



November 18, 2020

United States Patent and Trademark Office
600 Dulany Street
P.O. Box 1450
Alexandria, VA 22313

RE: Request for Comments on Discretion to Institute Trials Before the Patent Trial and Appeal Board, Docket No. PTO-C-2020-0055

To whom it may concern:

Conservatives for Property Rights (CPR) is pleased to comment on the “Request for Comments on Discretion to Institute Trials Before the Patent Trial and Appeal Board” (Docket No. PTO-C-2020-0055).

Conservatives for Property Rights is a coalition of conservative and libertarian organizations. CPR emphasizes the central importance of private property in all its forms — physical, personal, and intellectual. The right to private property ranks among the unalienable rights the Founders referenced in the Declaration of Independence. Moreover, the Founding Fathers placed patents securing the private property rights of inventors in Article I, Section 8 of the Constitution itself.

The America Invents Act (AIA), which established PTAB, provides the Patent & Trademark Office’s (PTO) director broad discretion in deciding whether or not to institute proceedings at the Patent Trial & Appeal Board (PTAB), specifically with respect to denial of inter partes review (IPR) or other PTAB proceedings. The U.S. Supreme Court has affirmed this denial authority in *Cuozzo Speed Technologies v. Lee* and *Thryv v. Click-to-Call*.

Further, PTO has statutory authority to “consider the effect of any such regulation on the economy, the integrity of the patent system, the efficient administration of the Office, and the ability of the Office to timely complete proceedings instituted under this chapter.”¹ Economic effects, patent system integrity, and timely, efficient management of PTO and PTAB are very important facets that must counterbalance the interests of challenging parties in these quasijudicial administrative proceedings. Only in the past three years have these important counterbalancing concerns begun to receive consideration. We greatly appreciate that PTO is

¹ 35 U.S.C. 316(b) and 326(b)

now examining ways more fully to weigh these factors, and we encourage PTO to pursue this focus here.

The years of not appreciably considering these important factors has contributed to established patterns and practices that disproportionately advantage patent challengers, enabling parties (many motivated by suit for patent infringement) not only to bring, but to bring repeatedly and in combination with litigation in federal courts, PTAB validity challenges. In short, highly likely PTAB institution has harmed property rights and disquieted title. And the PTAB system has been thoroughly gamed. This makes the attention PTO is now giving to “repeated administrative attacks on the patentability of the same patent claims and the harassment of patent owners” all the more critical to correct. CPR applauds the current PTO leadership for prioritizing the rectifying of these components.

CPR agrees that PTAB’s unfettered institution of proceedings has made gamesmanship by deep-pocketed parties not only possible, but easy and profitable. The nonexclusive factors set forth in the precedential denial case *General Plastic Co. v. Canon Kabushiki Kaisha* and those applied in *Valve Corp. v. Electric Scripting Products (Valve I and Valve II)* appropriately exercise statutory authority to preclude serial petitions against the same patent. The same or related petitioners, their schemes on timing multiple PTAB challenges, husbanding prior art as pretext for subsequent challenges, and the like deserve to be denied the ability to string out an unending series of administrative proceedings. Ensuring due consideration of the above countervailing factors would appropriately give balance to PTAB institution decisions, which strengthens property rights.

Serial PTAB proceedings, untimely completion of proceedings because multiple proceedings over time drag out ultimate resolution for patent owners, inefficient administration of PTO by misuse and abuse of its PTAB unit, parallel PTAB proceedings involving the same patent, and granting PTAB institution while existing proceedings involving the same patent are underway in federal court or the U.S. International Trade Commission (USITC) supply plenty of tools for PTAB gamesmanship by unscrupulous petitioners.

The adverse economic effects of such PTAB abuse include depriving patent owners freedom from harassment by petitioners, the right to exclude, and the ability to devote the time, resources, and focus of energies to making the most of their patent exclusivity and to commercializing their inventions for private and societal benefit. The PTAB-caused disquieted title to one’s patented invention discourages investors from assuming the risk of backing commercialization costs.² It quashes startup businesses, job creation, and wealth creation. It costs the U.S. economy the benefits of dynamic competition, new markets, new products and services, new employment opportunities for would-be taxpayers, and expanded economic output.

Essentially, the adversarial fora at PTAB have served to negate the expensive, diligent, long process of patent examination that may result in the patent grant. This is tantamount to inefficiency at PTO; one side of the house constructs while the other side of the house destroys. One side of PTO secures private property rights in newly created property, the other side of PTO renders that property and the title to it tenuous. Similarly, PTAB’s offering multiplicitous bites at the apple, led by monopolistic IP implementers to whom patents represent unwelcome

² Mark F. Schultz, “The Importance of an Effective and Reliable Patent System to Investment in Critical Technologies,” Policy Report by the Alliance of U.S. Startups & Inventors for Jobs, July 2020. https://static1.squarespace.com/static/5746149f86db43995675b6bb/t/5f2829980ddf0c536e7132a4/1596467617939/USIJ+Full+Report_Final_2020.pdf

procompetitive challengers, has resulted in never-ending, expensive legal defense of one's patents in various PTAB proceedings and in federal court. PTAB has proven to be anything but timely in settling patent validity matters because, without contemplating counterbalances in weighing institution decisions, PTAB proceedings compound complexity and burden those defending patents, falling short of providing a cost-effective alternative to litigation. Rather, PTAB layers on additional means of attacking issued patents. Indeed, PTAB has been weaponized.

All this translates into PTAB's playing a central role in undermining the integrity of the U.S. patent system. Recent efforts to repair the damage to our patent system's foundation, such as the Consolidated Trial Practice Guide and reforms for instituting a PTAB proceeding only on all or none of the challenged patent claims, begin the restoration. However, far more reform and repair are required, if the United States is once again to have the "gold standard" patent system of the world. This relies on restoring secure private property rights in patents.

The stated intent of Congress, quoted in the PTO's Federal Register notice, is that PTAB provide "quick and cost effective alternatives to litigation." By that standard, PTAB should allow only targeted, efficient, and strictly time-limited means of raising legitimate challenges to patent validity. Such an approach necessarily places tight limits and high standards on all aspects of patent reviews. Regarding institution of PTAB proceedings, petitions should face denial unless the patent at issue has never faced postgrant validity examination, the patent was recently issued, and another alternative course (e.g., federal court) has not already been chosen.

We favor a single-bite-at-the-apple, bright-line rule. We strongly urge PTO to "preclude claims from being subject to more than one AIA proceeding, regardless of the circumstances." Such a rule would meet the very important "quick" and "cost effective" criteria for PTAB, while bringing greater certainty and reliability of the patent grant for the patent owner. This approach leaves subsequent patent challengers access to federal court, should they have legitimate grounds for pursuing a subsequent patent validity challenge. This remedy closes down gaming the system, where the true goal is tying up patent owners in multiple proceedings that suck the life and financial resources out of those trying to commercialize an invention. If challengers may cast doubt about an issued patent's validity, essentially for the duration of the patent term — as is currently the case — then both speedy decisiveness and cost containment are denied. This ought not be.

Specifically, PTO should "altogether decline to institute on more than one petition," closing off any prospect of parallel petitions or parallel proceedings. Commendably, PTO has exercised discretion in denying institution to block serial petitions and designated these as precedential (e.g., *General Plastic, Valve I, Valve II*) regarding petitions against the same patent. This reform is necessary, but not sufficient. Parallel proceedings, too, should be unavailable, as such circumstances undercut the goals of speed, cost containment, focus, timely disposition, efficient administration, and regulatory humility (forgoing administrative proceedings in due deference to Article III courts or the USITC). The overarching goal is quiet title for an invention. Serial and parallel proceedings and a quasijudicial administrative body vying with the judicial branch keep title unsettled. Moreover, PTAB should not risk complicating matters by chancing "different outcomes on similar facts" (see *NHK Spring Co. v. Intri-Plex Technologies*).

While the option some have proposed of allowing follow-on petitions against a patent if the petitioner is unrelated to the original challenger may appear reasonable, its Achilles heel is that sophisticated patent infringers, deep-pocketed competitors, and speculators such as hedge funds can easily collude with other parties and obfuscate their ties. Though undetectable, the collaborating parties may in fact have an under-the-table agreement that would require extensive investigation to discover. Criminal enterprises engage in subterfuge with apparently

independent parties. No less should be expected from an entity whose economic interests lie in continued patent infringement while legal or quasijudicial matters buy them time to collect ill-gotten gains.

Similarly, the proposed option of disregarding court or USITC actions against the same patent under certain other conditions may seem worth considering. However, institution of a PTAB proceeding once a patent is being litigated in another forum should be disallowed. If it is the same petitioner, then that party has already chosen its alternative for seeking to invalidate the patent. If the petitioner requests PTAB patent validity review once judicial proceedings are underway regardless of who initiated them, PTAB should presume in favor of the patent owner's opposition to having a new front opened against its patent, adopting and applying a high standard for rebutting that presumption and proceeding with PTAB institution. At all times, PTAB should give deference to any judicial developments involving the same patent and deny, end, or suspend administrative proceedings, in order to avoid arriving at different outcomes on the same patent and the same issues. If in court or before the USITC due to another party bringing the challenge, then the subsequent petition should be considered superfluous. Again, the point of PTAB is supposed to be an alternative, faster decisions, lower costs. All three of these are operative elements; none is dispensable if PTAB is to serve a useful purpose and fulfill Congress's intention for it.

The proposal of patent owner consent to PTAB proceedings has certain merit. This is particularly so if more than one petition is filed or proceeding instituted. It reasonably provides fairness to patent owners.³

In conclusion, CPR commends PTO for this inquiry. Reforms presently under consideration herein would represent further steps in the right direction. PTAB proceedings should not continue as "patent death squads." PTO should consider issued patents with a strong presumption of validity. This includes all matters related to issued patents, beginning with the threshold question of whether to institute an administrative proceeding to question the validity of a duly issued patent.

To the extent PTAB exists, institution of PTAB proceedings should not be a default setting, but a rules-based, focused, fair decision. Denials of institution petitions are nonappealable for a reason. The patent owner deserves the benefit of all that has gone into securing IP rights with a patent, and a high burden of proof to reconsider and to overcome them rests on the backs of would-be challengers. And then, one administrative bite at the apple is sufficient for a faster, cheaper alternative to federal court or the USITC.

Conservatives for Property Rights appreciates the turn represented in this request for input. We commend Director Iancu and the leadership of PTO for examining such a critical matter and for inviting comments on a heretofore neglected area. We urge a giant step toward strengthening patents and property rights.

³ One option ensuring that petitioners have "skin in the game" would be to require them to post a significant bond in connection with filing a PTAB petition. Failure to obtain institution of proceedings or obtaining institution and prevailing at invalidation of any or all challenged patent claims, the patent owner would collect the bond monies. This would compensate the patent owner's legal costs and inconvenience, and cost the petitioner for its nuisance. PTO could receive up to 20 percent of the bond amount for PTAB denials. In case of claim invalidation, the bond monies could entirely go to the patent owner as "just compensation" for the taking of private property through a PTAB proceeding.

Sincerely,

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