Dr. Thomas E. Sawyer
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July 27, 2017

The Honorable Wilbur Ross
Secretary of the U.S. Department of Commerce
1401 Constitution Ave., NW
Washington, D.C. 20230

The Honorable David P. Ruschke
Chief Judge for the Patent Trial and Appeal Board
Patent Trial and Appeal Board
P.O. Box 1450
Alexandria, VA 22313-1450

Secretary Ross and Judge Ruschke,

I am a former officer and concerned shareholder of VoIP-Pal.com, Inc. (VoIP-Pal). I am writing to express my reservations about the failure of the present PTAB system to provide constitutional protections to patent holders.

I. Legal Background

Since a patent is "property" a patent should be protected by due process of law. The applicable portions of the Bill of Rights that provides that protect are the Fifth and Seventh Amendments.

> The Fifth Amendment to the Constitution, in part, provides:
>
> No person shall be… deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.
>
> The Seventh Amendment to the Constitution provides:
>
> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

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The America Invents Act (AIA) makes no provision for a "trial by jury" nor does it allow an appeal of a final written institution decision, which is the decision of greatest importance next to the granting of the patent itself.

Since nearly ninety percent of all patent petitions that are instituted by the PTAB result in the invalidation of one or more claims, the lack of *res judicata*, which precludes repeated litigation of issues and claims by a "real party in interest" or its "privy," would eliminate due process at a stage in the IPR process where it may matter most.

II. The History of the VoIP-Pal Litigation in the PTAB

VoIP-Pal.com has had eight IPR petitions filed against it within the past 14 months, all against the same two patents. The first petition was filed by Unified Patents ("Unified"). Unified is a membership entity that represents itself as a proxy for many computer companies including, presumably, Apple Inc., and AT&T. Since the law requires that all parties filing a petition for an IPR either be parties of interest or their privies, VoIP-Pal can only assume by the fact that Unified's petition was considered by the PTAB meant that the PTAB panel determined the Unified filed as a privy for the real parties in interest, Apple and AT&T.

III. Real Parties in Interest and Privies

35 U.S.C. 312(a) and 35 U.S.C. 311, which govern the IPR petition process, state that a petition for an IPR must identify all real parties in interest, Unified Patents was allowed to file a petition for an *Inter Partes* review on behalf of an undisclosed membership. Issue and claim preclusion lie at the heart of *Res Judicata* since they serve to limit needless litigation and ensure that the holding has the intended effect on those parties that are actually legally involved. It ensures that members of an industry-focused entity cannot use that entity as a tool to allow members to conduct "practice" litigation through the entity's litigation before the company has to deal with any of the outcomes of the decision.

My specific concern is that the petition of Unified Patents, which holds its membership list to be a trade secret, forces the litigants in the present case to assume that Unified filed as a "privy" of Apple and AT&T and that such a role was identified by the PTAB panel, although there was no explicit finding to that effect. Consequently, the "real parties in interest" should be bound by the decisions made by the PTAB on the Unified petition.

In other federal courts, the interests of a broader group of similarly situated people or institutions, is facilitated through allowing such groups to file an *amicus curiae* brief with the court. In this way the broader policy issues may be addressed but an entity that is not a "real party in interest" is not allowed to hijack the process. If United Patents petitioners are allowed to file for IPR's, the PTAB may effectively eliminate the legal protections of "standing."

IV. Determination of the Elements Required for Unified to be a "Privy"

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Since the only lawful basis that Unified could claim as a basis for jurisdiction in filing its petition is as a "privy" for the litigants, it is important to understand how the U.S. Supreme Court defines that role. In Taylor v. Sturgell, 553 U.S. 880 (2008). the D.C. Circuit identified a five-part test used by the Supreme Court to determine whether an individual was acting as a "privy" for another:

A nonparty may be bound by a judgment if there is both:

1. "Identity of interests"
2. "adequate representation" and

at least one of the three other factors:

3. "a close relationship between the present party and his putative representative,"
4. "substantial participation by the present party in the first case," or
5. "tactical maneuvering on the part of the present party to avoid preclusion by the prior judgment."

The "identity of interest" and anyone of the last three factors should be cause for concern, since all of them would appear to create a "cabal" that could undermine the purposes of the patent process.

V. Consequences of Unified's Petition not being Instituted

Unified's petition was not instituted. Under the doctrines of issue and claim preclusion under *res judicata*, the decision by the PTAB not to institute would have precluded any companies for which it was acting as "privy" from filling on those issues again.

Unified's petition sought to invalidate claims 1, 2, 7, 27, 28, 29, 34, 54, 72, 73, 74, 92, 93 and 111 of the '815 patent. The need to avoid repetitive litigation, both for judicial economy and fundamental fairness to the litigants, is clearly evident as you review the seven petitions subsequently filed by Apple and AT&T, all of which involved the same claims challenged in the Unified petition of VoIP-Pal Patent 8,542,815 ("815"), IPR2016-01082, and/or analogous claims in the continuation patent, 9,179,005 ('005). Based upon those facts, all of the petitions filed in this case subsequent to Unified, are precluded by the decision in Unified.

VI. Possible Anti-Competitive Relationship between Unified, AT&T and Apple

I have a further concern about the relationship between Unified, Apple and AT&T:

Unified, as a business organization that appears to serve as a "trust" and claims to act on behalf of unidentified member corporations, may also involve violation of anti-trust laws. If an interested entity that is not directly involved in the immediate question before the court is

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allowed to drive the IPR process without identifying the business entities that it represents, such actions may conflict with the Sherman Act which outlaws unreasonable "contract(s), combination(s), or conspirac(ies) in restraint of trade," and any "monopolization, attempted monopolization, or conspiracy or combination to monopolize." Unified Patents' position, as an entity driven by the interests of a limited group of undivulged members, might be seen as an "arrangement among competing individuals or businesses to fix prices, divide markets, or rig bids, involving "unfair methods of competition" and "unfair or deceptive acts or practices" which would violate the Clayton Act.

VII. Other nations have revised their laws to protect inventors

While our country prides itself on the fairness of its legal systems, the use of proxies in the IPR review process would not be tolerated under the more progressive patent laws of other countries. For example, while China was one of the last countries to offer meaningful patent protection to its inventors, it has recently recognized the value of the intellectual property of its inventors. That protection is reflected in its patent laws.

Erick Robinson analyzed the difference between the U.S. patent policy on allowing non-parties in interest (such as Unified Patents) to file for *Inter Partes* Review and the new patent policy in China in an article published on April 26, 2017:

China, unlike America, has made innovation a top priority. China's government has also, over the last few years, created the best patent enforcement environment in the world. Unlike the U.S., that makes decisions based on the next fiscal quarter, the Chinese government plays a long game. They make plans of 5, 10, and 25 years. For instance, while China's economic growth has "slowed" (the quotation marks are because the United States would be euphoric with half of China's 6.5% growth), this is because such a lull is a natural consequence of a shift from a manufacturing-based to an innovation- and consumer-based economy.

Because China thinks long-term, its government will be very unlikely to accept attacks on patents by proxy – especially by a foreign company such as Unified. First, patents are essential to China's growth as a technology powerhouse. Chinese companies are no longer the copycat wannabes of yesteryear.

They are leading the world in many areas of technology. Not only are they now directly competing with foreign companies, they are beating their foreign competitors. Huawei, ZTE, Alibaba, Baidu, Tencent, Xiaomi, Oppo, Vivo, Haier, and many others are not just more efficient, they are better. These new hometown heroes need patent protection, as do the next generation of Chinese innovators yet to be created. The Chinese government is not going to be happy if a foreign Troll of Trolls (Unified Patents) comes in to kill patents on behalf of American companies. http://www.ipwatchdog.com/2017/04/26/unified-patents-model-would-not-work-in-china/id=82399/ (accessed 07/22, 2017)

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The PTAB/IPR system appears to have been has been hijacked by the powerful Silicon Valley Companies that often are infringers seeking to avoid payment for licenses. The technology financial lobby has donated hundreds of millions of dollars to politicians. either directly or funneled through their foundations, presumably to secure some influence with the political process. I am asking you to give serious consideration to the legal flaws of the IPR process that fail to protect our laws and the constitutional rights of patent holders.

VIII The PTAB/ IPR rules have been applied in ways that:

1. Permit companies like Unified Patents, which have no legal standing, to file IPR petitions. This is an anti-competitive and anti-trust practice.
2. Allow infringers to file multiple IPR petitions on the same patent. How is a small inventor or company expected to bear the crippling financial burden of defending themselves against a myriad of IPR's? As mentioned previously, the PTAB has become the "killing fields' of patents.
3. Provide a venue to take away the property rights of patent owners by the canceling of patent claims without a jury.
4. Create a system that does not provide an appeals process for institution decisions.
5. Permit judges to rule on cases in spite of having clear conflicts of interest.

There have been a total of eight IPR petitions filed against Voip-Pal, on the same two of their patents. All of the claims and issues in each of the petitions are precluded by the decision not to institute the Unified Patents petition. The replacement of the original judges alone, does not make Voip-Pal whole. In order for the required due process to be followed, the PTAB must dismiss the two Apple petitions that have been instituted and a make a decision not to institute the five pending petitions

"America the free", is the land of opportunity and justice. The world looks up to our great nation. We cannot afford the present PTAB/IPR system to undermine our position in the world. The deficiencies in the present system demand that the process be restructured consistent with the mandates of The Constitution. I hope that you will personally follow up on this serious matter.

Sincerely,

Dr. Thomas E. Sawyer

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