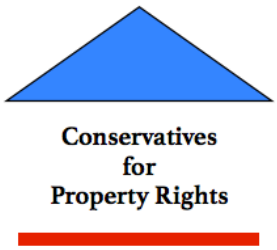

June 24, 2020

United States Patent and Trademark Office
600 Dulany Street
P.O. Box 1450
Alexandria, VA 22313

VIA E-MAIL: PTABNPRM2020@uspto.gov

RE: 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

To whom it may concern:

Conservatives for Property Rights (CPR) writes to comment on the Notice of Proposed Rulemaking (NPRM), "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).

Conservatives for Property Rights is a coalition of conservative and libertarian organizations. CPR emphasizes the central importance of private property in all its forms — physical, personal, and intellectual. The right to private property ranks among the unalienable rights the Founders referenced in the Declaration of Independence. Moreover, the Founding Fathers placed patents securing the private property rights of inventors in Article I, Section 8 of the Constitution itself.

The U.S. Supreme Court's *SAS v. Iancu* opinion was correct.[1] The Patent Trial & Appeal Board (PTAB) lacks the discretion under the statute that it had assumed with regard to decisions on institution of proceedings. That ruling represents (unusually for the Supreme Court in patent cases recently) both good statutory reading and good public policy. CPR is pleased with the Patent & Trademark Office's (PTO) responsive proposed changes to PTAB's institution rules.

[1] *SAS Institute Inc. v. Iancu*, 138 S.Ct. 1348 (2018)

We support all aspects of the proposed rule reforms: Institution decisions of a PTAB proceeding either on all grounds asserted in a petition or deny the petition; permit replies and patent owner responses to address issues discussed in the institution decision as well as sur-replies to principal briefs; and elimination of the presumption viewing a patent owner's testimonial evidence in the most favorable light for the petitioner. The effectiveness of this change (and other constructive regulatory changes that may come) should be judged by fewer PTAB proceedings being instituted, assuming PTAB panels conform to the new rule.

Foremost, eliminating the presumption of viewing a patent owner's testimonial evidence in the most favorable light to the petitioner represents a step toward fairness. The current PTAB rule of presuming in favor of the petitioner, rather than of the patent owner, undermines the reliability and predictability of the patent grant. So, eliminating the presumption is warranted.

In CPR's view, the proposed rule corrects several of the malign ways PTAB has operated, this one with respect to institution of quasijudicial administrative proceedings, that tilt the system in favor of petitioners and against patent owners. Moreover, PTAB's integrated bias undermines the private property rights of patent owners. It cannot be said with a straight face that one has an exclusive property right if the government routinely and less than with a de novo jury trial and a "clear and convincing evidence" standard withdraws the exclusivity a patent is intended to secure.

At a minimum, every administrative invalidation of an issued patent should be treated for what it is in fact: a government taking, which constitutionally should cost the rights-cancelling agency "just compensation" rightfully due the property owner. These serious deficiencies in the rules heretofore are reduced by PTAB panels having to consider all asserted grounds, rather than cherry picking certain ones, allowing patent owners to reply to issues raised in institution decisions, and, by all means, removing the presumption against the intellectual property owner, whose patent deserves a strong presumption of validity — both of all individual claims and of the patent in its entirety.

Further, the outlook for administrative adjudication and quasijudicial appointments is changing.[2] Reducing the latitude of mere administrative judges who hold their position short of presidential appointment and Senate confirmation, lack lifetime appointment, and are inferior in all respects to Article III judges is most appropriate. PTAB APJs should be bound tightly to high standards of ethics, due process, and fairness, and PTAB's decisions (except those denying institution of proceedings) subject to full judicial review in Article III court.

Hanging in the balance are cutting-edge technologies and continued American innovation and technological leadership. The consequences of PTAB's decisions, from whether to institute a proceeding to deciding the validity of a patent, matter immensely. They directly affect inventive individuals and R&D-based firms, investors whose capital stands at risk of loss, and American citizens and our society, which stand to gain or lose as consumers, as those benefitting from newly patent-created jobs and industries, and as taxpayers whose burden is lightened from growth in our economy.

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[2] In 2018, the U.S. Supreme Court decided in *Lucia v. Securities and Exchange Commission* that SEC ALJs are not constitutionally appointed, that the ALJs are "officers of the United States" under the Appointments Clause and must be presidentially appointed instead of agency hires. In 2019, the Federal Circuit Court of Appeals found in *Arthrex v. Smith & Nephew* that PTAB's administrative patent judges act as officers of the United States, have operated unconstitutionally, and must be confirmed by the U.S. Senate; thus, their patent validity decisions may be regarded as lacking constitutional validity.

Conservatives for Property Rights supports this proposed rule change. We view it as a step toward strengthening patents and property rights.

Sincerely,

James Edwards
Executive Director
Conservatives for Property Rights

Seton Motley
President
Less Government

Matthew Kandrach
President
Consumer Action for a Strong Economy

Tim Andrews
Executive Director
Taxpayers Protection Alliance

C. Preston Noell III
President
Tradition, Family, Property, Inc.

Rick Manning
President
Americans for Limited Government

James L. Martin
Founder/Chairman
60 Plus Association

Saulius “Saul” Anuzis
President
60 Plus Association

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

Daniel Schneider
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American Conservative Union

George Landrith
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