useful roadmaps—and, in some cases, cautionary tales—that IPR petitioners and patent owners alike can look to when grappling with IPR petitioner standing at the Federal Circuit.

1. The authors are attorneys at the intellectual property firm of Finnegan, Henderson, Farabow, Garrett & Dunner LLP. This article is for informational purposes, is not intended to constitute legal advice, and may be considered advertising under applicable state laws. This article is only the opinion of the authors and is not attributable to Finnegan, Henderson, Farabow, Garrett & Dunner LLP or the firm’s clients.

2. *Cuozzo Speed Techs., LLC v. Lee*, 168 S. Ct. 2131, 2143–44 (2016).

3. *Massachusetts v. EPA*, 549 U.S. 497, 505–06 (2007).

4. *Consumer Watchdog v. Wis. Alumni Research Found.*, 753 F.3d 1258, 1261 (Fed. Cir. 2014).

5. An IPR petitioner need not have standing to *defend* an appeal by the patent owner. *Pers. Audio, LLC v. Elec. Frontier Found.*, 867 F.3d 1243, 1250 (Fed. Cir. 2017) (Where “the party invoking judicial review is [the patent owner] ... Article III [is] satisfied as to the appellant,” and the IPR petitioner “is not constitutionally excluded from appearing in court to defend the PTAB decision in its favor.”). An IPR petitioner likely does, however, need standing to cross-appeal. See *Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 980 n.8 (Fed. Cir. 2018) (requiring party opposing a mark to establish standing to cross-appeal in mark owner’s appeal from a TTAB decision because “[a] party that is not adversely affected by a judgment lacks standing to cross-appeal.”) (quoting *TypeRight Keyboard Corp. v. Microsoft Corp.*, 374 F.3d 1151, 1156 (Fed. Cir. 2004)).

6. *Phigenix, Inc. v. ImmunoGen, Inc.*, 845 F.3d 1168, 1172 (Fed. Cir. 2017).

7. *Id.* at 1171 (citing *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340 (2006)).

8. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

9. *Phigenix*, 845 F.3d at 1171 (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2013)).

10. *Id.* (quoting *Spokeo*, 136 S. Ct. at 1545).

11. *Id.* (quoting *Spokeo*, 136 S. Ct. at 1548, *Lujan*, 504 U.S. at 560).

12. Typically a “concrete” injury must also be “imminent,” *Lujan*, 504 U.S. at 560, but this requirement is “relaxed” where, as for the IPR petitioner, a right to appeal is provided by statute. See, e.g., *Consumer Watchdog*, 753 F.3d at

1261 (citing *Massachusetts*, 549 U.S. at 517–18). The same is true of the “redressability” requirement of element (3). *Id.*

13. *Phigenix*, 845 F.3d at 1171 (quoting *Spokeo*, 136 S. Ct. at 1548).

14. *Id.* at 1172.

15. *Id.* at 1172–73 (collecting cases).

16. *Id.* at 1173 (quoting *Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002)).

17. *Amerigen Pharms. Ltd. v. UCB Pharma GmbH*, 913 F.3d 1076, 1083 (Fed. Cir. 2019) (citing *Warth v. Seldin*, 422 U.S. 490, 501 (1975)).

18. *Phigenix*, 845 F.3d at 1173 (citing *Massachusetts*, 549 U.S. at 505).

19. *Apple Inc. v. Qualcomm Inc.*, 992 F.3d 1378, 1381–82 (Fed. Cir. 2021) (“Apple should have made its standing arguments and proffered its evidence in support of standing in its opening brief,” but “waiver is a matter of discretion” and “[w]e exercise our discretion to reach the issue of standing”).

20. *Consumer Watchdog* considered and rejected the argument that a party’s statutory right of appeal creates Article III standing even absent an “injury in fact.” 753 F.3d at 1262 (“[T]he statutory grant of a procedural right does not eliminate the requirement that [an appellant] have a particularized, concrete stake in the outcome of the [post-grant review proceeding].”) (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 492–93 (2009)).

21. *Phigenix*, 845 F.3d at 1173–74.

22. *JTEKT Corp. v. GKN Auto. Ltd.*, 898 F.3d 1217, 1220 (Fed. Cir. 2018) (quoting *Consumer Watchdog*, 753 F.3d at 1262).

23. *Grit Energy Sol’ns, LLC v. Oren Techs., LLC*, 957 F.3d 1309, 1320 (Fed. Cir. 2020).

24. *Id.*

25. *Apple*, 992 F.3d at 1385 (“Apple also argues Qualcomm’s previous suit for infringement . . . provides standing . . . But *Grit Energy* involved a dismissal without prejudice, unlike the dismissal with prejudice here.”).

26. *Grit Energy*, 957 F.3d at 1320. See also *AVX Corp. v. Presidio Components, Inc.*, 923 F.3d 1357, 1365 (Fed. Cir. 2019) (“It does not matter than [patent owner] has sued [IPR petitioner] over other [products] that did not contain the [elements] claimed in the [patent at issue].”).



27. *Apple*, 992 F.3d at 1385. *See also General Elec. Co. v. Raytheon Techs. Corp.*, 983 F.3d 1334, 1343 (Fed. Cir. 2020) (“GE did not suggest that Raytheon would accuse that design of infringement—GE opined generally that Raytheon had ‘a history of threatening the aviation industry with their patent portfolio.’”). *Accord Argentum Pharms. LLC v. Novartis Pharms. Corp.*, 956 F.3d 1374, 1378 (Fed. Cir. 2020) (finding unpersuasive IPR petitioner’s assertion that patent owner had “already sued multiple generic companies to protect” the patented drug).
28. *Adidas AG v. Nike, Inc.*, 963 F.3d 1355, 1357 (Fed. Cir. 2020).
29. *E.I. du Pont de Nemours & Co. v. Synvina C.V.*, 904 F.3d 996, 1200 (Fed. Cir. 2018). *See also Adidas*, 963 F.3d at 1357 (“[Patent owner] has refused to grant [IPR petitioner] a covenant not to sue, confirming that [IPR petitioner’s] risk of infringement is concrete and substantial.”).
30. *Grit Energy*, 957 F.3d at 1320 n.3.
31. *Id.* at 1320 (“[A]lthough Grit Energy transferred ownership of the products accused of infringement in that suit, that does not absolve Grit Energy of liability for actions it took before the transfer.”).
32. *Id.*
33. *Id.*
34. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 120 (2007) (finding, in the declaratory judgment context, that a current licensor had standing).
35. *Apple*, 992 F.3d at 1383 (“In Apple’s view, a licensee’s obligations to pay royalties for a license to 100,000 patents would provide standing to challenge the validity of any single licensed patent, even if the validity of any one patent would not affect the licensee’s payment obligations. . . . We do not read *MedImmune* so broadly.”).
36. *JTEKT Corp. v. GKN Auto. Ltd.*, 898 F.3d 1217, 1221 (Fed. Cir. 2018). *See also id.* at 1220 (“The fact that [an IPR petitioner] has no product on the market at the present time does not preclude Article III standing.”)
37. *Id.* at 1221. *See also AVX*, 923 F.3d at 1365–66 (“AVX has not pointed to a [potentially infringing product] in any stage of development that might implicate the upheld claims.”); *Apple*, 992 F.3d at 1384 (“Apple provides no evidence that it intends to engage in any activity that may give rise to an infringement suit of the [patents at issue].”).
38. *E.I. du Pont de Nemours & Co. v. Synvina C.V.*, 904 F.3d 996, 1199 (Fed. Cir. 2018). *Compare Argentum*, 956 F.3d at 1378 (finding a “new manufacturing space” did not evidence standing because it would also be used to produce “a drug unrelated to the patent at issue”).
39. *Amerigen*, 913 F.3d at 1083 (Fed. Cir. 2019).
40. *Momenta Pharms., In. v. Bristol-Myers Squibb Co.*, 915 F.3d 764, 768 (Fed. Cir. 2019) (“Although Momenta had initially stressed that it had spent millions of dollars in its development of [a potentially infringing product], now upon Momenta’s termination of all potentially infringing activity, Momenta has not shown ‘an invasion of a legally protected interest’ that is ‘actual or imminent, not conjectural or hypothetical.’”) (quoting *Lujan*, 504 U.S. at 560).
41. *Argentum*, 956 F.3d at 1377 (finding no standing where IPR petitioner’s “manufacturing and marketing partner, not IPR petitioner, was “at risk of being sued”). *Cf. Mojave Desert Holdings, LLC v. Crocs, Inc.*, 987 F.3d 1070, 1079 (finding previously accused party’s “successor-in-interest” had standing because “the acquired assets . . . face potential patent infringement claims.”).
42. *Phigenix*, 845 F.3d at 1175.
43. *Id.* (citing *Consumer Watchdog*, 753 F.3d at 1262). *But see Generic Elec. Co. v. United Techs., Corp.*, 928 F.3d 1349, 1359 (Fed. Cir. 2019) (Hughes, J., concurring) (stating, while defending “competitor standing” in the patent context, that “the effects of [§ 315(e)] estoppel have especially significant impact where the parties are direct competitors”).
44. *Momenta*, 915 F.3d at 769.
45. *Id.* (quoting *Consumer Watchdog*, 753 F.3d at 1262).
46. *AVX*, 923 F.3d at 136263. *Accord Argentum*, 956 F.3d at 1378 (“Argentum has not shown that it will be harmed by estoppel where it has not established there is risk of an infringement suit.”).
47. *Id.* at 1363. *But cf. United Techs.*, 928 F.3d at 1359 (Hughes, J., concurring) (observing, while defending “competitor standing” in the patent context, that the court “ha[s] not decided whether § 315(e) would estop and IPR petitioner who lacked standing to appeal an unfavorable decision” and warning that “until [the court] do[es], [a patent at issue] is an even greater competitive deterrent” for a competitor IPR petitioner”).
48. *Samsung Elecs. Co. v. Infobridge Pte. Ltd.*, 929 F.3d 1363, 1368 (Fed. Cir. 2019).
49. *See, e.g., Momenta*, 915 F.3d at 769 (“[IPR petitioner’s] argument that it might at some future time receive a royalty . . . has no support in precedent.”); *Phigenix*, 845 F.3d at 1174 (finding unpersuasive IPR petitioner’s contention that patent at issue “encumber[ed] [its] licensing efforts.”); *but see id.* (“It is possible that, if [the IPR petitioner] had licensed [its patent] to the same parties to which [the patent owner] had licensed [the patent at issue], the invalidation of [the patent at issue] might have increased [the IPR petitioner’s] revenue.”).
50. *Argentum*, 956 F.3d at 1378 (finding unpersuasive IPR petitioner’s investment that also benefitted other, unrelated products).
51. *Amerigen*, 913 F.3d at 1083 (Fed. Cir. 2019).
52. *See, e.g., Clinton v. City of New York*, 524 U.S. 417, 433 (1998) (finding “competitor standing” for a party challenging government cancellation of a tax benefit); *Canadian Lumber Trade Alliance v. United States*, 517 F.3d 1319, 1324 (Fed. Cir. 2008) (finding “competitor standing” in a case examining the North American Trade Agreement and Continued Dumping and Subsidy Offset Act); *U.S. Telecom Ass’n v. FCC*, 295 F.3d 1326, 1331 (D.C. Cir. 2002) (finding “competitor standing” for a party challenging a federal “common carrier” designation and concomitant subsidies).
53. *AVX Corp.*, 923 F.3d at 1365 (quoting *New World Radio, Inc. v. FCC*, 294 F.3d 164, 172 (D.C. Cir. 2002)).
54. *Id.* (quoting *New World Radio*, 294 F.3d at 172).
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.* at 1363.
59. *United Techs.*, 928 F.3d at 1353–54.
60. *Id.* at 1354. *See also id.* (“[T]he government action must alter the status quo of the field of competition.”)
61. *Id.*
62. *Id.* at 1355 (Hughes, J., concurring).
63. *Id.*
64. *Id.* at 1357.
65. *Id.*
66. *Phigenix*, 845 F.3d at 1174 (quoting 10B Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. § 2738 (4th ed. 2016)).
67. *United Techs.*, 928 F.3d at 1354; *Apple*, 992 F.3d at 1384.
68. *United Techs.*, 928 F.3d at 1353.
69. *Id.*
70. *General Elec. Co. v. Raytheon Techs. Corp.*, 983 F.3d 1334, 1342 (Fed. Cir. 2020).
71. *Id.* at 1342.
72. *Id.* at 1343. *See also Altaire Pharmaceuticals, Inc. v. Paragon Biotech, Inc.*, 889 F.3d 1274, 1282–83 (Fed. Cir. 2018) (finding an IPR petitioner had standing because general counsel declared it intended to resume marketing of an infringing product as soon as an agreement with the patent owner was terminated and it “believe[d] that [the patent owner] will inevitably sue Altaire for patent infringement.”)
73. *See, e.g., Qualcomm Inc. v. Intel Corp.*, No. 20-1828 (oral argument held October 7, 2021).

