

From: ACUS Information nfo@acus.gov
Subject: FW: Small Claims Patent Court Comments
Date: August 29, 2022 at 9:34 AM
To: [REDACTED]

From: Darrell Metcalf [REDACTED]
Sent: Friday, August 26, 2022 9:24 PM
To: ACUS Information <info@acus.gov>
Subject: Small Claims Patent Court Comments

Note: the submissions below are provided due to the Submitt Comments web page <https://www.acus.gov/public-comment/project/12645> not working.

Comment of Darrell Metcalf 2022-08-26

In Response to the Request for Comment Regarding the Administrative Conference of the United States ("ACUS") Small Claims Patent Court Study

Introduction: I am a Small Entity inventor with sixteen US patents including two international patents. As a full-time inventor for 33 years I have manufactured, private-labeled, sold and/or licensed proprietary new-product innovations to Fortune 500 companies, including those largest in their respective fields internationally. And over the past three years I have been the CEO of a startup business relating to eCommerce. However, since the inception of the so-called 'America Invents Act' (now over a decade) have experienced personally and seen other inventors greatly harmed by corruption of the patent system and a rampant efficient infringement unleashed by AIA. Lavish funding by largest of multi-national corporations to 'influence' US patent decision makers at all levels has fueled a double-standard system if not an economic 'caste system'. For Small US entities this has resulted in a patent system 'rigged' to fail them.

.eBay v. MercExchange

The eBay case is a prime 'double-standard' example of how to guarantee for big players nearly a fool-proof means to oust Small Entities out of their markets -- on a basis that they are huge, and Small Entities are not.

PTAB

I have personally experienced the brunt of AIA's 'non-constitutional PTAB' when my case came before them at the apex of their 'US patent' invalidating practices. Just a year into AIA's thrashing of patents (wielded on the same premises that had issued them) a lead framer of AIA declared "It was horribly clear individual inventors were not being treated fairly". Before the full 'damage was done' in my case the former Chief Judge of the CAFC had characterized the PTAB as 'patent death squads' -- not surprisingly mostly crushing the patents of Small Entities (then and still) and destroying 84% of the patents they 'review'. Historically, and ironically, some of the US patent system's strongest years had been in the decade leading up to the 'America Infringes Act'. As AIA plundered ahead, the PTO plunged to its lowest ever point: being ranked 17th in the world by the US Chamber of Commerce. The 'trust factor' -- in US patents -- vaporized, investors were driven abroad. As a result, China now has great momentum and is often touted to have a

driven abroad. As a result, China now has great momentum and is often touted to have a patent system where patents 'can be trusted', are defensible. Consequently China is gaining some very big wins in important, key markets. Clear thinkers today understand that all we would need to do to make the USPTO as strong as it was pre-AIA would be to return to the well-known operating principles that ensured and sustained the United States' #1 position worldwide.

The Alice Case

No case has generated and sustained more ambiguity and thus uncertainty, particularly in software and computer implemented IP and Alice, yet again, has hit Small Entities the hardest. Alice uncertainties weaken a defending of US patents, while Europe and China strengthen their most forward-looking technologies unhampered by US patent laws. In many respects this is virtually handing over these most valuable of markets to multinational companies, owing no allegiance to the US. Ambiguity begets weak patents, makes vulnerable potentially very valuable IP and drives up costs for Small Entities who need to stay in the game in order to generate groundbreaking US IP that can be realistically monetized in the US.

Small Claims Court -- The Focus Should be Small Entities, not Small Claims
US Small Entity innovators / inventors need a level playing field, and courts practicing in a way that makes evident their fairness. They need this kind of backing of their inventions by the courts at all levels, by Congress and by the PTO. More complexities are not the answer, The US Constitution states: "securing to inventors the exclusive right to their discoveries". Its language is quite clear, it is simply eloquent. An additional court system is not needed to make this happen. Today, this clearly-worded phrase appears in practice to be so far off track as to mean to US Small Entities" "securing to gargantuan multinational corporations the exclusive right to knowingly infringe US inventors' discoveries". It must be an Article III court, not another Administrative Tribunal.

Injunctive Relief

There is no better -- proven way -- for "securing to inventors the exclusive right to their discoveries". It should be evident that US Small Entities need to be able to defend their IP and by removing injunctive relief or severely limiting its use, defending IP in the US makes a Small Entity toothless. Make injunction the default remedy.

Lack of inventor representation on the consultancy committee:

Too often US inventors see a 'Stakeholders' representation in a committee where IP policy decision-making occurs where US inventors are entirely left out, when more often than not it is US inventors who are bringing about the most innovators. It is time to let Small Entity inventors, innovators and entrepreneurs share their views at least proportionate to their evident contributions to US IP.

Sincerely, Darrell Metcalf