

Patent Law Comment

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Initial Comments of US Inventor Inc. In Response to the Request for Comment Regarding the Administrative Conference of the United States (“ACUS”) Small Claims Patent Court Study.

I. Introduction

US Inventor is non-profit 501 (c) 4. Since 2013, US Inventor has advocated for strong patent protection and strong patent rights for small businesses and startups, and inventors. With 80,0000 members nationwide, we are a trusted organization regarding advocacy for protection of the inventor and its entity.

For nearly a decade, we have worked with startups and inventors who have been victimized by the US Patent system. It is our goal to protect these small startups and entities from infringement and corruption of the patent system.

II. Background Information

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, we must first address the larger problems that harm small entities.

Small Entities

Most pioneering inventions are invented and patented by small entities, and these inventions are most often infringed upon and massively commercialized by very large multinational corporations. This means that most small entities do not have small claims – they have huge claims.

For small entities, the cost and complexity of a patent lawsuit is an unsurmountable barrier to defending their rights. 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.

Failed Patent System

eBay v. MercExchange

In 2006, the Supreme Court in eBay v. MercExchange created a 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.

When a patented invention of a small entity is infringed by a huge corporation, the infringer’s deep pockets, existing engineering, marketing and distribution capabilities

massively commercialize the invention and take the market leaving the small entity unable to compete and out of business.

Once out of business, the small entity cannot survive the eBay public interest test because they do not have a product on the market.

Patent Trial and Appeal Board

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 patent granted by the USPTO, and then attempted to commercialize it.

But little did the inventor know, the patent protection that they worked so hard to obtain, the patent protection that was issued by the USPTO, is also patent protection that can be easily declared invalid at 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 personal property right in the United States.

The PTAB is an administrative tribunal in the Executive branch of government, not an Article III court. Yet, they take 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 **destroy 84% of the patents they review.**

The PTAB's 84% destruction rate defies the very purpose of what the PTAB was meant to solve. The PTAB 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 litigation and add at least \$500,000 dollars of costs. Because there are no standing requirements, anyone can challenge a patent even if they will never be the subject of litigation. 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 huge corporations and their proxies.

Alice v. 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 unleashed a demon creating an exception to the word “any” called an abstract idea. This 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 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.

Summary

Between the PTAB, Alice and eBay, which all disproportionately harm small entities over large corporations, patents are a liability in the hands of a small entity.

Since 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 solicited topics

1. The Focus Should be Small Entities, not Small Claims.

Patent infringement litigation is among the most expensive and complicated 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, and 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 in the PTAB or 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 knocked off by huge corporations that massively commercialize them and run the small entity out of business. This means that many small entities do not have small claims, but they still cannot afford the millions of dollars to defend their rights.

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.

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. It must be an Article III court, not an Administrative Tribunal

As we all have witnessed through the PTAB's excessively high invalidation rates and their focus on invalidating small entity patents on the request of huge multinational corporations, administrative tribunals do not work. This is because the PTAB violates core Constitutional constructs of due process and separation of powers. An administrative tribunal cannot 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. *Small Entity Qualifications*

To qualify as small entity, the individual or business' 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. 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. *Motion Practice Limits*

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 it is now (corrupt) many will not accept a PTAB review.

6. *Injunction is 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.

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,

USI President, Randy Landreneau

USI Founder, Paul Morinville