

## PPAC Public Hearing on the Proposed Patent Fee Schedule

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The hearing today has been about fees. The information provided by the PTO and the previous witnesses has been very helpful and thorough as to the fees and how they are used. I will touch on the fees, but I will focus my comments on the interrelated concept of value. How do we determine if the fees are too high or too low? What is the right number? The answer is tied to the value of the products or services provided in exchange for the fees, right?

As business owners and as consumers we think about cost in relation to value. It's not a question of the absolute cost. It's a question of the value. So it all depends on what you get. You go to Walmart and you want a value, so you get a product that may not be reliable and it may not last, but it's cheap. So we want low cost when we go to Walmart. On the otherhand, if we want an extremely high quality, durable product – perhaps for commercial use rather than consumer use – we would pay more for that version of the product. It would be a high cost. But, both approaches might result in a similar value. What we don't want to do is pay high cost for a low quality or unreliable product. And so this discussion about the fee increase has thus far been based on an unrealistic and aspirational value proposition. So the budget for the patent office for 2019 is \$3.6B funded almost entirely by the fees we are discussing here today, and that might be too low or it might be too high. The question is what do the stakeholders get for the \$3.6B? As a small entity when I applied for my patents, the fees were about \$1,200 – filing, search, examination, and issuance. That is, in one regard, not a lot of money, \$1,200. But I have to compare that to what do I get for \$1,200. Which, when you ask Tom Pierson, founder and CEO of TAS Energy in Houston, TX and one of the inventors profiled in the new documentary called Invalidated: The Shredding of the U.S. Patent System, he points to his patents hanging on his office wall noting that they have all been invalidated by the PTAB.

Pointing he says, “our first one, our second one, our third one, and our fourth one – all invalidated”. These were his patents for his invention of a high efficiency turbine power plant, an invention he commercialized and built a company around. His patents were nothing more than a plaque that he hung on the wall. Reflecting on his useless patents and millions of dollars he had wasted he commented, “I guess it’s better than having an empty wall”. Even at \$1,200, that’s an overpriced plaque. Of course he paid much more than \$1,200, it was several more thousand in filing, RCE, issuance, reissue, and maintenance fees; then several million in attorney fees at the PTAB. All wasted. The PTO fees were much too high for these patents. But if he had received a real patent backed by the full faith and credit of the United States Patent & Trademark Office, then he would have had a good value. He would have been happy to have paid the higher fees proposed here today. We all would.

The agency fees are one aspect of this, of course the legal fees that go along with it are a concern as well. The AIPLA did survey a couple of years ago and determined that the median legal costs to defend a patent in the PTAB and subsequent appeal is \$350K. Tom Pierson had 4 for of them; I’ve had 8; David Monroe had 28 that sunk his San Antonio company; Patrick Racz of SmartFlash had 68, and Roman Chistyakov of Zond infamy had 125. How about the fee increase include a fund for these inventors to defend their patents – or an advocate at the PTO to defend the examination on behalf of inventors of modest means? \$350K is the median, and I can tell you that is not enough. The best PTAB lawyers and experts cost much more than that and they lose more often than not and cannot protect us from endless attacks. Very very few applicants have this kind of money. And very very few applicants understand that obtaining real patent – one approved by the PTAB – costs \$350,000. They will learn about this fee increase and believe they can get a patent that protects their invention for \$1,400.

Why isn’t the Patent Office defending the patents it has issued? Should the fees come with a defense of those patents against attacks by would-be infringers? I understand the AIA and the creation of the PTAB. But this is not error correction. This is destruction. These are phony patents. It seems to me the Patent Office should be defending patents and it is very shocking and incredulous that the lawyers at the PTO (I am speaking of the PTAB APJs as well as

the office of the solicitor) the lawyers spend almost all their time attacking patents; driving our costs to many orders of magnitude greater than the proposed fees before this committee.

Back to this question of value. It all depends on what we get. Does this proposed fee increase come with the full faith and credit of the United States government behind the patents that will be examined and issued upon adoption of the new fees? Then I say fantastic. This is a great proposal. I wholeheartedly support it. On the otherhand, is this fee increase for a plaque to hang on the wall like Tom Pierson did? Then that's kind of silly, isn't it?

Really, I think if you look at the PTAB statistics – and there's a lot of numbers floating around. I attend or listen to the PPAC quarterly meetings and I see the reports from the PTAB. Frankly, they are very speculative, and include a lot of incorrect assumptions. There is a very simple approach to the question of "can we rely on the patents issued by this Agency?". There have been 1,998 patents where the PTAB issued a Final Written Decision. And 1,690 of those had one or more claims invalidated. That is an 85% failure rate. That's the only number we have. Any report on settlements, non-institutions, pending cases are all irrelevant – they are unknowns. As are the other 2.5 million unexpired patents. All in limbo as to any legal right – but good enough to hang on the wall. From what I can tell, they do not come with the full faith and credit of the United States as to any legal right to the claimed invention.

Even if you don't accept my numbers – and you should accept my numbers and ask the new Chief Judge to start counting correctly – there is no other number that matters. There are only 1,998 patents that we have a ruling on from the PTAB, which is the only indication we have of whether they are worth the fees charged to obtain them. The others are of complete unknown reliability. Total blank. At best, 15% of the patents we know anything about might be reliable. 308 patents that have been tested and passed PTAB muster. Even those are of course still subject to additional attacks and reviews by the PTAB.

But whatever number you choose, 70%, 60%, 50% - whatever it is – it's horrendous! No business could survive a scenario where their product reliability level is in the 50% range. Where more than half the product that is going out the door (signed and sealed) is meeting the requirements. So what kind of business or agency would propose a fee increase when their

defect rate is in the 50-90% range? If that is what we are getting with this fee increase, then it is a pretty outrageous proposal to increase the fees. Given the current reliability levels as determined by the PTAB, the fees are incredibly excessive. I mean how much is an invalid patent worth? \$50? \$100? And that's what these are – the millions of patents printed over the past 20 years every Tuesday. Nothing but fancy pieces of paper you can frame and hang on the wall. It doesn't take \$3.6B to produce that. Let's lower the fees, pay the cost of printing, and switch to rubber stamps. Because that's what we are getting. And if the Patent Office is not going to back its product, you have no business increasing the fees.

Look, I know this is uncomfortable and discouraging – a damper on Director Iancu's optimistic leadership and vision for the patent system. My personal story that most of you have read or watched, and my comments here today are discouraging and discomfoting. No one wants to be in the crowd when the child tells the emperor has no clothes. But this is no empire! It is America. You know deep down that what I am saying is true. And you don't have to accept it. Your hands are not tied. After closing remarks, please clear your schedule for the afternoon and come with me Capitol Hill. Push back your flights and cancel your appointments. We can do this today. We need to sit down with Congressman Issa today. We will urge him to schedule a hearing on the integrity of the patent grant this month. Our hands are tied here, only Congress can restore the reliability needed. Congress will say it can wait until next session. Don't go along with that any longer. Be courageous and stand with me for what is right. Thank you.