

Dear Congress: A Small Request on Behalf of the Innovators You (Theoretically) Represent: Part 2

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Unless you are complying with a court order to read this blog as part of your sentence, it's safe to say that you are more interested than most in IP and

IP-related issues. And if that's true, then it is likewise safe to say that you are familiar with the "patent trial" regime put in place by the America Invents Act. Given that is likewise true, then you are almost certainly familiar with not only with the various forms of said trials, *Inter Partes* Review (IPR), Post Grant Review (PGR) and Covered Business Method Review (CBMR), but also with the **dismal stats these "trials" have generated** from the perspective of patent owners. I won't bore you with the details, as I presume you already know them and if by chance you don't, a simple and easy Internet search will deluge you with everything you could possible want to know, but suffice to say that the Patent

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Trial and Appeal Board (PTAB) has more than lived up to its moniker as a “patent death squad.”

So, what’s the upshot? Well, as heavily biased against patent owners as they are, at least the PGR is bounded by time from issuance (much like an Opposition in European practice) and the CBMR is bounded by the definition of a CBM patent (even though the whole concept of a CBM patent was created solely to define a subset of property rights – and then strip those rights away) as well as the requirement that the challenger must be sued for infringement.

But the IPR has *no* such limitations. Sure, the scope of the challenge is narrower than a PGR or CBMR, but considering the breadth of sections 102 and 103, especially considering that a printed publication includes *any* publication, made available *anywhere*, in *any* language, the threat of IPR is enormous. And given that an IPR can be filed *anytime* against *any* patent^[1] by *anyone*^[2] and that *any* number of IPRs can be filed against the *same* patent – that threat is interminable and the consequences for patent owners is devastating.

Basically, what Congress has said to patent owners is that, as long as they lay low and never make a fuss about anyone infringing their patents (which, statistically speaking, took years to acquire at the cost of thousands, if not tens of thousands of dollars), then those patents will be fine. BUT, as soon as a patent owner has the gall to actually attempt enforcement of their duly issued property right, the dogs are loosed in the form of endless threats of patent trials until either the claims of the patent are declared void or the patent expires.

Not only is that manifestly unjust, it makes patents themselves a bad business bet: would you spend thousands of dollars to acquire a right in which your title is never truly assured and anyone could challenge that title in a demonstrably biased forum for as long as you had it, forcing you to spend tens, if not hundreds, of thousands of dollars more to defend that title? I doubt it, but that’s what patent owners face today.

To add insult to injury, since *anyone* can challenge *any* patent, a cottage industry has sprung up around IPRs, whether as a way to short stocks or as a classic protection racket, where an IPR is filed and then the patent owner is given the choice between settling on odious terms or paying the cost of defending the patent against ridiculous odds. Leave it to Congress to create a weapon only a racketeer could love.

According to Congress, IPRs were supposed to be a faster, less expensive alternative to litigating the validity of a patent. OK – against my better judgement, I’m willing to give Congress the benefit of the doubt. If that was Congress’ intent, then shouldn’t IPRs only be available when the threat of litigation exists? In other words, shouldn’t one have to be legitimately threatened with a patent infringement suit to be able to file an IPR? Given that around 80% of existing IPRs involve underlying litigation, such a change would hardly affect the current practice and Congress already knows how to do it – they can simply cut and paste from the CBMR statute. Admittedly, this is far from a “fix” for the inequities of the patent trials and the PTAB will continue to use the biased rules they created to smugly and arrogantly take back from patent owners what their own office granted, and do so for the life any patent. But it will at least prevent otherwise disinterested third parties from using what was purported to be an alternative to costly litigation to actually create what is effectively...wait for it...costly litigation.

So, what’s not to like, Congress? In an effort to walk before you run, I’m willing to let you slide for now on the inequities of the currently implemented patent trials, so IPRs will still exist as an anti-patent alternative to litigation and 80% of the current cases would still qualify. Unless you’re being paid by the racketeer lobby (who will no doubt fire up their angry little twitter accounts as well as leaving self-serving comments below), how about a little cutting and pasting to aid in the process of saving the patent system that used to be the envy of the world from your own rash actions? Doesn’t seem like too much to ask....

[1] Any patent that isn’t subject to a PGR, in which case one would simply have to wait until the PGR was concluded – and then, if by some miracle the patent survived the PGR, file an IPR on the same patent.

[2] Other than the patent owner, or a party (or real party in interest, or privy) who was served with a complaint alleging infringement more than a year earlier.

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