



November 11, 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

Subject: SUCCESS Act Correction

Dear Committee:

We write to bring to your attention and ask for your assistance with regard to a serious omission by the USPTO with respect to the SUCCESS Act.

On October 31, 2018, President Donald J. Trump signed into law the Study of Underrepresented Classes Chasing Engineering and Science Success Act of 2018 or "SUCCESS Act"¹. Section 3 of the act required the director of the U.S. Patent and Trademark Office (USPTO), in consultation with the administrator of the U.S. Small Business Administration, to provide a report to Congress on publicly available data on patents applied for and obtained by women, minorities, and veterans. The report was also to provide legislative recommendations regarding how to:

- Promote the participation of women, minorities, and veterans in entrepreneurial activities.
- Increase the number of women, minorities, and veterans who apply for and obtain patents.

During the summer of 2019, the USPTO gathered information for the purposes of preparing the study required by the SUCCESS Act. The public provided comments and attended public hearings concerning the participation of women, minorities, and veterans in entrepreneurship activities and the patent system.

An overwhelming majority of the inventors who testified identified difficulty with enforcing their patents, risk of PTAB invalidations, and efficient infringement as obstacles to participating in the patent system. As one witness put it, "what good is a patent if one cannot defend it?"² We have included in an Appendix sample testimony from 30 of the 38 inventors who provided oral or written testimony raising these concerns.

So what is the problem? The problem is that the report³ issued to Congress on October 31, 2019:

1. failed to provide any USPTO Initiative to address enforceability or PTAB (see page 2 of the report), and

¹ <https://www.congress.gov/bill/115th-congress/house-bill/6758>

² Complete transcripts and written comments are accessible as links at <https://www.uspto.gov/successact>

³ <https://www.uspto.gov/sites/default/files/documents/USPTOSuccessAct.pdf>

2. failed to offer any Legislative Recommendation to address enforceability or PTAB (see page 3 of the report)

Either the USPTO or Congress or both must address these concerns. **The voices of the 30 woman, minority, and veteran witnesses should not be silenced.** These inventors who sacrificed substantial time and expense to share their expertise should not have been relegated to a mere mention the appendix of the report.

Women, minorities, and veterans must be encouraged to innovate, and the patent system must be repaired so it is actually “securing to [women, minority, and veteran] inventors the exclusive right to their discoveries” according to Article I Section 8 of the Constitution. This includes making it feasible to stop big corporations that steal inventions and preventing the USPTO from double-crossing inventors by revoking their issued patents at the behest of corporate invention thieves.

We respectfully request that PPAC:

1. Publish this letter into the public record
2. Require the USPTO to correct the Report to include a USPTO Initiative that addresses the problems raised by the 30 inventor witnesses.
3. Require the USPTO to correct the Report to include a Legislative Recommendation that addresses the problems raised by the 30 inventor witnesses.

Sincerely,



Randy Landreneau

President

Cc:

USPTO Director Andrei Iancu
USPTO Deputy Director Laura Peter
Former SBA Administrator Linda McMahon
Acting SBA Administrator Chris Pilkerton
U.S. Representative Hank Johnson
U.S. Representative Jerry Nadler
U.S. Representative Hakeem Jeffries
U.S. Representative Nydia Velazquez
U.S. Representative Alma Adams
U.S. Representative David Cicilline
U.S. Senator Chris Coons
U.S. Senator Mazie Hirono
U.S. Senator Diane Feinstein

APPENDIX

NOVEMBER 11, 2019 LETTER TO PPAC RE: SUCCESS ACT CORRECTION

Selected Public Comments with Respect to Patent Enforceability

The following are selected comments from the witnesses that testified at the public hearings in Alexandria, VA, San Jose, CA, and Detroit, MI over the summer of 2019.

What good is a patent if one cannot feasibly defend it?

With the current state of patent law in the United States, independent inventors and small businesses cannot adequately license the patents they receive with larger, financially-abled entities – the “represented” class – nor can they enforce their patents against this class when their patents are stolen. This is because this represented class can simply bleed the underrepresented class dry legally and financially by taking advantage of today’s current patent laws.

So, although pursuing equal opportunity with women, minorities, and veterans in obtaining a patent is a valuable effort, if it does not coincide with equal outcome in one’s ability to utilize the patent once received, regardless of the person’s financial state, telling women, minorities, and veterans that they stand to benefit from a patent will simply be false doctrine.

- Patricia Duran

For a single post-grant review, a patent holder – the independent inventor – will need just shy of half a million dollars. And with stats showing the kill rate for patents at the PTAB between 75-85%, no attorney will take this on contingency, especially when there are no damages on mere success at the Patent Office. This cost is on the inventor’s dime. And this is just to reach the same state of reliance that previously existed on the day a patent was granted before the AIA went into effect. In other words, if you don’t have half a million dollars to spare for a single patent challenge at the Patent Office, you will not find representation if you ever want to license your patent.

Does a patent give women, minorities, or veterans any real benefit, or all independent inventors or small businesses, for that matter? With a patent system like this, the question that arises if you were to encourage these groups to get more patents is not “what are you doing for them?”, but “what are you getting them into?” because they have no idea.

These are not the so-called “patent trolls”. These are the true American innovators trying to start a company in their garage. Establish and identify them—inventors who own their patents—in the statute. This is the true underrepresented class. Give them preference when it comes to their patents being challenged. If it is more economical and faster to go to the PTAB, then they’ll go. If not, they’ll stay in the traditional Article III court.

- Jeff Hardin

I would like to know that there is a level playing field for me as an individual inventor. After getting my patent issued and going through the process, I learned right away the patent is only valuable if you can defend it.

Again, getting the patent is the easy part. Protecting is the hard part. It could cost tens to hundreds of thousands of dollars and years to complete. I've read stories on products on Kickstarter of being knocked off in China and being sold and delivered to the US before the Kickstarter project has even finished regardless of if they had IP or not. If that don't kill the business, I don't know what will. I feel the larger companies don't honor this and they label us patent trolls to defending our patents. And they use the courts to take advantage of us knowing full well that we can't do anything to beat them.

I also feel that needs to be more accountability with those companies that do prey on people as well. I would also like to add that securing a patent helps with getting money and investment. I will keep moving forward and I can with this process. And I will keep hoping changes will be coming from Congress. And on a side note, I don't have \$400,000. That's it.

- Brian Aumiller

My patent was very widely accepted and utilized, produced, sold, manufactured and made by everyone. When something is successful, big companies come in.

So while there was nothing in this field and then suddenly a multi-hundred billion dollar — million dollar industry that is now in the billions, sold by News Corp., sold by 3M, sold by Hewlett Packard, infringing products all around. I lost the money that I put in, that I could've been generating more business.

Because the patent was not respected by commercial businesses, by the large corporations, and not by the court, I have to question, is The United States Patent and Trademark Office issuing valid patents? And if so, why are they not being upheld in the judiciary?

- Darcy Bisker

I didn't even know that Debtors Anonymous existed until I tried to pick my life back up after October. That's when I was invalidated in the US court, in the Southern District of New York.

I personally experienced being shunned, scolded, and lectured whenever I mentioned being a patented inventor in the digital technology industry. I would do everything that was by the book. I had people laugh at me. Oh, you think a cartoon character is going to encourage someone to stay healthy? Get out of here. Yeah, and by 2005 Nintendo had launched Wii fit. I had a former senior executive from Activision just blatantly tell me you are the problem. You are not the solution. My self-esteem has really taken a lot of blows.

So it's my continued optimism that my own dreams to appeal my status as being invalidated and to have that be realized, crazy as it may seem, and I'm really motivated just to be with this group of inventors and to meet you all personally to share these stories.

- Paula Murgia

Rather than solely speak for inventors, I wanted to give many of these inventors a chance to speak for themselves, and to that end, at a recent inventor conference, I interviewed them, including some of my own clients from the clinic, asking them what issues they are facing in today's patent market.

"There is a risk in working with a large company. If one goes and presents intellectual property to them, the company may look at it in a different way. For example, they may

consider simply going ahead and infringing the rights and then appealing it to the PTAB, which has a high chance of invalidating the patent.”

“Due to how easy patent invalidation has become, companies do not feel a need to license. Instead of licensing it and being more economical to infringe and invalidate the patent.”

“The effects of the PTAB analysis decision made me unable to defend my patent rights and caused my investors to leave.”

“I am considering no longer patenting in the U.S. I can get better protection in China. As a veteran, I do not want to move my creations elsewhere but feel that, in view of the current market conditions, I do not have any choice.”

It is startling to me to receive repeated feedback from many inventors that companies blatantly will disregard patent rights because, quote, “It is cheaper to kill a patent than it is to license one.”

- Britten Sessions

Without these safeguards, I don't think that asking women, minorities, independent inventors, veterans to get involved in the patent process makes a lot of sense because it can be very risky financially to go down this road. Part of it is the excitement, of course, of inventing, but the other part of it is really defending your invention when it's infringed, and that could be quite a daunting process.

Typically what will happen is that the other side will say that a patent is invalid, and it shouldn't have been issued. And this whole process that occurs here with these typical validity challenges can go on for years, and without adequate funding from an independent inventor, you really don't have much of a chance standing up against some of these big dogs in the marketplace. And what I mean by that is simply that the typical strategy of a large infringer will be to run the independent inventor out of money. You're looking at years, hundreds of thousands, millions of dollars.

If USPTO wants to get independent inventors involved — women, minorities, veterans — you're going to have to take a look at this validity process.

- Robert Granadino

If patents can't be defended, big tech just steals them, and using their huge markets and deep markets, massively commercializes them

The USPTO set up the PTAB skewed to invalidate huge percentages of the very same patents that it just granted...These are the patents that inventors have put their trust in, betting their careers and sometimes their entire life savings to commercialize or license them, only to have that trust betrayed, and then to lose everything.

We all want women, minorities, and veterans to climb the social and economic ladders, but to do that, we must have a patent must be capable of attracting investment. It must be presumed valid, exclusive right, and can't cost so much to obtain and defend that nobody can do it as it does today.

- Paul Morinville

I don't expect to participate in the US patent system any further unless the financial disparity is addressed. The USPTO should eliminate the IPR process for all of the patents initially filed by a small entity, a micro entity, and for inventor-owned and/or -controlled companies. When large corporations undergo the IPR process, they utilize less than 1% of their resources. When my peers and myself of limited financial means have to undergo the IPR process, then we face business and personal bankruptcy just to afford to defend ourselves. If we cannot scrounge up half a million dollars for attorney fees, then we cannot defend our patents, and there is nothing to gain even by a successful defense. We will end up spending half a million dollars just to maintain the status quo and then still face business and personal bankruptcy.

- Tesia Thomas

Please fix the America Invents Act, things have changed lately, and it's had a devastating effect, I think, on individual patent owners currently. So either you get a patent or you don't. You get a patent and then six, seven years later, oh, maybe we made a mistake, and then they just take it away....I mean, there's an 85 percent clobber rate with the PTAB. So basically you have a patent, and that's great, but you only have a 15 percent chance of keeping it, and you have to spend another \$450,000 to prove to keep it. I do have a lot of other ideas, but I'm not going to invent and patent right now unless this gets fixed.

- Carrie Hafeman

Every woman I talk to feels like it is something worth doing. But it's hard to find venture capital...investment when we have a PTAB that will take away the rights to your patent...once it does matter. Because our patent system is becoming so weak, knock-offs are allowed all over the place. That's where the patent office needs to put all of its energies.

- Marjorie Weir

The challenges that underrepresented populations face tend to be less related to USPTO, and more related to access to capital, lack of appropriate mentors and role models, and the costs of attorney fees associated with obtaining and defending a patent.

- Dr. Rory Cooper

Unfortunately...four patents...have been invalidated in the case by district court on a Rule 12(b)(6)...that means without claim construction, they got a quick invalidation.

- Ted Tsao

It is virtually impossible for an inventor of something truly valuable to 1) stop the theft of it, 2) stop the invalidation of his or her patent(s), or 3) stop him or herself from being rendered penniless and summarily defeated in legitimate efforts to stop the theft of the invention.

- Peter Antros

Thanks to the PTAB and lack of strong enforcement in court, patents cost inventors far more than is ever returned. Patents are just liabilities.

- Arnold Beal

Certainly if a family member of yours had their patent revoked or copied without recourse, you would care. Our country was built on many things and the ability to feel safe with a patent you have issued is one of them. It's time to change the usual and customary practices which have a blatant disregard for the United States patent holder.

- Valerie Carbone

It is crucial that we concurrently increase the enforceability of those patents. Patents have become liabilities for independent inventors thanks to the PTAB and lack of strong enforcement in court.

- Deja Castro

I thought patents were my insurance plan to protect me. My invention was stolen and they made millions and our product is still selling.

- Shelly Conte

To seek more patent applications from anyone, let alone the groups this survey targets to help, without addressing the problem surrounding the PTAB is nothing more than, dare I say, [redacted].

- Travis Creighton

The present system affords no benefit, and no likelihood of success to women, minorities, veterans, or other independent inventors who attain patents. I strongly support legislative and rule changes to address the gross inequities in the present system which are the product of well-funded lobbyists who get the laws and rules they want regardless of how unfair and unreasonable they are. Make no mistake, the current IPR and CBM laws were not written by Congressmen, they were written by lobbyists for corporate infringers. It is high time to remedy these stunning examples of corporate excesses.

- John D'Agostino

Patents have become liabilities for independent inventors thanks to the PTAB and lack of strong enforcement in court. If the recommended legislation does not include increased protection of patents, we will end up destroying the lives of the very individuals we intend to help.

- Kip Azzoni

However the subsequent risk of, after having paid and worked to obtain a patent reviewed by a qualified patent examiner, only to have struck down arbitrarily by the PTAB at the whim of a large financially rich corporate entity unwilling to pay the lawful royalties that the patent is supposed to award the inventor, is too great.

- Keir Finlow-Bates

I truly believe that we are slowing down progress by making easier for big companies to monopolize on someone else's invention by simply outspending and exhausting the small inventors resources in court litigation.

- Curt Flowers

Independent inventors risk thousands of dollars in developing and patenting their products only to find that the greatest liability is to have a product reach success in the marketplace. Under our current weakened patent system, large corporations with deep pockets and teams of attorneys can easily infringe on a small, independent inventor's product, swamping the inventor with litigation costs and extreme financial stress in trying to protect their own USPTO issued patent.

- Laura Myers

If a product is successful, large companies come in and steal the idea and force the patent owner to start a lawsuit that they rarely can afford. Then, even if the inventor can pay the enormous legal fees, if the infringer chooses to take the patent to the PTAB, the inventor has almost no chance of surviving.

- Martin Nguyen

The initiation of the process litigation, makes a dent on the cash flow potential of the to be startup, or person, money that is tight, or money that have to borrow to defend themselves from people who claim that the patent needs to be invalidated, given expert advice from lawyers, in general.

- Alberto Ratmiroff

The estimated mean legal fees of an IPR proceeding through appeal runs nearly half a million dollars. If a patent is challenged and the patent owner loses, his patent is invalidated and his investment is lost. If he wins, he effectively "wins" nothing, since he still has a patent but there is no consequence to the challenger, often a large infringing company. A business such as mine could be ruined by a single IPR.

- Thomas Riederer

101 objections were just an excuse to give Google and the other big tech companies what they paid for lobbying Congress and me, I am just a dumb schmuck who thought I would get the chance to plead my case in front of a jury of my peers — how stupid am I to expect that kind of fairness from my own government. You have no idea how this AIA feels to inventors — none.

- Name Withheld

Yes the cost is high to litigate to protect your patent claims against infringers and yes the cost is high to fight against big companies who label you trolls and invalidate your patent. These companies know that you do not have the resources to fight back because you cannot hire honest attorneys for a reasonable fee or on a contingency.

- Darrell Thompson

These days, however, the risks and costs taken on by a patent holder can outweigh the advantages. With extremely high PTAB invalidation rates, patents offer little protection to the inventor. Many independent inventors, particularly those from underrepresented classes, are unable to pay to defend a patent in an IPR, which has been estimated by the AIPLA at \$450,000. Patents only have value if they are a dependable right without the risk of being so easily revoked.

- Bob Zeidman

However, after the controversial Supreme Court Rulings on Alice, and the PTAB's practice in invalidating a huge number of software related patents, my patent portfolio is now valued for less than 10% of its original value, which is way below my cost of obtaining the patents plus the maintenance fees paid to USPTO. I am heavily in debt. My patents have relegated my socioeconomic status to economic distress. Businesses cannot be built on false promises of exclusive right and patent enforceability.

- Ronald Zhang