Kazia Nowacki

From: ACUS Information <info@acus.gov>
Sent: Tuesday, August 30, 2022 10:21 AM
To: [redacted]
Subject: FW: Public Comment on Patent Small Claims Court
Attachments: Public Comment to ACUS.pdf

From: Edward Lin [redacted]
Sent: Monday, August 29, 2022 11:51 PM
To: ACUS Information <info@acus.gov>
Cc: Paul Morinville [redacted]; Randy Landreneau [redacted]; 'josh [redacted]; Natalie Young [redacted]; Kassidy Morinville [redacted]
Subject: RE: Public Comment on Patent Small Claims Court

Dear Sir/Madam,

Even though the deadline for submission of comments online on the Patent Small Claim Court is end of today. After an exhaustive search, I am unable to find any link that would accept the submission of the attached comment. I am therefore submitting the attached via email which was supposed to be an alternative way of submitting comment. Thank you for your consideration.

Ed

Dr. Edward Lin
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My **TED** talk: "You'll See It When You Believe It" (https://tinyurl.com/Turn-into-reality)

"The future is not some place we are going to, it is one we are creating. The paths are not to be found, they are to be made. And the activity of making them changes both the creator and the destination." — John Schaar

"Genius is seeing what everyone else sees and thinking what no-one else has thought." — Albert Szent-Gyorgy

"Simplicity is the ultimate sophistication ." — Leonardo da Vinci

Imagination is more important than knowledge, for while knowledge points to all there is, imagination points to all that can be. – Albert Einstein

"How wonderful it is that nobody need wait a single moment before starting to improve the world." — Anne Frank

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From: Edward Lin
Sent: Monday, August 29, 2022 11:41 PM
To: 'info@acus.gov' <info@acus.gov>
Cc: 'Paul Morinville' [redacted] 'Randy Landreneau' [redacted]; 'josh [redacted]; Natalie Young [redacted]; Kassidy Morinville [redacted]
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Response to the Request for Comment Regarding the Administrative Conference of the United States ("ACUS") Small Claims Patent Court Study.

Re: **Small Claims Patent Court Comment**

I am an inventor and member of US Inventor Inc., a non-profit 501 (c) 4 with a large membership. . I speak with the knowledge and experience of someone with the equivalent of two doctoral degrees, as a board-certified anesthesiologist, and inventor of diverse game-changing technologies in telecommunications, medical devices and other sectors. I'm writing in Response to the Request for Comment Regarding the Administrative Conference of the United States ("ACUS") Small Claims Patent Court Study.

The US patent system was the backbone and foundation that enabled the US to become a powerhouse in innovations. The ability to invent has been shown by history to not be the exclusive domain of Americans. Without doubt, it is the original patent system that protected and rewarded inventors for their risk and toil that made it possible for the US to become a world leader in innovations.

Since 2013, US Inventor has advocated for strong patent protection and strong patent rights for small businesses and startups, and inventors. It is a trusted organization advocating for equitable protection of the inventor, and hence the framework for our nation's economic prosperity and security. For nearly a decade, since the advent of the (perhaps well-intentioned but) ill-conceived AIA, America Invents Act, we have worked with startups and inventors who have been victimized by the US Patent system. It is our goal, as it should be for all Americans, to protect these small startups and entities—which are responsible for the majority of innovations Americans create— from infringement and corruption of the patent system.

In order to properly address the ACUS' request for views, information, and data on all aspects of a potential court or proceeding for small entity patent claims and its impacts, it is crucial to first to understand the larger insidious problems that harm small entities. Only after this, can we set forth intelligently and equitably to create genuine, effective solutions.

Most pioneering inventions are invented and patented by small entities, and these inventions are most frequently infringed upon and commercialized on a massive scale by huge multinational corporations. This means that most small entities suffer grievously from such violations and economic injury.

Therefore, these aggrieved small entities do not have small claims – they have huge claims.

For small entities, the cost and complexity of a patent lawsuit is a crushing, unsurmountable barrier to defending their rights and securing redress. The lack of money can cause a small entity to license a patent that they do not infringe just to stop the huge legal fees. But the size of a claim has no relationship to whether a small entity has millions of dollars to defend their patent rights.

How does the current patent system fail small inventors, and hence fail our national best interest?

If a squatter decides to move into your house against your will and occupy half or more of your house, you ought to be able to stop that squatter, right? A court injunction will stop that, and restore peace and ownership to you.

But In 2006, the Supreme Court in eBay v. MercExchange created an ill-conceived public interest test to determine if injunctive relief should be granted. The eBay public interest test REQUIRES the patent holder to have a product on the market with the manufacturing and distribution power to replace the infringer.

That's like saying UNLESS you can show you are already using the space in your house for some commercial purpose, you're required to let the squatter use it! Does that sound fair? Or American?

When a patented invention of a small entity is infringed by a huge corporation, the infringer's deep pockets, overwhelming engineering, marketing and distribution prowess simply usurp the invention and market share, leaving the small entity unable to compete and essentially out of business. Once in dire straits, the small entity cannot survive the eBay public interest test because they do not have much of a product, if any, on the market.

The crushing of the peanut entity into peanut butter by large corporations.

In 2011, the America Invents Act created an administrative tribunal called the Patent Trial and Appeal Board (PTAB). The PTAB consists of government lawyers called Administrative Patent Judges (APJ). These "judges" are hand-picked to adjudicate patent validity reviews, which are petitioned by mostly large corporations against small entities. APJs work within the USPTO to invalidate the same patents − a personal property right − that were just issued by the patent examiners, who also work within the USPTO. Patents targeted for invalidation at the PTAB are those with significant commercial value. They are invented and owned by small entities who − in pursuit of their American dream − conceived it, invented it, and protected it with a hard-fought patent granted by the USPTO, and then attempted to commercialize it. But little did the inventor know, the patent protection that they toiled to obtain, the very patent protection that was issued by the USPTO, is also patent protection that can be easily declared invalid by the USPTO's PTAB for reasons which were (or should have been) addressed during patent examination. The USPTO Director, who runs both patent examination (creating patents) and the PTAB (destroying patents) has dictatorial power to both create and destroy the most important and hard-fought personal property right in the United States.

Do you think it is fair that a house you paid for, toiled to build, got all the permits and proper title to and insured, should then be ordered destroyed and become worth NOTHING, with zero compensation, because a squatter would prefer to have you out of the way?

The PTAB is an administrative tribunal in the Executive branch of government, not an Article III court under our judicial system. Yet, they take away Inventors' personal property rights without a jury and without due process of law. The vast majority of the APJs have little or no practical experience in the field of their technical undergraduate degree and in many cases, have no experience in the technology of the patents they invalidate.

Yet, they have destroyed and invalidated a shocking 84% of the patents they review!

The PTAB's 84% destruction rate runs counter to and makes a mockery of the very purpose of what the PTAB was created to accomplish. The PTAB was implemented with the intent to protect small entities and provide a faster and less costly way to resolve disputes whether the small entity is the patent holder or the accused infringer.

However, the PTAB has utterly failed small entities. PTAB reviews can add three or more years to litigation and add at least $500,000 in costs. Because there are no standing requirements, ANYONE can challenge a patent even if they will never be a party to or a subject of the litigation at issue.

Should your unrelated neighbor two houses down be able to challenge your will?

Worse yet, there are no limits to the number of PTAB reviews that can be filed. Many small entities have been overwhelmed by dozens of PTAB reviews filed by multiple large corporations and their proxies—like marauding packs of wolves.

35 USC 101 states "Whoever invents or discovers **any** new and useful process, machine, manufacture, or composition of matter, or **any** new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title."

In 2014, the Supreme Court in Alice v. CLS Bank unleashed a demon creating an indefinite exception to the word "any" called "an abstract idea". From this ruling "abstract ideas" became not patent eligible. But the court did not define what "an abstract idea" is! This has left the USPTO and the lower courts grasping for a meaning of abstract idea and in their struggle, trial courts invalidate around 67% of patents challenged as abstract ideas, and the USPTO fails to grant a huge number of patents that should be granted.

In summary, between the PTAB, Alice and eBay, all of which individually and even worse, in concert,
[1] disproportionally harm and injure small entities over large corporations, and
[2] lay waste to one's precious patents and turn them from valuable asset into financial liabilities for a small entity.

Since patents are often the only asset synthesized through toil, blood, sweat and tears, and the only gold a small entity can collateralize to attract investment, especially at the earliest stages

of development, early-stage funding of startups has migrated from the U.S. to Shenzhen, the silicon valley of China.

Although China was a developing nation at one time better known for knock-off shoes and cheap knick-knacks, it has become a technology powerhouse with advancements in many important technology sectors that rival or even surpass the U.S. It accomplished this in part by a relentless application of and even enhancements to the original U.S. patent law system. While this transformation is an accelerated ongoing process, today, China protects the intellectual property rights of inventors in important ways even better than the U.S. For example, China has in recent years instituted injunctive relief to infringed inventors while the US has eliminated it.

The result of AIA, PTAB and recent court rulings above is an insidious, yet massive cancer that undermines our national technological and economic advantage.

Why spend all that effort and money to patent and disclose an innovation that has high chance of being nullified? This is a horrendous disincentive to American ingenuity and national security that we cannot afford to continue. America must wake up. NOW.

The only way to restore American technology prowess to supremacy is to stand with American inventors and accord them the protection they deserve and were promised under our Constitution.

In designing the Small Claims Patent Court, several key considerations must prevail:

1. **The Focus Should be Small Entities, not Small Claims**. Patent infringement litigation is among the most expensive and complex litigation in the U.S. Teams of lawyers, mostly working for accused infringers, run costs into the millions of dollars. Often dozens of motions are filed that must be answered yet require enormous technical review by experts. A single case can have several appeals to the Court of Appeals for the Federal Circuit (CAFC). Cases can take ten years to fully resolve.

   Due to the high costs, extremely long pendency, and the high chance that the patents will be invalidated by the PTAB or simply thrown out as an abstract idea, and because injunctions are no longer available for most small entities, very few law firms will take a case on a contingent fee basis.

   This means that small entities need millions of dollars to defend their rights. Small entities, whether the patent holder or the accused infringer, cannot shoulder the financial burden. Also, small entities often invent pioneering technologies. These inventions are copied and knocked off by giant corporations that flood the market and crush the small entity.
   Peanuts are not supposed to become peanut butter this way. It is grievously unamerican.

This means that many small entities do not have small claims, they simply cannot afford the millions of dollars to defend their rights and seek restitution.

Therefore, a small claims court is not a practical solution, and any new process must focus on the size of the entity rather than the size of the claim. It should more aptly be called a Small Entity Court.

The infringer lobby has repeatedly pushed a narrative the small entities are the target of patent lawsuits. If this is indeed the case, then small entity defendants must also be considered in any solution.

2. **The Small Entity Court must be an Article III court, not an Administrative Tribunal**. As we all have witnessed through the PTAB's horrifically high invalidation rates and their focus on invalidating small entity patents on the request of huge multinational corporations, administrative tribunals simply do not work. This is because the PTAB violates core Constitutional constructs of due process and separation of powers.

   An administrative tribunal should not and must not adjudicate patent litigation cases for the same reasons. That leaves Article III courts. However, as we have found in the CAFC, the concentration of adjudicative power in a few judges can lead to a dangerously unbalance court. Over the years, a large number of anti-patent judges have been put on the CAFC. These judges have repeatedly and unfairly decided cases against small entities and for huge multinational corporations. This could not happen if patent appeals were distributed across all appeal courts. The CAFC has demonstrated that it will override sound judges on venue transferring cases to the headquarters of the infringer. This practice will prohibitively raise costs for small entities because they will need to travel, take excessive time off work and hire local counsel in courtrooms often thousands of miles away.

   If a separate Article III court is created to hear small entity cases, those small entities not near that court will have the same disproportionate cost increase. Small entities must be able to file lawsuits in the courthouse nearest to them. The solution is to create small entity rules in the Federal Rules of Civil Procedure (FRCP) that Article III courts must follow upon request by either party if that party is a small entity. This allows a small entity to file suit in the federal district court most convenient to the small entity.

3. **The Court must be limited to cases where at least one party meets Small Entity Qualifications**. To qualify as small entity, the individual or business' revenue must fit the federal definition of a small business: and no more than 499 employees. Upon request by either party, the small entity FRCP rules must be followed by the Article III court.

4. **A Limited Motion Practice must be clearly stipulated. Excessive motion practice** is common in patent cases. Largely this practice is intended to drive up costs for the party least able to afford the cost increase. Therefore, limiting the number of motions each party can file is important. Limiting the number of motions forces each party to consider

the importance of the motions so that it files only those motions that have a material effect on the adjudication of the case. Frivolous motions are avoided by this limit.

5. **PTAB reviews must be optional for small entity patent holders**. If the PTAB becomes a fair solution, many will accept the PTAB to adjudicate validity. If it remains as corrupt as it is now, many will not accept a PTAB review.

6. **Make Injunction the Default Remedy**. Injunctive relief drives settlements. As a case moves to its final trial date, each party learns the risks related to infringement and validity. In nearly all cases, when the parties are anticipating an injunction, a settlement occurs before trial. This will increase the opportunity of settlement prior to trial thereby eliminating the costs of trial. Injunctive relief brings a market value for the infringement because damages would be negotiated in a free market by willing buyer and a willing seller. In cases where the practical life on the patents do not allow for injunctive relief or in cases where the patent holder does not request injunctive relief, disgorgement of all profits must be the remedy for past infringement and rules of thumb should be established for ongoing licensing fees.

   Reestablishment of injunctive relief not only keeps with the Constitution's construction of a patent solely as an "exclusive Right", but it also eliminates all the costs incurred by litigating damages, which can match or exceed infringement litigation and are impossible for small entities to afford.

   Thank you for your time and consideration to this important matter.

Sincerely,

Dr, Edward Lin, CEO

HealO Medical, LLC

www.healomedical.com