From: ACUS Information info@acus.gov
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From: D rk Toms n
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To: ACUS Informat on < nfo@acus.gov>
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I. Introduct on
US Inventor s non-profit 501 (c) 4. S nce 2013, US Inventor has advocated for strong patent protect on and strong patent r ghts for sma bus nesses and startups, and nventors. W th 80,0000 members nat onw de, we are a trusted organ zat on regard ng advocacy for protect on of the nventor and ts ent ty.

For near y a decade, we have worked w th startups and nventors who have been v ct m zed by the US Patent system. It s our goa to protect these sma startups and ent t es from nfr ngement and corrupt on of the patent system.

II. Background Informat on
To proper y address the ACUS’ request for v ews, nformat on, and data on a aspects of a potent a court or proceed ng for sma e nt ty patent c a ms and ts impacts, we must first address the arger prob ems that harm sma ent t es.

Sma Ent t es
Most p oneer ng nvent ons are nvented and patented by sma ent t es, and these nvent ons are most often nfr nged upon and mass ve y commerc a ze d by very arge mu t nal ona corporat ons. Th s means that most sma ent t es do not have sma c a ms – they have huge c a ms.

For sma ent t es, the cost and comp ex ty of a patent awsu t s an unsurmountab e barr er to defend ng the r r ghts. The ack of money can cause a sma ent ty to cense a patent that they do not nfr nge just to stop the huge ega fees.

But the s ze of a c a m has no re at onsh p to whether a sma ent ty has m ons of do ars to defend the r patent r ghts.

Patent System

In 2006, the Supreme Court n eBay v. MercExchange created a pub c nterest test to determ ne f njunct ve re ef shou d be granted. The eBay pub c nterest test requ res the patent ho der to have a product on the market w th the manufactur ng and d str but on power to rep ace the nfr nger.

When a patented nvent on of a sma ent ty s nfr nged by a huge corporat on, the nfr nger’s deep pockets, ex st ng eng neer ng, market ng and d str but on capab t es mass ve y commerc a ze the nvent on and take the market eav ng the sma ent ty unab e to compete and out of bus ness.

But tt e d d the nventor know, the patent protect on that they worked so hard to obta n, the patent protect on that was ssued by the USPTO, s a so patent protect on that can be eas y dec ared nva d at the USPTO’s PTAB for reasons wh ch were (or shou d have) been addressed dur ng patent exam nat on.

The USPTO D rector, who runs both patent exam nat on (creat ng patents) and the PTAB (destroy ng patents) has d ctator a  power to both create and destroy the most mportant persona property r ght n the Un ted States.

The PTAB s an adm n strat ve c c buna n the Execut ve branch of government, not an Art c e III court. Yet, they take persona property r ghts w th a jury and w th due process of aw.

The vast major ty of the APJs have tt e or no pract ca  exper ence n the fie d of the r techn ca undergraduate degree and n many cases, have no exper ence n the techno ogy of the patents they nva date. Yet, they destroy 84% of the patents they rev ew.

The PTAB’s 84% des ruc on ra e defies he very purpose of wha he PTAB was mean ng so ve. The PTAB was m mg a em ed o
The TAB's destruction led to its purpose being what the TAB was meant to solve. The TAB was implemented 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 failed small entities. PTAB reviews can add three or more years to the timeline and add at least $500,000 in costs. Because there are no standard requirements, anyone can challenge a patent even if they were never the subject of the patent. 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 corporates and the patentees.

A case. CLS Bank
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 unashed a demon creating an exception to the word “any” as an abstract idea. Ths means that abstract ideas are not patent eligible. But they 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 n the struggle, tr a courts have date around 67% of patents engaged as abstract ideas, and the USPTO fa to grant a huge number of patents that should be granted.

Summary
Between the PTAB, A case and eBay, which a disproportional y harm small entities over large corporates, patents are a ability in the hands of a small entity.

Snce patents are often the only asset that 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, China. This is now a national security crisis and must be resolved.

III. Comments in response to specified topics

1. The Focus Should be Small Entities, not Small Companies.
Patent infringement litigation among the most expensive and complex in the U.S. Teams of lawyers, most work for accused infringers, run costs into the millions of dollars. Often dozens of motions are filed that must be answered, and a small entity case can have severa appeals to the Court of Appeals for the Federal Circuit (CAFC). Cases can take ten years to fully resolve.

Due to the high costs, extreme delay, and the high chance that the patents were not dated n the PTAB or as an abstract idea, and because njudicative are often onerous abelow for most small entities, very few law firms take a case on a contingent fee basis. Ths means that a small entity can be forced to defend the rights of a patent holder or the accused infringer, cannot shoo derr the financial burden.

A small entity often nvent a new process or technology. These inventions are knocked off by huge corporates that mass produce and run small entities out of business. Ths means that many small entities do not have small companies, but they still cannot afford the millions of dollars to defend the rights.

Therefore, a small company is not a practice or practice, and any new process must focus on the size of the entity rather than the size of the company.

The infringer obby has repeated pushed a narrative that the small entities are the target of patent awsu ts. If ths is ndeed the case, then small entity defendants must be so conservative n any su ont.

2. It must be an Art of III court, not an Administrative Tribunal.
As we all have witnessed through the PTAB’s excess ve y high nvalidity rates, and the focus on nvalidity, many small entities lose the right to review the huge amount of corporate patents. Adm n stringent validly take a case on a contingent fee basis. Ths is because the PTAB is above the Constitution, and the courts have jurisdiction over powers. An adm n str value buna cannot adjudicate cation patents on cases for the same reasons.

That eaves Art of courts. However, as we have found n the CAFC, the concentration on adjudicating power n a few judges can ead to a dangerous y unbalanced ane court. Over the years, a large number of ant-patent judges have been put on the CAFC. These judges have repeated y and unfairly decided cases against small entities and for huge corporate owners. Ths could not happen if patent appeal s were distributed across a appeals court.

The CAFC has demonstrated that t w over sound judges on venue transferring cases to the headquarters of the infringers. Ths practice would cause the small entities because they need to travel, take excess ve y off work and r e oca course n courthouses often thousands of miles away. If a separate Art of courts created to hear small entity cases, those small entities are not near that court w have the same d proportionate cost increase.

Small entities must be able to file as plaintiff the courthouse nearest to them.

The so on is to create small entities n the Federa Rules of Civil Procedure (FRCP) that Art of courts must now the request by either party t that party s a small entity. Ths a ows a small entity to file suit n the federal district court most convenient to the small entity.

3. Small Entities and Small Companies
To qualify as small entities, the net annual revenue must be no more than 500MM and 499 employees.
Upon request by either party, the small entity FRCP rules must be followed by the Article III court.

4. Motion Practice Limits
Excessive motion practice is common in patent cases. Large-thesis practices intended to drive up costs for the party east 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. Motion Practice Limits
PTAB reviews must be optional for small entity patent holders. If the PTAB becomes a far superior option, many will accept the PTAB to adjudicate validity. If it remains as it is now (corrupt) many will not accept a PTAB review.

6. Injunctions as the Default Remedy
Injunctions drive settlements. As a case moves to its final date, each party earns the risks related to infringement and validity. In near all cases, when the parties are antipatenting an injunction, a settlement occurs before trial. This increases the opportunity of settlement prior to trial thereby reducing the costs of trial.

Injunctions bring a market value for the infringement because damages would be negotiated in a free market by willing buyer and willing seller.

In cases where the practicalities of the patents do not allow for injunction or in cases where the patent holder does not request injunction after infringement, disgorgement of profits must be the remedy for past infringement and rules of thumb should be established for ongoing licensing fees.

Reinstatement of injunctions not only keeps with the Constitution’s construct of an “exclusive right”, but also maintains the costs incurred by getting damages, which can match or exceed infringement trial costs and are impossible for small entities to afford.

US Inventor appreciates the opportunity to provide these comments. We thank ACUS for its time and attention to this matter. We are available for additional discussion and look forward to assisting further.

Sincerely,
Dr. Toms, husband of Inventor