PUBLIC SUBMISSION

As of: 11/19/20 2:26 PM
Received: November 15, 2020
Status: Posted
Posted: November 17, 2020
Tracking No. 1k4-9k3s-sisq
Comments Due: December 03, 2020
Submission Type: API

Docket: PTO-C-2020-0055
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-2020-0055-0286
Comment from Christopher Rayon

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General Comment

I am Christopher Rayon, an inventor from Miami. We need the USPTO to give the individual more protection.

I request that the USPTO make regulations that govern the Director's discretion to institute PTAB trials and for these regulations to abide by the following precepts:

1.Sense of Congress, Impact on the Economy, Small Businesses, and Inventors

Pursuant to the Sense of Congress stated in the America Invents Act, the patent system should "protect the rights of small businesses and inventors from predatory behavior." Public Law No.112-29 (09/16/11), Section 30. When this sense of Congress was introduced, the record shows it was accompanied by this statement: "... the bill is about innovation, genius, creation, job creation, and it should be about small businesses. Small businesses should be as comfortable going to the Patent Office as our large businesses. ... We must always be mindful of the importance of ensuring that small companies have the same opportunities to innovate, patent,

and that the laws will continue to protect their intellectual property." (Congress Record Vol. 157, No.91, House of Representatives - 06/23/11)

Accordingly, the AIA requires that these regulations help small businesses and inventors protect their inventions. Sadly, the current state of AIA trials allows big businesses to engage in predatory behavior against small businesses and inventors. This is exacerbated by a lack of financial resources and access to effective legal representation in AIA trials. Anytime an AIA trial is instituted on a patent owned by an inventor or small business, harm is caused to their livelihood and business, and as a result, the idea of patent protection has shifted from being a protection and investment vehicle to being a risk of unnecessary disclosure and financial loss. In terms of trust, yesteryear's inventors who entered into the patent bargain and disclosed their inventions prior to the AIA did not agree to AIA trials, nor should they have expected it.

As a result, AIA trials have damaged inventors' trust in the patent grant, and the integrity of the patent system, which i) ruins incentive to innovate and seek patent protection, ii) thwarts new business development and competition, & iii) harms the economy.

2.Institution 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 & not 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. If compound or weighted factors are absolutely necessary, they should be minimized and the rubric must be published in the Code of Federal Regulations.

3:Limit Petitions to Increase Patent Reliance & Trust

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 need to file their 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.

4:Proceedings Preference

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.

5:Privy & Real Parties of Interest

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.