

August 25, 2020

The Honorable Lindsey Graham
U.S. Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein
U.S. Senate Judiciary Committee
152 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Thom Tillis
Subcommittee on Intellectual Property
113 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Christopher Coons
Subcommittee on Intellectual Property
218 Russell Senate Office Building
Washington, D.C. 20510

Dear Chairman Graham, Ranking Member Feinstein, Chairman Tillis, and Ranking Member Coons:

The undersigned write to inform you that we are encouraged by recent steps taken to curb the marked imbalance of the Patent Trial and Appeal Board's (PTAB) processes and practices that have contributed to the unreliability and reduced quality of issued patents. These changes have been initiated by U.S. Patent & Trademark Office (PTO) leadership following careful review of the status quo or taken in response to judicial rulings. The bottom line is that PTO has recently made changes that begin to remediate patent reliability and to promote the rule of law.

First, we heartily commend PTO Director Andrei Iancu for his leadership. He has brought the understanding of an experienced, practicing intellectual property attorney to the job. This includes his eye toward reducing imbalances and inconsistencies at PTAB that render issued patents unreliable and enable the widespread practice of "efficient infringement."¹

We enthusiastically support and applaud PTO's 2018 claim construction rule,² as well as the 2019 patent-eligible subject matter guidance,³ the 2019 withdrawal from the 2013 joint Department of Justice (DOJ)-PTO "Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments" (2013 Joint Policy Statement) and subsequent replacement with a new and improved DOJ-PTO-National Institute of Standards

¹ "Efficient infringement" is to deliberately infringe someone's patent and then to hold out taking a license, force the patent owner into protracted litigation, negotiations, and delays, while repeatedly challenging the patent's validity through all available judicial and administrative avenues. It has a direct, adverse effect on patent reliability, quality, and value.

² Changes to the Claim Construction Standard for Interpreting Claims in Trial Proceedings Before the Patent Trial and Appeal Board, Docket No. PTO-P-2018-0036. This rule requires PTAB to apply in its trials the *Phillips* standard for construing patent claims. The *Phillips* standard is used by Article III courts and the International Trade Commission in patent validity proceedings. <https://www.federalregister.gov/documents/2018/10/11/2018-22006/changes-to-the-claim-construction-standard-for-interpreting-claims-in-trial-proceedings-before-the>

³ 2019 Revised Patent Subject Matter Eligibility Guidance, Docket No. PTO-P-2018-0053.

and Technology (NIST) Joint Policy Statement,⁴ and the 2020 proposed rule for PTAB institution determinations pursuant to the U.S. Supreme Court’s ruling in *SAS v. Iancu*.⁵

Together, these measures represent important steps toward redressing PTAB’s imbalances and the resulting harm to patent reliability and quality. Further, the pending changes to rules of practice governing PTAB institution decisions should reduce nefarious opportunities for gamesmanship by petitioners. This change could pare the rate of institutions, including when multiple petitions are filed against a single patent, either serially or in parallel. Under the proposed rule, the PTAB will either grant the institution of a petition on all asserted grounds or deny the petition, allow replies and patent owner responses to address issues discussed in the institution decision and allow sur-replies to principal briefs, and eliminate the presumption that a patent owner’s testimonial evidence must be viewed in the most favorable light for the petitioner when there is a genuine issue of fact. Fairer decisions on instituting PTAB proceedings should serve due process interests and strengthen patent reliability.

In a few recent cases, the PTAB has constructively exercised its discretion (see 35 U.S.C. §§ 314(a) and 325(d)) to preclude infringer gamesmanship when petitioners file multiple or serial petitions or challenge issued patents in both PTAB and federal court.⁶ These recent, welcome developments not only promise to place limits on options for abuse by multiple or serial patent challengers, they also appropriately defer administrative adjudication to Article III proceedings. Far too often, patent owners have found themselves whipsawed between litigation in both federal court and PTAB proceedings, faced the same arguments in multiple venues by the same challengers with different outcomes, and borne double the legal costs to defend their patents’ validity. The administrative judge entity rightly should show deference to Article III courts when an upcoming judicial proceeding would resolve common issues; this promotes the rule of law, our country’s foundational legal principle and protection of rights.

Yet, the recent and pending changes only represent constructive first steps. More remains to be done regarding PTAB to restore patent reliability to the level of America’s “gold standard” patent system and to end abusive efficient infringement.

The constitutionally promised exclusive rights patents are to secure for limited duration provide patent owners certainty. Unfortunately, PTAB has established a record of unreliability and uncertainty regarding patents and associated rights, including the ability to enforce one’s patent rights. That remains largely unchanged.

Signatories herein prefer various approaches for addressing concerns about PTAB proceedings. But we uniformly agree that in any congressional assessment of PTO’s reforms, you consider carefully the adverse outcomes from a novel administrative entity Congress created, along with what amounts to a body whose incentives favor granting patent challenges and whose adversarial, quasijudicial proceedings heavily favor patent invalidation. Even with a few initial steps toward remediation, PTAB proceedings continue to advantage patent

⁴ Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments, December 19, 2019 (<https://www.justice.gov/atr/page/file/1228016/download>).

⁵ PTAB Rules of Practice for Instituting on All Challenged Patent Claims and All Grounds and Eliminating the Presumption at Institution Favoring Petitioner as to Testimonial Evidence, Docket No. PTO–P–2019–0024.

⁶ *Apple v. Fintiv* (Case IPR2020-00019, March 20, 2020); see also *Becton, Dickinson v. B. Braun Melsungen* (Case IPR2017-01586, December 15, 2017) and *General Plastic Industrial Co. v. Canon Kabushiki Kaisha* (Case IPR2016-01357, September 6, 2017).

infringers, speculators, and others whose private interests diametrically oppose patent reliability and quiet title during patent exclusivity.

The Patent Trial and Appeal Board has come under scrutiny since the 2011 America Invents Act (AIA) established it, as have its adversarial postgrant adjudicatory proceedings for challenging issued patents. Indeed, the former chief judge of the Court of Appeals for the Federal Circuit, Randall Rader, has referred to PTAB as “death squads killing property rights.”⁷ The scrutiny has continued to mount, as the inter partes review (IPR) proceeding remains tilted against issued patents and PTAB fails to respect the statutory presumption of patent validity.⁸

By April 2020, 11,401 petitions sought PTAB trials. Annual institution rates for those trials fall between 55 percent and 87 percent. Following the high likelihood of institution is the high likelihood of patent claim invalidation in instituted PTAB proceedings. At least one patent claim has been invalidated in 80 percent of PTAB proceedings. All challenged patent claims have been cancelled in 62 percent of completed PTAB trials.⁹

Moreover, PTO reports of PTAB institution rates understate the actual rates as well as the adverse effects PTAB has on challenged patents and patent reliability. This is due to PTO basing its figures on petitions rather than on patents. For instance, it is common for challengers to file two petitions against a single patent, and for the PTAB to subsequently grant one petition and deny the other. The PTO reports this as a 50 percent institution rate, when in fact it is a 100 percent institution rate with respect to the patent. Accordingly, PTO asserts a decline from 68 percent of petitions instituted in FY 2015 to 54 percent through March 2020.¹⁰

However, accounting for multiple petitions, the institution rate on a per patent basis remains at or above 65 percent from 2015 to present.¹¹ While a few petitions have been denied recently

⁷ Remarks of Randall Rader at the AIPLA annual meeting, October 2013.

⁸ 35 U.S. Code § 282.

⁹ Steve Brachmann, “Financial Incentive Structure for AIA Trials Destroys Due Process at PTAB, New Vision Gaming Argues,” IPWatchdog, July 15, 2020. <https://www.ipwatchdog.com/2020/07/15/financial-incentive-structure-aia-trials-destroys-due-process-ptab-new-vision-gaming-argues/id=123303/>.

¹⁰ PTO, “Trial Statistics, March 2020” report, p. 6. https://www.uspto.gov/sites/default/files/documents/trial_statistics_20200331.pdf

¹¹ Josh Malone, “PTAB Institution Data Analysis Proves That Reforms Have Failed,” IPWatchdog, May 21, 2020. See “Multiple Petitions Effect on Institution Probability” table. <https://www.ipwatchdog.com/2020/05/21/ptab-institution-data-analysis-proves-reforms-failed/id=121440/>

on discretionary grounds, the institution rate remains alarmingly high and cause for concern.¹² It is impossible for the patent system to promote innovation while the agency considers the vast majority of *the most valuable patents it has issued* to be defective.

Further, the strategy challengers use of filing more than one petition against the same patent markedly raises the likelihood of PTAB instituting a proceeding. A single petition against a patent has a 63 percent likelihood of PTAB institution, whereas filing two petitions against that patent raises the probability to 75 percent, three petitions to 80 percent, and north of there for each additional petition against the same patent. It has been observed that “filing multiple petitions remains extremely effective through 2020.”¹³

In addition, serial petitioning, filing a subsequent petition more than 90 days after an earlier petition against the same patent, prevails at PTAB 85 percent of the time. Nevertheless, parallel petitioning and single petition strategies also enjoy strong institution records — 73 percent and 63 percent, respectively.¹⁴ The point is that PTAB remains subject to gamesmanship and even abuse by petitioners, while exposing patent owners to great risk of their patents being repeatedly challenged, invalidated, and effectively denied the essential right of exclusivity over the patented invention.

Therefore, we urge you to examine and correct incentives, processes, conflicting interests, and structural or other factors that may affect PTAB’s impartiality in affording patent owners fairness and due process as well as deprivation of statutory presumption of patent validity.

¹² Certain PTAB structural incentives have been cited as aiding and abetting biases. An appellant brief filed with the Federal Circuit on June 30, 2020, in the case of *New Vision Gaming & Development, Inc., v. SG Gaming, Inc., f/k/a Bally Gaming, Inc.* spells out problems:

“The PTAB operates as a ‘business unit’ with its own budget responsibilities. About 40% of the approximately \$57 million in annual AIA fee collections depends on granting petitions to institute. The PTAB leadership [Administrative Patent Judges (APJs)] have dual roles as executive and adjudicator. The APJs making most institution decisions are subjected to performance reviews and management tools by PTAB leadership, and the APJ’s salary and bonus structures incentivize higher ‘production,’ which means more institutions. Lastly, APJs lack the judicial independence of Article III judges or even administrative law judges.

“This uncommon system creates temptations beyond what is permissible under the Due Process Clause. It is not difficult to see how PTAB leadership APJs face conflicting interests between their adjudicatory responsibilities to decide AIA petitions and their executive responsibilities to manage PTAB finances and revenue. It is also not difficult to see how the average APJ could be tempted — or seen as tempted — to grant borderline petitions, in order to ensure continued workflow, possible bonuses, and robust PTAB fee collections. Indeed, about \$23 million annually rests solely on APJ decisions to grant AIA petitions.”

Appellants in this case observe that PTAB officials’ performance reviews, salary increases and bonuses, as well as job security through PTAB revenue from fees upon institution of proceedings tilts the playing field heavily in favor of granting patent challenges. “Every time an APJ decides to institute, that patent judge understands that his or her production scores will likely improve.” The brief notes the ultimate effect diminishing impartiality and fairness: “The structural bias ingrained in the [PTAB’s] AIA decisionmaking process violates due process.” This tilt against due process is borne out in figures New Vision cites.

¹³ Malone, *op. cit.*

¹⁴ *Ibid.*, “Serial vs. Parallel Petitions” table.

Also, please investigate how PTAB continues to be gamed through serial and parallel petitions against patents, which serves to disquiet title to exclusive intellectual property, and take steps to fix this.

Congress must ensure that PTAB no longer enables petitioners to further their “efficient infringement” of others’ patents, where they continue to garner ill-gotten gains commercially while subjecting those whose patents are being infringed to stand on the precipice of losing the right to exclude because conflicted adjudicators may well invalidate their patents. Such reform would promote the rule of law, make patents more reliable, and, by ensuring quiet title, improve the quality and value of issued patents.

Respectfully,

Kevin L. Kearns
President
U.S. Business & Industry Council

James Edwards
Executive Director
Conservatives for Property Rights

Randy Landreneau
President
U.S. Inventor, Inc.

Seton Motley
President
Less Government

Chris Israel
Executive Director
Alliance of U.S. Startups and Inventors for Jobs (USIJ)

Earl “Eb” Bright
President
ExploraMed

Curt Levey
President
The Committee for Justice

Ashley Baker
Director of Public Policy
The Committee for Justice

Ed Martin
President
Phyllis Schlafly Eagles

Hon. J. Kenneth Blackwell
Chairman
Constitutional Congress, Inc.

Kenneth Stanwood
Chief Technology Officer
WI-LAN

Bernard E. Shay
General Counsel
Earlens Corporation

Ginevra Joyce-Myers
Executive Director
Center for Innovation and Free Enterprise

Dee Stewart
President
Americans for a Balanced Budget

Jeffrey Mazzella
President
Center for Individual Freedom

Brian Pomper
Executive Director
Innovation Alliance

Daniel Schneider
Executive Director
American Conservative Union

Sara Croom
President
Trade Alliance to Promote Prosperity

Jenny Beth Martin
Honorary Chairman
Tea Party Patriots Action

Paul Caprio
Director
Family PAC Federal

Jason Pye
Vice President of Legislative Affairs
FreedomWorks

David Williams
President
Taxpayers Protection Alliance

Lisa B. Nelson
CEO
American Legislative Exchange Council

Michael Bowman
President
ALEC Action

cc: Members of the Senate Judiciary Subcommittee on Intellectual Property

August 25, 2020

The Honorable Jerrold Nadler
Chairman
House Judiciary Committee
2138 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Jim Jordan
Ranking Member
House Judiciary Committee
2142 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Hank Johnson
Chairman
Courts, Intellectual Property, & Internet Subc.
6310 O'Neill House Office Building
Washington, D.C. 20515

The Honorable Martha Roby
Ranking Member
Courts, Intellectual Property, & Internet Sub.
H2-189 Ford House Office Building
Washington, D.C. 20515

Dear Chairman Nadler, Ranking Member Jordan, Chairman Johnson, and Ranking Member Roby:

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Respectfully,

Kevin L. Kearns
President
U.S. Business & Industry Council

James Edwards
Executive Director
Conservatives for Property Rights

Randy Landreneau
President
U.S. Inventor, Inc.

Seton Motley
President
Less Government

Chris Israel
Executive Director
Alliance of U.S. Startups and Inventors for Jobs (USIJ)

Earl “Eb” Bright
President
ExploraMed

Curt Levey
President
The Committee for Justice

Ashley Baker
Director of Public Policy
The Committee for Justice

Ed Martin
President
Phyllis Schlafly Eagles

Hon. J. Kenneth Blackwell
Chairman
Constitutional Congress, Inc.

Kenneth Stanwood
Chief Technology Officer
WI-LAN

Bernard E. Shay
General Counsel
Earlens Corporation

Ginevra Joyce-Myers
Executive Director
Center for Innovation and Free Enterprise

Dee Stewart
President
Americans for a Balanced Budget

Jeffrey Mazzella
President
Center for Individual Freedom

Brian Pomper
Executive Director
Innovation Alliance

Daniel Schneider
Executive Director
American Conservative Union

Sara Croom
President
Trade Alliance to Promote Prosperity

Jenny Beth Martin
Honorary Chairman
Tea Party Patriots Action

Paul Caprio
Director
Family PAC Federal

Jason Pye
Vice President of Legislative Affairs
FreedomWorks

David Williams
President
Taxpayers Protection Alliance

Lisa B. Nelson
CEO
American Legislative Exchange Council

Michael Bowman
President
ALEC Action

cc: Members of the Subcommittee on Courts, Intellectual Property, and the Internet