

No. 18-468

In The
Supreme Court of the United States

SSL SERVICES, LLC, *Petitioner*

v.

CISCO SYSTEMS, INC., *Respondent*

On a Writ of Certiorari to The United States Court of
Appeals for the Eleventh Circuit

**AMICUS BRIEF OF USIJ IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

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INTEREST OF *AMICUS CURIAE*

USIJ is a coalition of 30 startup companies and their affiliated executives, inventors and investors that depend on stable and reliable patent protection as an essential foundation for their businesses. A list of USIJ members is attached as Appendix A.

USIJ was formed in 2012 to address concerns that legislation, policies and practices adopted by the U.S. Congress, the Federal Judiciary and the U.S. Patent & Trademark Office (“PTO”) were placing individual inventors and research-intensive startups (“the invention community”) at an unsustainable disadvantage relative to their larger incumbent rivals and others that would misappropriate their inventions, both domestic and foreign. USIJ’s fundamental mission is to assist and educate Members of Congress, leaders in the Executive branch and the Federal Judiciary regarding the critical role that patents play in our nation’s economic system. In this endeavor, USIJ works with other groups and coalitions within the invention community to insure that protection of the creative role played by individual inventors, universities, startups and small companies is recognized as a primary objective of the U.S. Constitution, which provides the foundation for the U.S. patent system.¹

¹ No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission. The parties have consented in writing to the filing of this brief.

SUMMARY OF ARGUMENT

Inter Partes Review (“IPR”) procedures were created by Congress as an economical way to eliminate “bad patents” through expedited administrative proceedings at the PTO instead of litigation in a district court. Whatever success IPRs may have had in nullifying bad patents, the PTO’s processes have expansively allowed IPRs to be instituted against meritorious patents that already survived multiple challenges. The outcome in this case is a direct reflection of that indifference and cries out for this Court’s guidance. The PTO struck down the SSL patent after the same agency, using the same or nearly identical prior art, had affirmed its validity on six separate occasions and after a district court and the Federal Circuit had also affirmed the validity of the same claims in an infringement case.

The failure of the PTO to implement Sections 315(e) and 325(d) in a meaningful way at the outset has allowed abuse of IPRs on a grand scale. Large infringers have been permitted to mount wave after wave of challenges to the same patent claims. What was envisioned by Congress as limited to “one bite at the apple” – *i.e.*, a single challenge to a patent claim – became instead a system wherein a single patent claim can be attacked by even the same challenger with two, three, four, five, six, or more petitions. That same challenger, often a large corporation, also can coordinate its challenges with those of other challengers who file their own separate salvos against

the same claim. Not surprisingly, a crop of enterprising profiteers, funded principally by a network of large technology companies, has emerged to file separate petitions pretending to be independent of the real party in interest and thereby hoping to avoid the estoppel provisions of the AIA.

Congress never intended the post grant challenges to patent validity created by the AIA to be used as weapons to raise the cost of litigation for inventors and small companies. Indeed, the legislative history of the AIA is to the contrary, with numerous expressions of concern, through successive sessions of Congress, about the ability of large infringers to use post grant challenges to harass “brilliant inventors” and small companies by attacking their patents. Congress understood clearly that if the very best patent imaginable is subjected to a sufficient number of probabilistic challenges, as all litigation inevitably becomes, sooner or later the patent will be held invalid.²

35 U.S. §325(d) was included in the final version of the AIA for the very purpose of preventing infringers from forcing a patent owner to defend multiple proceedings whenever it tried to enforce its

² An article by Phillip S. Johnson, formerly Senior Vice President, IP Policy and Strategy, Johnson & Johnson, chronicles the manner in which the IPR process was allowed to create what he referred to as a “killing field.” See, “A Lookback at the Legislative Origins of IPRs,” IP WATCHDOG, September 20, 2017. <https://www.ipwatchdog.com/2017/09/20/look-back-legislative-origin-iprs/id=88075>

patents. Allowing multiple attacks eviscerates doctrines such as *stare decisis* and *res judicata* that have existed for decades to settle contested issues with finality and to provide repose to the parties. Section 325(d) is a clear statement by Congress that the interests of legitimate patent owners must be taken into account and balanced against the statutory objective of eliminating so-called “bad patents.” After a patent claim has been subjected to an IPR challenge once without falling, that patent no longer can be considered a “bad patent,” and infringers should be required in most cases to use the district courts to adjudicate any further assertions of invalidity.

Section 325(d) is particularly applicable to the situation here. Prior to the ruling at issue in this case, the SSL patent had survived *ex parte* reexamination brought by an infringer on three prior occasions, two of which were based upon the identical prior art that later was used by the PTO to invalidate the SSL patent. Each of the three proceedings was followed by an additional *de novo* review requested by SSL, and each of these affirmed the patent’s validity with written opinions. Thereafter, the SSL patent was asserted against the same infringer who raised, as a defense in the district court, the same primary reference that it had used unsuccessfully in each of the reexaminations, this time in combination with RFC1508 (a portion of the internet specification). The jury found, as the PTO had previously held, that the prior art did not invalidate the patent. That

judgement of the district court was affirmed on appeal by the Federal Circuit.³

Against this backdrop and in light of Section 325(d), it is unacceptable for the PTO simply to ignore its own conclusions in six prior reviews of the same question and to reject the final ruling of an Article III district court, affirmed by an Article III court of appeals. Equally important, it is both shocking and surprising that the Federal Circuit, in issuing a Rule 36 affirmances without opinion, did not provide any substantive guidance on this critical question of separation of powers. An Article I administrative tribunal should never be allowed to override the conclusions of prior tribunals of the same agency and the final rulings of two Article III courts.

There must be meaningful restraints on the willingness of the PTO to accept multiple challenges seeking to invalidate a patent that already has survived a post-issuance challenge, particularly where the prior art on which the later challenge is based is the same or substantially the same as in the prior challenge. The unfairness in such a process is evident to anyone. Sooner or later, a panel of judges will be found that will conjure up a justification to kill a patent, as happened here, despite numerous contrary rulings by the same agency. A single unfavorable panel is all it takes to destroy an

³ *SSL Servs., Inc. v. Citrix Systems, Inc.*, 769 F.3d 1073 (2014), aff'g 940 F.Supp. 2d 480 (E.D.Tx 2014).

important and highly valuable property right.⁴ It is not the “bad patents” that have become the focus of IPRs, but now it is the most meritorious.

It is difficult to gauge the damage that this type of outcome has had on those inventors and entrepreneurs who would risk economic livelihood, time and monetary resources in the pursuit of critical breakthrough technologies. The inventor and investor communities increasingly despair about the cost and uncertainties of genuine patent protection. It is this community that USIJ represents and that is in great need of some good news.

ARGUMENT

I. THE LEGISLATIVE HISTORY OF THE AIA MAKES CLEAR THAT PATENTS SHOULD NOT BE SUBJECTED TO MULTIPLE ATTACKS

Throughout the course of debate over the AIA and its predecessor bills, Congress reiterated its commitment to avoiding repeated attacks on a patent. This commitment, as established below, is codified in the AIA but was widely ignored by the PTO during the Obama Administration, as exemplified in the instant case.

⁴ PTO records show that Patent No. 7,237,634 has been the subject of 16 IPR petitions. The best patent one could conceive is severely at risk facing such repetitive attacks.

In the debates surrounding the proposed Patent Reform Act of 2007, a legislative predecessor of the AIA, the Senate Report explicitly referenced concern about multiple attacks on a patent. These comments were directed to what at the time were being characterized as “first window” and “second window” opportunities to initiate post-grant review (“PGR”) proceedings. This “second window” was the forerunner of the now-enacted IPR provisions.

Congress plainly saw the potential for abuse of IPR proceedings as a costly delaying tactic that large companies could exploit to bankrupt small inventors:

“A few words about second window: opening up a second window for administrative challenges to a patent only makes sense if defending a patent in such proceedings is not unduly expensive, and if such proceedings substitute for a phase of district-court litigation. If second-window proceedings are expensive to participate in, a large manufacturer might abuse this system by forcing small holders of important patents into such proceedings and waiting until they run out of money. **Defending oneself in these proceedings requires retention of patent lawyers who often charge \$600 an hour, quickly exceeding the means of a brilliant inventor operating out of his garage – or even of a university or small research firm.**

“Second, if estoppel rules are unduly liberalized, second-window proceedings could easily be used as a delaying tactic.”

Senate Report 110-259, “The Patent Reform Act of 2007,” 110th Congress, to accompany S. 1145, at 66 (emphasis supplied).

Recognizing that duplicative petitions are “one of the worst evils” of administrative proceedings, Congress sought to all-but-eliminate such proceedings (allowing for repeat proceedings only in extreme cases, such as in cases of collusion between the patent owner and the petitioner):

“Subsection (c) of section 327 applies a successive-petition bar of sorts to second or successive petitions for second-period review. It is a rare patent that should be twice subjected to second-window proceedings....

“Lengthy and duplicative proceedings are one of the worst evils of other systems of administrative review of patents. During the pendency of such proceedings, a patent owner is effectively prevented from enforcing his patent. Subsection (c) should ensure that second or successive second-period proceedings are few and far between.”

Congressional Record, Vol. 154 (2008), Part 16, Pages 22620-22632 (Senator Kyl speech on Patent Reform) (emphasis supplied). The substance of Section 327(c) of the bill then pending became Section 325(d) of the AIA.

Congressional determination to prohibit multiple petitions continued through the 2011 debates and enactment, with both the Senate and House

reiterating the goal of precluding repetitive and abusive challenges. Senator Grassley explained:

“In addition, the bill would improve the current inter partes administrative process for challenging the validity of a patent It would also include a strengthened estoppel standard to prevent petitioners from raising in a subsequent challenge the same patent issues that were raised or reasonably could have been raised in a prior challenge. **The bill would significantly reduce the ability to use post-grant procedures for abusive serial challenges to patents.**”

Senate Debate 2-28-2011 (157 Cong. Rec. S936-S953)
(comments of Senator Grassley) (emphasis supplied).

Congress’ intent that patents not be subjected to repeated attacks was codified in 35 U.S.C § 325(d), quoted below. This provision expresses the incontrovertible intent of Congress to avoid the kind of repetitive attacks that characterize the instant case. And while the decision to implement an IPR proceeding is entrusted to the PTO, we respectfully submit that it was an abuse of discretion, on the facts here, for the PTO to implement the IPR that the patent owner appeals from and a further failure by the Federal Circuit to address the injustice. We urge this Court to grant the petition for a writ of certiorari and allow the patent owner the benefit of a substantive review on the merits.

II. THIS CASE IS AN EGREGIOUS EXAMPLE OF UNFETTERED ATTACKS ON PATENTS

The AIA provides that in considering whether to implement an IPR based on substantially the same prior art or arguments that previously were presented to the PTO, the Director should consider rejecting the petition:

“In determining whether to institute or order a proceeding under this chapter, chapter 30, or chapter 31, the Director may take into account whether, and reject the petition or request because, **the same or substantially the same prior art or arguments previously were presented to the Office.**”

35 U.S.C. Section 325(d) (emphasis supplied).

This section, which is promulgated under Chapter 32 of the AIA directed to post-grant review proceedings, is equally applicable by its terms to Chapter 31, concerning institution of IPR proceedings. While this congressional directive may be discretionary, discretion is not boundless. When the same prior art has been so thoroughly considered in multiple PTO proceedings, as is the case here, there must be an end to the PTO’s willingness to entertain yet another attack on the same grounds. This is particularly true where an Article III court, supported by a jury verdict and the affirmation of the Federal Circuit, has already upheld the patent’s validity. *See Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113, 68 S.Ct. 431, 92 L. Ed. 568 (1948) (“Judgments, within the powers vested in courts by

the Judiciary Article of the Constitution, may not lawfully be revised, overturned or refused faith and credit by another Department of Government.").

In this case, the Alden and Takahashi references used by the PTO had already been asserted against the SSL patent in multiple reexamination proceedings. The Federal Circuit specifically found the Takahashi reference inapplicable. *See SSL Servs., LLC v. Citrix Sys.*, 769 F.3d 1073, 1089 (Fed. Cir. 2014) ("We agree with SSL that substantial evidence supports the finding that Takahashi does not disclose the authentication and encryption software at the applications level.").

Nonetheless, by now adding two additional prior art references to the combination, Cisco was successful in challenging the patent based on a combination of four prior art references, still grounded on the the same Takahashi and Alden references that had already been evaluated by the PTO. If that practice establishes the legal standard governing this Federal agency – *i.e.*, the ability of an infringer to assert a claim of obviousness by locating a tertiary and quaternary reference to bootstrap already-litigated prior art – then there is no meaningful limit to the PTO's discretion to subject patent owners to yet another expensive attack on their inventions. Section 325 thus becomes a dead letter.

The present attack on this patent owner's rights is symptomatic of the much larger problem with how the PTO administered the IPR provisions of the AIA

during the Obama Administration.⁵ Following enactment of the AIA in 2011, and notwithstanding the legislative history referred to in Part I, above, the PTO began to implement procedures that were weighted heavily in favor of anyone wishing to extinguish the rights of a patent owner.

The reality is that the IPR process has been weaponized by large infringers to raise the cost of patent litigation to levels that only the largest and most profitable companies can afford. It has become predictable and almost routine for certain large companies – in many situations contrary to the patent statute – to invoke IPR procedures in tandem with judicial proceedings, and to subject a patent to multiple IPR challenges.

We call the Court's attention to a White Paper prepared by *Amicus* USIJ and posted to its website,

⁵ The current director of the PTO, Andrei Iancu, took office on February 5, 2018. Director Iancu has expressed concerns about some of the policies and procedures left over from the Obama Administration that were in place when he arrived and has taken steps to remedy some of the problems for the future. That change in approach, however, should not be a reason for this Court to deny certiorari here. In *Cuozzo Speed Tech. v. Lee*, 136 S.Ct. 2131 (2016), this Court affirmed the broad discretion of the PTO to adopt rules governing the institutions of IPRs, and we do not quarrel with that. That discretion, however, must have some limits, and we submit that implementation of an IPR in this case on its face exceeded that discretion. Moreover, for the Federal Circuit to refuse to assert its own jurisdiction and at least consider the merits of the outcome in the PTO is an assault on fundamental principles of *res judicata* and *stare decisis*, to say nothing of constitutionally protected property rights.

entitled “How ‘One Bite at the Apple’ Became Serial Attacks on High Quality Patents at the PTAB” <https://www.usij.org/research/2018/serial-attacks>.

The White Paper is based on an analysis of published data showing the rampant abuse of the IPR process by the five largest filers of IPRs – Apple (397), Samsung (270), Google (213), Microsoft (134) and LG Electronics (130). The analysis shows that 56% of the IPR petitions filed by Apple are overlapping of another Apple petition against at least one patent claim. That is, a patent owner fighting Apple will be faced with more than one Apple petition against a single claim over half the time. Likewise, the four next most frequent filers routinely file two or more petitions against a single patent claim, with the percentages of such overlapping petitions at 59% for Microsoft, 38% for Samsung, 38% for Google, and 34% for LG. Far from a single “bite at the apple,” it is now routine practice to file 2, 3, 4, 5 or more petitions against even a single patent claim. This is exactly the burden on patent owners that Congress sought to restrain but is nonetheless rampant today.

The burden represented by the present case is exemplary of this much broader assault on inventors. The Court should grant certiorari to make clear that the PTO’s willingness to entertain wave after wave of attacks against a single patent must have some limits.

III. THE SYSTEMATIC WEAKENING OF PATENT PROTECTION UNDERMINES THE FUNDAMENTAL REASONS FOR HAVING PATENTS AT ALL

The end result of undermining the integrity and reliability of U.S. patents should come as no surprise to anyone who understands how incentive systems operate in the real world. The willingness of entrepreneurs and investors who once were willing to take on the high-risk challenges required for the development of disruptive new technologies has waned, as later stage companies and those that are less reliant on patents attract ever larger portions of risk capital. USIJ recently analyzed venture capital investing trends over the period from 2004 to 2017. That study, which can be viewed at <https://www.usij.org/research/2018/7/9/us-startup-company-formation-and-venture-capital-funding-trends-2004-to-2017>, shows that while the total amount of venture capital invested in the U.S. increased by a factor of four over that 14-year period, the portions invested in many of our most important and strategically critical industries showed substantial declines. In 2004, for example, investments in semiconductors accounted for 1.2% of all the companies that received venture capital funding and 2% of all the venture capital dollars invested. By 2017, the number of companies that received funding had fallen by an order of magnitude and the dollar commitment was negligible.

This particular statistic should be a wake up call to Americans in light of the challenge being mounted

to U.S. dominance of strategically important areas of science and technology by China and others. Semiconductor technology would rank high on almost any list of the most critical technologies for cybersecurity, artificial intelligence, national defense and virtually every other economic activity that depends on computational progress.

Nor are the declines limited to just semiconductors – the USIJ study shows that entrepreneurial investments in network equipment, wireless communications, pharmaceutical and other patent dependent industries are declining while the shares dedicated to investments in wearing apparel, entertainment, hotels, food products and restaurants are rising. This is not to suggest that those other industries are not economically important, but they are not the strategic industries that will maintain this country's dominance of science and technology.

Although it may be many years before the full implications of this shift away from strategic technologies is apparent, we already can see some of the important fallout. For example, the U.S. Chamber of Commerce has for several years published an annual assessment of the relative effectiveness of the patent systems of industrial countries, worldwide, to incentivize invention and investment. Published in February 2018, "US Chamber International IP Index https://www.theglobalipcenter.com/wp-content/uploads/2018/02/GIPC_IP_Index_2018.pdf looks at whether "a given economy's intellectual property system [will] provide a reliable basis for investment in the innovation and creativity lifecycle."

In 2017, the U.S. patent system was dropped from 1st in the world to 10th. In 2018, it was dropped further to 13th. <https://www.patentdocs.org/2018/02/us-drops-to-13th-in-worldwide-patent-protection-according-to-study-released-by-us-chamber-of-commerc.html>. The U.S. ranking of 13th puts our country behind the Netherlands, Spain, Sweden and Italy, among others.

Similarly, the Bloomberg Innovation Index of countries ranks the U.S. 12th in the world, behind South Korea, Singapore and others. <https://www.bloomberg.com/news/articles/2018-01-22/south-korea-tops-global-innovation-ranking-again-as-u-s-falls>.

A recent report by CB Insights shows that 48% of all worldwide investment in artificial intelligence went to China, while less than 40% was invested in our country. This is consistent with figures from the National Venture Capital Association showing that over the past 15 years, the portion of venture capital invested in the United States has fallen from 84% to 54%.

If the United States is to retain (or regain) its leadership position in the development of strategically important technologies, it is imperative that this Court reverse the enforcement trends of the last fifteen years and recognize the real world linkage between strong patent enforcement and the behavior of individuals with the motivation, skill and resources needed to develop disruptive new technologies having long development cycles.

IV. RELIABLE PATENT PROTECTION REQUIRES MORE THAN LIP SERVICE

A. Reliability and Respect Are Essential Aspects of the Property Right Conferred by a Patent

The ability of inventors and investors to rely on the protectability of what they invent is a fundamental component of the incentive mechanism that patents are supposed to create. The current Director of the PTO, Andrei Iancu, in one of his public appearances earlier this year, emphasized the critical importance of reliability if patent are to play a proper role in our economy. In an address before the U.S. Chamber of Commerce Patent Policy Conference, Director Iancu noted the decline in the Chamber's assessment of the U.S. patent system and spoke to ways of reversing the trend. Director Iancu's address, entitled "Role of U.S. Patent Policy in Domestic Innovation and Potential Impacts on Investment," can be found at <https://www.uspto.gov/about-us/news-updates/remarks-director-andrei-iancu-us-chamber-commerce-patent-policy-conference>. Needless to say, a patent subject to an unbounded number of IPR challenges by infringers is hardly a "reliable" for investing time and resources in new technology.

Few people would quarrel with the observation that for more than 200 years, our patent system has provided the essential protections that allowed inventors and their investors to take the risks associated with bringing disruptive new technologies into being. As noted by this Court in *Bonito Boats*,

Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 150-51 (1989):

“The federal patent system thus embodies a carefully crafted bargain for encouraging the creation and disclosure of new, useful, and nonobvious advances in technology and design in return for the exclusive right to practice the invention for a period of years.”

As further noted in a 2012 report from the U.S. Department of Commerce,

“[t]he granting and protection of intellectual property rights is vital to promoting innovation and creativity and is an essential element of our free-enterprise, market-based system.”

Economics and Statistics Administration & United States Patent and Trademark Office, United States Department of Commerce, Intellectual Property and the U.S. Economy: Industries in Focus, (March 2012) (“Commerce Department Report”), available at <http://1.usa.gov/IkztGg>. The same report goes on to note:

“The investments necessary to develop IP are often quite substantial. Firms and individuals, in order to invest the necessary resources, need some assurance that they will benefit from and recover the costs of the creation of intellectual property.”

Commerce Department Report at 1.

Despite such widespread pronouncements by policy makers extolling the virtues and successes of

the U.S. patent system, those views are no longer shared by the most important audience that the patent system was designed to incentivize – people who would develop disruptive new technologies that challenge the dominance of incumbents and monopolies. When small companies are forced to forego patent protection because of the extraordinary cost of enforcement – which is the natural result of repetitive challenges and unreliability – the incentive mechanism is lost. Patents only work if they are respected. Without widespread acceptance and submission to the property rights of others, no system of property rights will work properly, and patents are no exception.

B. The U.S. Patent System Must Be Accessible to All Companies, Not Just Large Ones

The invention of disruptive new technologies that save lives and protect our national security are far more likely to come from individual inventors and the companies that they start than from incumbent large corporations with their own established lines of products and intense focus on existing markets. This phenomenon is well documented and sometimes referred to as “The Innovator’s Dilemma,” a reference to Clayton Christianson’s widely read book detailing the many factors that constrain large incumbent companies from undertaking high risk investments. That does not gainsay the valuable innovative contributions to manufacturing, marketing and worldwide distribution that large organizations can provide, but it is a mistake to expect established incumbents to promote disruptive new ideas and

inventions that challenge the primacy (and bonuses) of their most important executives whose careers have rewarded them richly for doing things they know will work.

It is difficult and perilous to start any new company from scratch. The process requires visionary people willing to give up secure jobs, take risks and join companies that have a high probability of failure. It also requires investors with a strong understanding of risk who are willing to invest in an often distant prospect of a return sufficient to justify such risk. Most importantly – for those products and technologies having a long development cycle – these prerequisite conditions can only exist within the security ambit provided by a properly functioning patent system.

Reliable and enforceable patents are essential to protect startups and small companies from the predatory behavior of incumbents and would-be competitors that are anxious to copy any new product or technology once its feasibility is proven – and without the costs of development. Enforceable patents are also essential to allow these inventors and entrepreneurs to attract capital needed to build the companies that will bring such products to market. Without enforceable patents, there is no incentive for investors or entrepreneurs to assume the risks involved in challenging entrenched market players with entirely new technologies.

V. CONCLUSION

Individual inventors have defined indelibly a pantheon of American heroes. Thomas Edison, Samuel Morse, the Wright Brothers, Alexander Graham Bell, Charles Goodyear, James Watson, Ray Dolby, Chester Carlson and countless other lesser known names have contributed enormously to our country's well being and its dominance of technology for two centuries. USIJ submits that maintaining an environment where future American heroes can emerge is paramount to the future of our country.

To that end, we strongly urge this Court to grant the writ requested by Petitioner and, at the very least, send this case back to the Federal Circuit for further consideration of the wisdom of subjecting a patent to multiple validity challenges that continue until a court or an agency finds the patent invalid – with the customary *in rem* finality for all future purposes that is triggered by such a finding. The inventor and investor communities are increasingly of the view that their patents are worthless and serve no purpose. That view spells a long term disaster for our country that already is becoming apparent. We need the invention community and its creative energies.

Respectfully submitted,

22a

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