

# US INVENTOR

Innovators, Inventors, Dreamers, and Builders

August 5, 2019

Patent Public Advisory Committee (PPAC)

Marylee Jenkins, Chair; Steven Caltrider, Jennifer A. Camacho, Barney Cassidy, Mark E. Goodson, Bernard J. Knight, Jr., Dan H. Lang, Jeffrey M. Sears, Julie Mar-Spinola, Members; Pamela R. Schwartz, Catherine Faint, Vernon Ako Towler, Union Representatives

Via email to: [ppac@uspto.gov](mailto:ppac@uspto.gov)

Dear Committee:

The PTAB is still off the rails and destroying the integrity of the patent system. A few wealthy and sophisticated patent owners others can play the game, but ordinary inventors and small businesses are being obliterated. We need you to hold the USPTO to account. Director Iancu has been saying he fixed it, but nothing has changed for our constituents. See the following details of abuse from the past few months. US Inventor staff are ready and willing to discuss this further with any of you. Director Iancu and senior management are well aware of these concerns and they should be prepared to address them at the PPAC meeting this Thursday, August 8, 2019. We respectfully request that:

- 1) This letter be made a part of the public record for the August 8, 2019 meeting
- 2) The PPAC PTAB committee review the issues raised below at the August 7, 2019 executive meeting
- 3) A PPAC representative coordinate with the USPTO representative to prepare a preliminary response to these concerns to be presented at the August 8, 2019 meeting
- 4) The PPAC request the USPTO to prepare a complete response and proposed solutions prior to the November, 2019 meeting

The situation is very bad, inventors have lost faith in the system. Your immediate and urgent action is required.

## Overwhelming Financial Burden for Inventors

AIPLA reports that the average cost for an AIA trial is \$450K. Only 16% patents emerge the PTAB intact. Small businesses built on a patented technology don't have \$450K to wager on a 16% chance of holding on to their primary asset. Furthermore, we have been in contact with many inventors and small business owners that have retained unqualified counsel for these high stakes litigations. These attorneys are unaware of the latest guidelines, precedents, and strategies. Inventors lack access to effective advocacy when attacked in AIA trials by aggressive litigators allied with hostile PTAB APJs.

**Example 1:** Jan 24, 2019 / [IPR2018-01129](#). Emmy award winning inventors Glenn Sanders and Howard Stark are not "patent trolls" asserting "bad patents". These pioneers of digital wireless microphones built their company Zaxcom in reliance on their U.S. patents. Now their competitors are using their technology and the PTAB is helping them by unwinding the patent grant, declaring their invention obvious 14 years after the fact. The cost of defending the 3 IPRs is overwhelming their small business.

**Example 2:** April 3, 2019 / [IPR2018-01754](#). The PTAB ignored the §315(b) time bar and permitted GoPro to file an IPR 2.5 years after they had filed a declaratory judgment against inventor Michael Kintner's company

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360Heros. The once growing business has drastically downsized and Kintner has informed US Inventor that he does not have funds for a legal defense of his patent at the PTAB. Contingency firms rely on damages to recoup their investment, but in the PTAB there is no monetary compensation for the inventor that prevails.

**Example 3:** April 30, 2019 / [IPR2019-00233](#). Apple refused to pay inventor Mark Kilbourne for his remote control deadbolt, so they asked the PTAB to revoke his patent. The panel ruled that it “would have been obvious” to combine an old-style deadbolt with a Swiss army knife! This type of reasoning jeopardizes every patent ever issued. Kilbourne runs a small business manufacturing his invention and this unnecessary and duplicative PTAB trial imposes an extreme burden and risk to his business. His patent prosecution attorney was in over his head, and filed the patent owner response last week without any objective evidence of non-obviousness.

**Example 4:** April 30, 2019 / [IPR2019-01030](#). Apple. Again. They filed a THIRD IPR against a single patent held by small inventor-owned business called Zomm founded by inventor Henry Penix. Penix is not a patent troll. He went on Shark Tank, produced and sold the hugely popular wireless leash. Even one petition is enough to wipe out his business, but big bullies like Apple suffer no consequences for abusing the IPR system to harass smaller competitors.

**Example 5:** July 17, 2019 / [PGR2019-00025](#). Inventor William O'Keeffe had no idea what an IPR was when out of the blue his patent is challenged by a competitor. His patent prosecution attorney scrambles to learn about AIA trials. William has no funds to hire a litigator and doesn't even know that is necessary, so his prosecution attorney takes a stab at it. With only 90 days to save the patent and very little budget, the attorney misses the deadline due to difficulty using the E2E system. Provided an extra day over the objections of the petitioner, he files a mere 4 PAGE rudimentary preliminary response. The patent prosecution attorney is in way over his head. The PTAB instituted review. Now what should William do?

## Word Games Used to Invalidate Patents

A common tactic employed by infringers and the PTAB is to interpret the words and phrases in the patent broader than intended by the inventor, and to use that stretched interpretation to invalidate the patent. Egregious examples include construing “no arcing” to mean “a little arcing”, “single merchant” to encompass multiple merchants, and “gasoline” to include butane.

**Example 1:** January 10, 2019 / [IPR2018-01043](#). American inventor Ryan Jurgenson greatly improved the reliability of magnetic disk drive heads. But the USPTO helped a Japanese infringer by cancelling the patent. The PTAB adopted broader construction of several terms than what the inventor claimed, effectively accusing him of claiming rights to an earlier invention. The Article III courts would have applied the plain an ordinary meaning for the terms and resolved any ambiguity in favor of upholding the patent. Unable or unwilling to incur the cost of a full PTAB trial, the patent owner elected to dismiss the case.

**Example 2:** April 8, 2019 / [IPR2019-00025](#). PTAB rejected the definition of “gasoline” adopted by the inventor, examiner, and Illinois district court. They instead adopted their own unique definition of “gasoline” that includes all the distilled components of crude oil. Thus according to the PTAB “gasoline” includes butane. The PTAB

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refused to apply discretion under §314(a) and §325(d) and instead is interfering with the district court litigation, adding unnecessary cost and duplication.

**Example 3:** April 16, 2019 / [IPR2019-00030](#). Corephotonics inventors developed a compact telephoto lens for smartphones. The USPTO is yet again assisting Apple by taking back the patent from the inventors. The invention is a tiny optical design with “total track length” of only 6.5mm. The PTAB construed “total track length” as “partial track length” so they could find prior art with a “partial track length” of 6.5mm. If inventors cannot rely on the USPTO to stand behind their patents then businesses like Corphotonics cannot afford to invest in R&D and innovation is discouraged.

## Administrative Patent “Judges” Are Not Experts

The idea of the PTAB being staffed with technologists that are subject matter experts has not played out. Most PTAB APJs have a bachelors degree with zero years of professional experience in technology. They are administrative lawyers, not technologists. Analysis of their written opinions often reveals superficial wordsmithing to support a conclusion at odds with the intent of the inventor, the examiner who approved the patent, and common sense.

**Example 1:** April 19, 2019 / [IPR2017-02097](#). APJs at the USPTO overruled the examiner at the USPTO, who is an expert in micro-fluidics. John Gilbert, Manish Deshpande, and Bernard Bunner created an amazing device to precisely place particles into a moving stream, an important technology for biomedical research. The examiner allowed their patent noting that it was an improvement over the prior art such as a patent by “Wada”, but the PTAB APJs (who have zero experience in microfluidics) falsely charged these inventors of claiming the same device as Wada and stripped them of their patent rights.

**Example 2:** April 19, 2019 / [IP2018-01630](#). PTAB APJs that have zero experience with video compression technology violated several of the new rules and helped Netflix avoid paying the inventors for their asymmetric video compression technology. One APJ has a B.S. in computer science with no professional experience, one a degree in molecular biology, and another in materials science. They do have 30+ years combined experience disparaging patents as litigators and PTAB APJs. They are in way over their heads causing total chaos and destruction to the U.S. innovation economy.

**Example 3:** April 29, 2019 / [IPR2018-00146](#). Rocky Snawerdt invented a secure fiber optic switch, extremely important technology. But he made the mistake of revealing his discovery to the USPTO who decimated his patent to help another big corporation. The task achieved by the panel was to find 3 or 4 components of Rocky’s invention in the prior art, using his patent as a roadmap. That doesn’t mean it was obvious. That’s what an invention is – putting things together in a new way no one else thought of. These APJs have no experience in the technology and don’t understand the law. What they are doing is analogous to a child assembling a jigsaw puzzle using the picture on the box as a guide. It has nothing to do with the technology, the invention, or the law.

## Interference with Article III Courts & Delayed Justice

PTAB was intended to be a faster, cheaper, alternative to district court. It has proven to be the exact opposite:

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slower, more costly, and in conflict with district court. It is only cheaper and faster when it puts the inventor out of business by cancelling his key patents or draining his bank account. Those that survive are hampered with millions of dollars of unnecessary expense and years of market growth lost.

**Example 1:** March 12, 2019 / [IPR2018-01597](#). Steven & Mary Reiber's semiconductor wire bonding patent survived a validity challenge in district court, but the PTAB doesn't honor that holding. In addition the PTAB allowed Toshiba to play games with their corporate structure to get around the one year time bar.

**Example 2:** March 13, 2019 / [IPR2018-01632](#). Bad Boy Mowers is a classic American success story. It was founded in Batesville, Arkansas in 2002 and has grown to employ 700 people to design, develop, and build their innovative zero-turn mowers. A company break-up spilled into district court with disputes over inventorship, validity, and infringement. Rather than let it play out in court, the PTAB jumped into the fray by overruling the examiner that had recently allowed the patent over identical prior art.

**Example 3:** April 2, 2019 / [IPR2018-01500](#). PTAB instituted review of a haptic feedback patent by prolific artificial intelligence and augmented reality inventor Louis Rosenberg. Once again Director Iancu's new rules are tossed aside by the PTAB. Rather than let the real court resolve the dispute at the jury trial this very week, the PTAB insists on inserting themselves into the middle of it. The same prior art considered in examination. Incorrect claim construction by the PTAB. The USPTO is taking the side of the multi-national infringer. More cost. More delay. Inventors betrayed by the USPTO. Nothing has changed at the PTAB.

**Example 4:** April 22, 2019 / [IPR2015-01691](#). Geoff Gosling and Mogens Smed lost 4 years and 2/3 of their patent as the USPTO intervened to help their competitor escape liability for stealing their invention for joining modular office partitions. Now they have to decide if they want to pay an additional \$2-300K for another appeal to the Federal Circuit. A jury trial would have been faster, cheaper, and fairer. Small businesses like theirs cannot withstand 4+ years and millions of dollars fighting over their primary asset.

**Example 5:** July 15, 2019 / [IPR2019-00416](#). Director Iancu has updated the rules and procedures, but the PTAB shrugs them off. They just decline to apply discretion. Why does the USPTO Director delegate his discretion to the PTAB? They only have one job - to destroy the lives of inventors like IOENGINE founder Scott McNulty. He was fighting the infringers in court and was bludgeoned by mega-corporations filing 12 IPRs against his 3 patents. They have no business making the institution decision. "We are not persuaded by Patent Owner's argument that we should exercise our discretion and deny institution of this Petition based on the number of petitions filed by Petitioner and PayPal....To the extent Petitioner is accused of gamesmanship, the accusation relates to the district court proceedings, not the PTAB proceedings. Therefore, we are not persuaded by Patent Owner's argument that we should exercise our discretion and deny the Petition....We disagree with Patent Owner that Genske is being relitigated in this proceeding."

**Example 6:** July 25, 2019 / [IPR2019-00435](#). Del and Danny Ross survived a decade of patent litigation against the some of the biggest tech companies on the planet. Their initials comprise the patentee name DDR Holdings. Their '399 patent survived Alice challenges to become the gold standard for eligibility. It has been adopted throughout the MPEP as the example of eligible subject matter. Everyone tries to say their tech patents are like DDR Holdings in hopes of surviving Alice. Guess what - after 13 years of litigation the PTAB allowed the big tech

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infringers to file 13 IPRs against their 4 patents - and instituted review on obviousness! Gang tackling is alive and well at the PTAB. Last week Del and Danny flew to Denver to see their patents attacked by the infringers and the USPTO PTAB panel.

## Due Process, Takings, Appointments Violations

Barely one year ago, the Supreme Court ruled that patents are no longer property rights but are “public franchise rights” like the right to erect a toll bridge, thus revocation by the Executive branch does not violate separation of powers or 7th amendment. The American ideal used to be that anyone of any status could obtain a property right in exchange for revealing their invention to the world. Today only the wealthy elite can secure these rights.

**Example 1:** November 18, 2018 / CAFC 18-1489. DOJ attorneys argue that inventors are not entitled to compensation when their patents are revoked. The reasoning is that if the USPTO determines that they should not have issued a patent the inventor never had a patent to begin with. This argument ignores the fact that the agency applies stricter rules, guidance, burdens of proof, and procedures that often result in revoking a patent that would be upheld in an Article III court. If the USPTO is going to take back patents from inventors without a full and fair trial to decide their property right, then it must be presumed a taking has occurred and compensation is due.

**Example 2:** January 23, 2019 / [IPR2018-00315](#). The USPTO continues to run roughshod over the 5th Amendment. The inventor Dr. Michael Masini was prohibited from testifying at the trial over his own patent. The PTAB doesn't care to hear his views on his improved artificial knee joint. The right to testify in person is one of the many fundamentals of due process absent from PTAB proceedings.

**Example 3:** April 1, 2019 / CAFC 18-1768. PTAB “judges” have near total power over deciding who owns the rights to patented inventions. They overrule real judges and juries. They overrule examiners. Their findings are given deference by the appellate courts. They alone decide which inventors get to keep their property rights and which ones don't. Yet the DOJ and USPTO say in their brief that APJs are merely inferior officers and do not need formal vetting required by the Constitution. Real judges have to be appointed by the President and confirmed by the Senate. But we are supposed to just trust these administrative patent “judges” without looking at their qualifications, associations, and sympathies.

Thank you for your service and your attention to holding the USPTO accountable to remedy these devastating failures of the current U.S. Patent system.

Sincerely,



Randy Landreneau