

New England Intellectual Property, LLC
291 Main Street
West Newbury, MA 01985
978-363-1700

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Chief Economist
Mail Stop OPIA
Director of the U.S. Patent and Trademark Office
P.O. Box 1450
Alexandria, VA 22313-1450
successact@uspto.gov

Re: Comments on the SUCCESS Act Study

Dear Sir:

New England Intellectual Property would like to recommend that the USPTO report to Congress that best way to assist underrepresented classes is to maintain a strong, fair, and predictable patent system. This letter responds to the request for comments on the SUCCESS Act Study, as published in the Federal Register on April 26, 2019 in Vol 84, No 81, page 17809.

I am an intellectual property professional with over 20 years working with the patent system as a licensing executive, a patent broker, a patent agent, and an expert witness. The majority of my clients are small businesses and individual inventors. I represent a number of clients from underrepresented classes, including minorities, women, and the economically disadvantaged. Most of my clients are eligible for Micro entity status. I am also an inventor named on 32 US patents. As such, I have a view of the patent system from a wide perspective.

My clients struggle to pay the USPTO fees, even at a Micro entity level, and often need to pay my fees over time. Obtaining and maintaining a patent can easily cost \$15-20,000 over the life of a patent. For the economically disadvantaged and minorities, this represents a significant portion of

their annual income. But they have an invention, a concept that no one else has heard of, and they are excited to apply for their patent. They are also looking at their invention as a way to pull their family out of poverty.

But getting their patent is only part of the story. In about half of the states in the USA, if this inventor tries to send a letter asking for a license, they are at risk of a tort action under state law for notifying a large corporation about their patent. Inventors are particularly at risk under this type of legislation, as they are enthusiastic about their invention, and often overreach. Minority, women and the economically disadvantaged often do not have the resources to hire a lawyer to engage in a licensing campaign, and will need to send licensing letters themselves out of economic necessity. As a result, these state tort actions for patent licensing letters disproportionately affect the economically disadvantaged.

If the minority patent owner is fortunate enough to live in a state where there is no risk of state action for the letter, the infringing company will typically discard the licensing letter, leaving the inventor without the courtesy of a reply. The odds of a corporation replying to a patent licensing letter is proportional to the wealth of the sender.

And if the inventor can get the company to respond, it is typically with an IPR or a CBM seeking to invalidate the patent. This process is particularly cruel to minorities and the economically disadvantaged, as answering an IPR or CBM will typically cost several hundreds of thousands of dollars, and in 70% of the cases results in the patent being taken away from the inventor. Most minority, women, and economically disadvantaged have no resources to pay for the defense of their patent, regardless of the merits.

Should an inventor decide to enforce his patent in court, the costs are completely unaffordable, with patent litigation costs ranging upwards from \$5 Million. A decade ago, law firms would take cases on contingency, as the odds were good enough to provide a risk based income. But with the advent of IPRs and CBMs, the contingency business model no longer works. This leaves minority, women, and economically disadvantaged inventors without representation to enforce their patents.

In general, the USPTO does a good job assisting minority, women, and economically disadvantaged inventors with patent prosecution. The Micro Entity status has helped many inventors to afford patents, and most patent examiners will work with *pro se* inventors to guide them through the patenting process.

But once the inventor obtains their patent, the US patent system turns against the minority, women, and economically disadvantaged inventor. With the PTAB finding most of the patents it reviews invalid, the balance is tipped against the disadvantaged. The USPTO must reform the IPR and CBM process so that the PTAB affirms about 75% of the patents it reviews. The USPTO must stand behind the Director's signature on the front of an issued patent. Any commercial enterprise that recalled 70% of its work would find itself out of business, yet this is normal business for the USPTO. For an inventor who has taken food off of the table to pay for his maintenance fees, taking the patent away in a PTAB proceeding is particularly harsh.

In order to reform the patent system to support the minority, women, and economically disadvantaged inventors, the USPTO should:

1. Change the IPR and CBM standards to presume validity.
2. Retrain the PTAB Judges to look to preserve validity.
3. Encourage the US Congress to fix the uncertainty surrounding patent eligibility under 35 USC 101.
4. Encourage states to leave patent matters to the Federal government, and actively fight against state patent licensing letter related tort laws.

There is much more that could be done to improve the patent system, but these four steps would add balance, predictability, strength and fairness to the US Patent System. This would tip the balance away from powerful corporations and back towards minority, women, and economically disadvantaged inventors.

Thank you for the opportunity to comment on the SUCCESS Act, and thank you for the Office's leadership in patent policy.

Sincerely,

A handwritten signature in blue ink, appearing to read 'R. Baker', with a stylized flourish at the end.

Richard Baker
President of New England Intellectual Property, LLC