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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

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Comment from Joshua Stern.

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General Comment

I have been involved on and off with the US patent system for fifty years and believe I understand the issues now colliding and the wreckage that is resulting. As briefly as possible I commend the PTAB and its (not entirely explicit) mission to invalidate 80% or more of existing patents, which have become largely nonsense, unreadable gibberish, and tickets to litigation, rather than a protection for inventors.

However, small inventors in particular seem to be suffering in the wreckage. I hope their case can be better addressed. Endless litigation is not acceptable. Alternatives to the USPTO are already being constructed. I prefer the USPTO survive as the best way forward.

I suggest that the single effective class of patent that exists today is insufficient to modern needs, indeed has been insufficient for decades or longer. Let us call today's type of patent the "classic", that allows prosecution of infringers. The number of these issued and supported should probably be 90% or 99% less than the historic numbers. Most should be new, much lighter types of patents, as described below.

Most patents filed today by large corporations are basically defensive, declarations of what they are doing, so that some stranger does not come by a years later, in all innocence independently develop and patent a process, and then have a case against the corporation for what they

invented first and were doing first. I suggest defensive patents should be issues as easily as modern copyrights: first by fact of the matter, second by simple registration. A defensive patent cannot be used to prosecute infringers, so if anything it is *easier* to obtain than a copyright. The next patent class would be an extended sort of design patent, and this would cover 80% or more of small inventors need for patents. It should also be very simple to obtain but narrow in its coverage, preventing identical or overly similar copies, but not claiming any wide application. It can be used to prosecute infringers, with full disgorgement.

I suggest that virtually all existing patents, that the PTAB would currently invalidate when challenged, might be automatically reissued in these two limited categories instead. This might be more palatable to all involved.

I understand that, unfortunately, what I propose here requires extensive legislation.

While there are no doubt details to be worked out in all of this, if the USPTO is to survive, these are the challenges, and I hope I have indicated some opportunity for solutions.