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

Comment On: PTO-C-2020-0055-0001
Discretion to Institute Trials Before the Patent Trial and Appeal Board

Document: PTO-C-2020-0055-0092
Comment from Derek L. Smith.

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General Comment

Dear Reviewer,
I am commenting on the injustice and threat to rights of property and possession and demotivator to innovation that AIA materially represents. I have worked for a firm whose patents were unceremoniously invalidated under the terms of this Act. David Furry revolutionized an industry by innovating--adapting technology from one arena to another through extensive experimentation, and two of these relevant patents have been invalidated by predators--FLIR, specifically--who have sought from the beginning to trespass upon his groundbreaking work. This Act supports this kind of treacherous bullying by allowing consecutive petitions from corporate giants in a manner similar to how eminent domain is invoked and exploited by The State. The process obviously needs to be reformed to restore or institute justice thereinto. To that end I propose that the concepts of predictability, multiplicity of petitions, harmonization of tribunals, privy apprisal and economic impact.

I: PREDICTABILITY
Regulations must provide predictability. Stakeholders must be able to know in advance whether a petition is to be permitted or denied for policy reasons. To this end regulations should favor objective analysis and eschew subjectivity, balancing, weighing, holistic viewing and individual discretion. The decision-making should be procedural based on clear rules. Presence or absence of discrete factors should be determinative, at least in ordinary circumstances. If compounded or weighted factors are absolutely necessary, the number of possible combinations must be minimized and the rubric must be published in the Code of Federal Regulations.

II: MULTIPLE PETITIONS
a) A petitioner, real party in interest, and privy of the petitioner should be jointly limited to one petition per patent.
b) Each patent should be subject to no more than one instituted AIA trial.
c) A petitioner seeking to challenge a patent under the AIA should be required to file his petition within 90 days of an earlier petition against that patent (i.e., prior to a preliminary response). Petitions filed more than 90 days after an earlier petition should be denied.
d) Petitioners filing within 90 days of a first petition against the same patent should be permitted to join an instituted trial.
e) These provisions should govern all petitions absent a showing of extraordinary circumstances approved by the Director, Commissioner and Chief Judge.

III: PROCEEDINGS IN OTHER TRIBUNALS
a) The PTAB should not institute duplicative proceedings.
b) A petition should be denied when the challenged patent is concurrently asserted in a district court against the petitioner, real party in interest or privy of the petitioner and the court has neither stayed the case nor issued any order that is contingent on institution of review.
c) A petition should be denied when the challenged patent is concurrently asserted in a district court against the petitioner, real party in interest or privy of the petitioner with a trial is scheduled to occur within 18 months of the filing date of the petition.
d) A petition should be denied when the challenged patent has been held not invalid in a final determination of the ITC involving the petitioner, real party in interest or privy of the petitioner.

IV: PRIVY
a) An entity who benefits from invalidation of a patent and pays money to a petitioner challenging that patent should be considered a privy subject to the estoppel provisions of the AIA.
b) Privy should be interpreted to include a party to an agreement with the petitioner or real party of interest related to the validity or infringement of the patent where at least one of the parties to the agreement would benefit from a finding of unpatentability.

V. ECONOMIC IMPACT
Regulations should account for the proportionally greater harm to independent inventors and small businesses posed by institution of an AIA trial to the extent that it harms the economy and integrity of the patent system, including their financial resources and access to effective legal representation.