Small Claims Patent Court Comments

Steven Thrasher
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To: ACUS Information info@acus.gov ;Kazia Nowacki knowacki@acus.gov

Patent Office Problem 2022 to Jo h pdf

Dear Sir/M'am:

As an inventor and patent holder with nearly 30 years of experience with the US Patent Office, I submit the attached Statement regarding the proposed Small Claims Patent Court, which I oppose in the strongest terms for the reasons set forth therein.

Please review and add these to the other comments, and let me know if you have any questions, or would like to discuss further, or would like my in person or via video testimony.

Sincerely,
Steven Thrasher

<u>Memo</u>

To: Administrative Conference of the United States,
Suite 706 South, 1120 20th Street NW, Washington, DC 20036
From: Steven Thrasher, Inventor/Patent-Holder and Entrepreneur
Re: Small Claims Patent Court Comments
Date: 29 August 2022

After 245 years of patent law the idea is floated that a patent small-claims court is needed.

I urge the office and the Government to “just say ‘No!’” to this, as it is simply an additional procedural barrier to patent enforcement that denies the Patent Owner his property right to be heard in an Article 3 Federal Court.

Context of the Proposed Patent Small Claims Court

Since my first day clerking for a patent lawyer in St. Louis in 1993 (in part to explore my own invention) I have witnessed the fall of the US patent system. The fall has been tragic, predictable, and is now nearly complete.

Over these 30 years US Patent Office transformed from an office that promotes substantive innovation into an office obsessed with incoherent forms and impossibly complex procedures.

The value of each invention was, in 1993, the value each inventor created, the idea of a “small entity” was experimental, and just a little over a decade earlier <u>there were only THREE simple, flat FEES in the entirety of the Patent Office: filing, appeal & reexamination</u>. That was it!

Today, legal procedures (call them what they are: “games”) have pummeled the value of an invention into the costs of litigation where “he who can most bear this cost ‘wins.’” And that is always – *always(!)* – the large entity.

The irony is that it is the large entities who lobbied for the voluminous complex procedures that drove up the costs of litigation that they continue to complain about.

In 1993 a patent litigation was like a trademark litigation or any other federal court civil litigation. There were no Markman Hearings, or Invalidity Hearings, or Enforceability Summary Judgment Motions, or Expert Hearings on Relative % Value of the Invention in the (hypothetical) Pool of Related Patents, or PTAB Proceedings.

Do you want to know why patent litigation is so lengthy and expensive? Read that last paragraph again – and again and again -- until it sinks in.

These new, expensive and complex procedures didn’t replace old ones, they added to the old ones. Of course, they promised ‘streamlining’, ‘certainty’, ‘lower costs’ and ‘faster results.’ Each time, they delivered complexity and uncertainty, raised costs, and delayed justice.

What's more: *only infringers/defendants win these proceedings*. They either delay the day in court, or they kill the case completely. The patent holder literally cannot win!

Yet, these new procedures were completely unnecessary to begin with.

Back in 1993 patents were challenged by "Re-examination"; today patents are still challenged by Re-examination. In 1993, patents were challenged in Federal Court (which, you may be shocked to learn, is still used to challenge patents).

It is the culmination of the time and expense related to these *new* procedures on top of the previously existing ones that is the very cause of 'cost-of-litigation patent lawsuits', which led to what is pejoratively referred to as 'trolling.'

If you doubt me, ask why prior to 2001 you never heard a peep about "patent trolls"?

The above narrative is critical in understanding what the proposal for a patent small claims court is really all about: creating yet another barrier for inventors that empowers innovation thugs to pummel inventors into silence.

About the Small Claims Court Specifically …

What is presented as a 'small claims' court will, necessarily and like a wasp emerging from its larva-shell, transform into another procedural tool in the hands of infringers to sting inventors.

What is sold as streamlined, more certain, less-costly, and faster, will, like the multitude of other procedural frauds (see above 'new procedures') perpetrated on the public by large infringing entities, morph into yet another barrier denying each patent holder his/her rightful day in court.

What's more, this new court will necessarily force the creation of multiple expensive hearings – far from the patent owner's home – for example: to determine *a-priori* if infringement damages exceed that court's jurisdictional limits.

Every incentive imaginable exists for *every* infringer-defendant to force *every* case to the small-claims court. *A patent small claims court will, inevitably, become a court of first procedure.*

Often, this hearing *alone* will be litigation outcome-determinative and like the other hearings that have spontaneously generated since 1993, can only favor the infringer-defendant who will then use the might of their legal resources to literally strong-arm the patent owner into accepting a $0 settlement.

Doubt me? Ponder this example:

Following a ‘pro-patent holder’ decision of, say, $300,000, the infringer-defendant’s lawyer calls the patent-holder’s lawyer and says: “this has just begun; take $25,000 now or my client will run up your fees for the next ten years with Reexamination, PTAB, Discovery, Markman Hearings, Appeals, Etc. and your *best* day is $200,000. You know you are going to spend $2,000,000 fighting this and you may get nothing!” Keep in mind that the patent owner likely spent $125,000 – or much more -- getting that small-claims decision.

Now do you get it?

It's intellectual property just the way the mob would design it.

There is literally no reason a patent holder will have to hold a patent for anything other than the most innovative invention with the largest markets; but how can they know that in advance?!

The Long-Term Results are just as predictable:

- Innovation will slow even more.
- Patents will be more narrow. Startups will be harder to fund.
- China, Japan, South Korea, India and Europe will gain parity and soon surpass the US in innovation (where they haven’t already).

Ultimately, **if** what matters is the promotion of legal-sector employment, then by all means, proceed.

If what is desired is the off-shoring of innovation, this is a further step in that direction.

My hope is that these outcomes are not desired by an agency that purports to “promote the advancement of science…”.

Much reform is needed.
Frankly, the simple reform of returning to the laws and procedures of 1993 would be a vast improvement (even with all the baggage that would bring).

But for now, let’s not make the situation with patent law and at the patent office worse.

Conclusion:
For the reasons stated above, and many others more informed minds are sharing with this esteemed body, there must not be a patent small claims court.