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Request for Comments on Discretion to Institute Trials Before the Patent Trial and Appeal Board

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Discretion to Institute Trials Before the Patent Trial and Appeal Board

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Comment from Think Computer Corporation

Submitter Information

Organization: Think Computer Corporation

General Comment

The regulations governing the Patent Trial and Appeal Board (PTAB) as currently written do not foster an efficient patent system that rewards inventors for the creation of novel inventions. In the name of vanquishing "patent trolls"—a legitimate problem that still has not been properly addressed—too many inventors have been unjustly punished by the PTAB for investing the time, money and energy in creating something new. The PTAB favors the largest corporations in the United States (and their attorneys) and makes defense of a legitimate patent's claims by an independent inventor virtually impossible.

Opposition proceedings under the AIA should only be implemented during a 30-day opposition period at the end of a patent application's examination process, in the same way that any member of the public can file an opposition proceeding with the Trademark Trial and Appeal Board (TTAB) at the end of a trademark's application process. Cancellation proceedings should be possible thereafter, but with heightened scrutiny on allegations made on petitions to cancel claims. Accordingly, there should be no serial petitions, and no separate category for CBM petitions, both of which have been used in an abusive manner by larger companies to target smaller companies and independent inventors. The USPTO should also not use "case-specific analysis" to decide whether to implement multiple petitions, which tends to lead to arbitrary and capricious decisions. Make a rule and stick with it: one petition per opposer-patent pairing. Parallel petitions should be allowed where they target different claims. Overlapping petitions should not be instituted.

In Square, Inc. v. Think Computer Corporation, Square filed two CBM petitions (CBM2014-00159 and CBM2015-00067) because its lawyers made a mistake. The second petition was duplicative and pointless, wasting the USPTO's time and valuable legal resources. Square was successful at cancelling claims in the first proceeding because A) it employed an expert witness who lied under oath, and who has yet to be held to account for his perjury because the USPTO has no regulations that require experts to actually produce their own work and perjury is rarely prosecuted under such circumstance; and B) the PTAB apparently believes that an inventor's testimony should be discounted as biased. In federal court, the same type of misconduct by an expert witness would be sanctionable at the very least. Nor is there any legitimate ground for only considering the testimony of one side in a legal proceeding.

Because the PTAB has proven itself to be a "kangaroo court" rife with conflicts between Administrative Law Judges and attorneys, gross incompetence, procedures that deny parties due process, and regulations that change seemingly weekly, AIA trials should be generally discouraged as a general rule in favor of judicial review by Article III judges. Given the USPTO's incredibly poor handling of PTAB proceedings during the PTAB's early years, there should also be a program in place to review faulty decisions made by the PTAB, even if already affirmed by the Federal Circuit Court of Appeals, as many such decisions were clearly erroneous and have had detrimental effects on the lives of countless Americans.

This is not to say that the problem of patent trolls should be ignored. But until the USPTO makes a serious investment in upgrading its information technology infrastructure to better examine patent assignments and ownership, and makes efforts to work with the Judicial Council, the problem will persist.