

December 14, 2018

Acting Deputy Chief Administrative Patent Judge Jacqueline Wright Bonilla  
PTAB Request for Comments 2018  
United States Patent and Trademark Office  
600 Dulany Street  
P.O. Box 1450  
Alexandria, VA 22313

**Re: Notice of Proposed Rulemaking PTO–P–2018–0062**

Dear Hon. Bonilla,

Eagle Forum Education & Legal Defense Fund supports the proposed changes in the Notice of Proposed Rulemaking PTO–P–2018–0062 (“Proposed Rule”).

Founded in 1981 by Phyllis Schlafly, Eagle Forum Education & Legal Defense Fund (“Eagle Forum ELDF”) has consistently advocated for strong patent rights by small inventors, and has filed multiple *amicus curiae* briefs in defense of these rights. Phyllis Schlafly was a tireless defender of small inventors and traditional patent rights. Her writings on this issue have been published in “Patents and Invention,”<sup>1</sup> dedicated in part to John G. Trump who was a professor at MIT, an uncle of President Donald Trump, and a prolific inventor. John G. Trump received the National Medal of Science from President Ronald Reagan in 1983. Eagle Forum ELDF has long emphasized that the bedrock of our Nation’s prosperity and economic opportunity is our traditional American patent system.

Eagle Forum ELDF supports proposed rules which enhance the incentives to invent, and thereby restore the patent system to its traditional protection of the rights of inventors. The only place where the word “right” is used in the original U.S. Constitution is in reference to inventors:

“To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries”

U.S. CONST., Art. I, Sec. 8, cl. 8. This constitutional right is in the discoveries, not merely in the original claims of a patent. Accordingly, the PTO should freely allow amendments to patent claims in order to promote the rights in the inventions themselves. Similarly, the burden should be on one contesting a patent to prove that claim amendments would somehow be unjustified.

The reforms contained in this Proposed Rule are necessary to align the patent system with the constitutional rights of patent-holders. By allowing inventors to amend their claims more freely than permitted under the existing system, the Proposed Rule improves the incentives for inventing, and for obtaining enforceable patents in those inventions. Inventors should not be

---

<sup>1</sup> Phyllis Schlafly, “Patents and Invention” (Skellig America: 2018).

required to continue to endure procedural obstacles for amending their own patents when challenged, which is a defect to the current system.

The Federal Rules of Civil Procedure establish that substantive amendments to pleadings in judicial proceedings should be freely granted, during and even after trial. FED. R. CIV. P. 15(b)(1) (“The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party’s action or defense on the merits.”).

There are obvious reasons for allowing amendments freely, in order to facilitate substantive justice. Adversarial proceedings, whether in courts or before the PTO, should not be games of “gotcha” where form is elevated over substance. Inventors should be able to amend their claims in their patents as easily as litigants in court can, and inventors should enjoy this right whenever there is a challenge to their patents. This would better promote the constitutional rights of inventors in their “discoveries,” not merely in their original patent applications as granted.

Similarly, the burden of persuasion should be placed on a petitioner, who challenges the validity of a patent, to disprove the patentability of an inventor’s proposed amendment to claims. Anyone who asserts that a proposed amendment would be futile should bear the burden of establishing that futility, and Eagle Forum ELDF welcomes how the Proposed Rule suggests rulemaking in order to adopt this standard.

\* \* \*

Eagle Forum Education & Legal Defense Fund supports the proposed reforms in PTO–P–2018–0062 because these changes would enhance the incentives to invent, and to patent those inventions.

Respectfully submitted,

/s/ Andrew L. Schlafly

Andrew L. Schlafly  
Attorney at Law  
939 Old Chester Rd.  
Far Hills, NJ 07931  
(908) 719-8608  
Counsel for Eagle Forum Education &  
Legal Defense Fund