



August 31, 2020

The Honorable Lindsey Graham
United States Senate
290 Russell Senate Office Building
Washington, DC 20510

The Honorable Dianne Feinstein
United States Senate
331 Hart Senate Office Building
Washington, DC 20510

The Honorable Thom Tillis
United States Senate
113 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Christopher Coons
United States Senate
218 Russell Senate Office Building
Washington, DC 20510

Dear Chairman Graham, Chairman Tillis, Ranking Member Feinstein and Ranking Member Coons,

By letter dated June 18, 2020, to the above Chairmen and Ranking Members of the Senate Judiciary Committee and IP Subcommittee, a number of groups representing large incumbent technology companies object to efforts by the U.S. Patent & Trademark Office (“PTO”) to establish clarity and more balanced procedures for managing the institution phase of Inter Partes Reviews (“IPRs”). The Alliance for U.S. Startups and Inventors for Jobs (USIJ),¹ however, strongly supports the effort by PTO Director Andrei Iancu to erect a more rational legal structure around the unbridled discretion that previously was given to the Patent Trial & Appeal Board (“PTAB”) in deciding whether to institute an IPR. In addition, we point out that the signatories of the June 18 letter are hardly neutral observers trying to preserve a system that treats both petitioners and patent owners evenly. They are instead trade associations and front groups for very large companies that benefit significantly from rules that make patents vulnerable to attack by infringers. The largest of the signatories is the so-called High Technology Inventor Alliance (“HTIA”), a group made up of ten of the largest corporations worldwide in the consumer electronics space, having collective annual revenues of nearly \$1T and a combined market capitalization over \$4T. Their complaints about “steep legal costs” arising from the mere existence of a system for protecting the intellectual property of inventors and entrepreneurs ring hollow.²

¹ USIJ is an association of inventors, startups, venture capital investors and entrepreneurs whose efforts to bring new companies and new technologies into being are entirely dependent on a viable and reliable system of patent protection. USIJ was formed in 2014 to support a strong and enforceable U.S. patent system to promote investment and innovation in patent-intensive industries that are critical to U.S. economic leadership. A list of our members is attached as Exhibit A to this letter.

² The companies that make up HTIA are Adobe, Amazon, Cisco, Dell, Google, Intel, Microsoft, Oracle, Salesforce and Samsung. A recent essay by Professor Adam Mossoff of George Mason University entitled “Big Tech’s Opposition to Section 101 Reform: Policy Rhetoric vs. Economic Reality” should be mandatory reading for anyone trying to assess the credibility to HTIA. <https://www.ipwatchdog.com/2020/06/22/big-techs-opposition-section-101-reform-policy-rhetoric-versus-economic-reality/id=122709>. Professor Mossoff describes a hearing

Since the creation of the IPR regime in 2012, its process has been widely criticized as tilted in favor of infringers and against entrepreneurs and startups trying to enforce their patents, many of whom invested years and millions of dollars in businesses built on their reliance on their patents, only to have those protective property rights arbitrarily wiped out by the PTAB.³ In response to this criticism, the bipartisan STRONGER Patents Act⁴ has been introduced in both houses and would address many of the most egregiously unfair aspects of the IPR process that increasingly are rendering U.S. patents irrelevant to innovation in many critical and strategic areas of technology. USIJ respectfully submits that this Committee needs to understand the actual impact of the IPR process on the entrepreneurs and startups whose patents represent the end product of months – or even years – of research and development. Unless our nation restores the incentives for investment and risk-taking that have defined it for more than 200 years, we cannot expect to remain the world’s leader in strategic technologies that protect the security, safety and health of our citizens.

The June 18 letter asks this Committee (and its counterpart in the House) to “fulfill its oversight responsibility by investigating PTAB’s use of discretionary denials” (p.3). Given the statutory language of the Leahy-Smith America Invents Act (“AIA”, 35 U.S.C. §§ 311 - 19), it is difficult to determine what the authors have in mind, since the AIA already defines what Congress intended in creating the IPR procedures. The June 18 letter argues that decisions to institute IPRs should be based on considerations “specifically defined by Congress in the AIA” and that 35 U.S. § 314(a) specifies a single requirement – “a reasonable likelihood that petitioner will prevail” – as if this were the only factor to be considered. No reasonable reading of the AIA would reach the conclusion advocated in the June 18 letter. The actual language of § 314(a) states only that the Director **may not institute an IPR** without making such a determination, and the section is otherwise silent as to any specific criteria to be used by the Director, leaving those to the administrative processes used in most if not all Federal agencies. Other parts of § 314 give to the Director the full and unlimited discretion to institute or not, as the Director chooses, and subsection (d) makes such determination nonappealable by either party.

Also not mentioned by the authors of the June 18 letter is the extensive discussion of the reasoning of the PTAB in most of its decisions that deny institution of an IPR. For example, the June 18 letter complains on behalf of HTIA member, Intel Corporation, that in denying institution of an IPR brought against patents owned by VLSI Technologies, LLC, the PTAB failed to account for the patent owner’s repeated assertions of patents and strategic gamesmanship (June 18 letter, p.3, fn.12). Nothing in the AIA mentions these

before the Senate Judiciary Committee a few months ago in which Senator Tillis invited the constituent companies that comprise HTIA to reveal their individual views and identities. They chose instead to send their front organization to the Committee. Professor Mossoff also points out that, despite their protestations of injury traceable to “bad patents,” the combined revenues of the HTIA since enactment of the AIA compared to the number of patent cases brought against the group has increased from \$2.5B per patent case in 2013 to \$7B per patent infringement case in 2019. That is not exactly a reflection of suffering from “abusive behavior” or incurring “steep legal costs,” as set forth in the June 18 letter.

³ See, e.g., comments by Philip S. Johnson reviewing the failure of the PTAB to carry out the legislative intent of Congress during the first six years after enactment of the AIA (prior to confirmation of the current Director) and operating as nothing but a “killing field” for patents. <https://www.ipwatchdog.com/2017/09/20/look-back-legislative-origin-iprs/id=88075> (Nov. 2017). Mr. Johnson, a retired senior executive from Johnson & Johnson, was an active participant in the legislative discussions that led to the AIA.

⁴ H.R.3666, 116 Cong., 1st Sess. (2019); S.2082, 116th Cong., 1st Sess. (2019).

factors as being relevant to the institution decisions made by the PTO. Certainly they are not more relevant than the factors that actually were relied on by the PTAB: *i.e.*, (i) whether the district court handling litigation involving the same patent has granted a stay or whether the petitioner has provided evidence that a stay was likely to be granted if IPR were to be instituted; (ii) the closeness of the district court's intended trial date to the PTAB's statutory deadline for a final written decision; (iii) the amount of work already completed in the court action by the court and the parties; (iv) the overlap between issues raised in the petition with those in the court proceeding; (v) whether the parties in both proceedings were the same; and (vi) other factors such as the merits of the petition. In the *Intel* case, the PTAB balanced the facts weighing on the foregoing factors, and especially in light of the advanced stage of the district court litigation and the overlap in the issues, found that it would be inefficient use of resources to institute an IPR. *Intel Corp. v. VLSI Technology LLC*, IPR2020-00106, Paper 17 (May 5, 2020). Further, the two considerations referenced in the June 18 letter – namely, gamesmanship and litigation abuse – are the types of factors that a district court must consider at the conclusion of the litigation in the event Intel prevails and makes a claim for attorney fees and costs. The district judge will be in a far better position than the PTAB could ever be on a limited record to assess the validity of such claims after hearing the parties and the witnesses in a full trial.⁵

As noted above, there is much about the IPR process that is wrong and that should be corrected. A scholarly article published in 2015 shows that abuse of the IPR procedures became apparent early in the existence of the PTAB and was largely predictable because Congress had made it far too easy to challenge the validity of all issued patents without significant risks to the challenger and with existential risk to the patent property.⁶ From its very inception, contrary to the June 18 letter, the abuses that have been seen in the IPR procedure have actually come from large incumbent technology companies that leverage their size, market power and resources to file serial IPRs. These attacks are often coordinated attacks involving multiple petitioners and have the calculated effect of stringing out the process and making it extremely costly and time-consuming for any smaller company to enforce its intellectual property rights. In a white paper published in late 2018, USIJ called attention to the legislative history of the AIA in which proponents of the IPR process gave empty assurances to Congress that inventors would not be subjected to multiple rounds of challenges by large infringers. The USIJ study, entitled “How ‘One Bite at the Apple’ Became Serial Attacks on High Quality Patents at the PTAB,” demonstrated that large technology companies frequently sponsor multiple attacks on the same patent. The very existence of duplicative attacks demonstrates that the patent in question is not a “bad patent,” as the June 18 letter argues, but merely one that an infringer does not want to pay the inventor to use. The study shows that HTIA members Microsoft, Google, and Samsung are among the primary offenders, using multiple IPR petitions 59%, 38% and 38% percent of the time, respectively. Apple also is a primary offender, with multiple petitions being filed in 56% of IPR challenges to a patent. In addition, the study showed that many petitioners hide behind

⁵ *Octane Fitness v. ICON Health & Fitness*, 134 S.Ct. 1744 (2014) and *Highmark v. Allcare Health Management Systems*, 134 S.Ct. 1749 (2014) (Supreme Court established “totality of the circumstances” as the standard to be applied by district judges on applications for attorney fees under Section 285 of the Patent Act).

⁶ Dolin, “Dubious Patent Reform,” University of Baltimore, Legal Studies Research Paper No. 2015-34 (2014) <https://ssrn.com/abstract=2488220>. Professor Dolin documents the direct correlation between the ease of challenging patent validity and the incidence of abuse. His paper concludes with the following admonition:

“Creating additional and ever-more expansive procedures to eradicate [invalid] patents is a dubious approach because it may end up imposing unnecessary and exceedingly high costs on legitimate patents and patentees. It is a lesson that Congress would be well-advised to heed as it proceeds to debate yet another round of patent reform.”

surrogates to avoid the estoppel provision built into the AIA to prevent duplicative attacks. That paper can be downloaded at <https://www.usij.org/research/2018/serial-attacks>.

Multiple attacks on the same patent are particularly insidious, because even the best and most valuable patent can be destroyed if it is challenged a sufficient number of times. A recently published scholarly analysis of the statistical impact of multiple challenges on any patent demonstrates that the probability of invalidation begins to approach 100% when it is repeatedly subjected to challenges.⁷ From the standpoint of a small company, this renders the patent system illusory, at best, and cruel deception by our government at worst.

For nearly two decades, our nation has witnessed the gradual decline of its patents as a foundation for promoting the invention and innovation envisioned by the U.S. Constitution. That decline was not accidental nor was it based on any rational understanding of the economic processes involved. It was, instead, the result of an intentional, systematic and focused public relations campaign developed by a small group of large and highly profitable corporations to enhance their own profits at the expense of future generations of American innovators. The objective of this effort was to persuade government agencies, the Federal Judiciary, Members of Congress and major publications that patents are not only unimportant to innovation, they are affirmatively detrimental. Using grossly exaggerated stories about “bad patents” and “patent trolls” whose meritless lawsuits were supposedly harmful to startups and small businesses, the infringer lobby was relentless in its slanderous campaign.⁸ The subtext of HTIA’s June 18 letter to this Committee is simply a continuation of this effort to snuff out competition from potential challengers, entrepreneurs and competitors by subverting intellectual property rights without paying for them.

The term “patent troll” is an epithet first used at Intel for describing the owner of a patent that Intel was infringing. The term is now applied liberally by infringers to virtually any entity trying to enforce a patent, including inventors, universities and research organizations that support some or all of their work by licensing the patents they are awarded. In 2018, Director Iancu, in a talk given to the Eastern District of Texas Bar Association, exposed the mendacity that underlies the themes spewed by HTIA and its cohort of infringers. Rejecting the underlying premise of the antipatent narrative, which he properly identified as “Orwellian doublespeak,” Director Iancu emphasized the importance of risk-taking to technological progress and the damage that the conjuring of “scary monsters” has had on American invention and innovation. He pointed out that a key aspect of our constitutionally created patent system has been to level the playing field so that “everyone is incentivized [to invent, invest, etc.]” The importance of this point is magnified a hundredfold today by this nation’s increasing interest in making American prosperity available to all our citizens. Director Iancu’s talk can be found at <https://www.uspto.gov/about-us/news-updates/remarks-director-iancu-eastern-district-texas-bar-association-inaugural-texas>.

⁷ Sabatini, “PTAB challenges and innovation: a probabilistic approach,” SSRN 3668216 (2020). https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3668216

⁸ USIJ does not deny that a few individuals and small companies have purchased patents of questionable value and used abusive tactics in trying to assert them, and we do not condone such behavior. Worth noting, however, is that the magnitude of this problem was vastly overstated by the infringer lobby during the legislative deliberations prior to passage of the AIA and has largely gone away as a result of numerous changes in the substantive law thereafter. Our nation’s legal systems have dealt with abusive litigation tactics since their creation, and that has never provided a proper basis for disproportionately eliminating the underlying rights, as has been done with the U.S. Patent system.

Despite its fundamental falsity and gross exaggeration of the impact of abusive litigation on their businesses, the narrative has been remarkably effective in persuading all three branches of the U.S. government, with the exception of the current Administration, to move steadily and systematically to weaken the enforceability of patents in numerous ways, such that today patents are no longer considered by entrepreneurs and investors to be reliable property rights that can protect long term investments in risky new technologies. To put this latter point more starkly, patents have become increasingly irrelevant to the inventors, investors and entrepreneurs who make decisions about where to invest time and resources in starting new companies. Although the venture capital industry continues to invest significant amounts of money for funding startups and emerging companies, a comparison of today's investments with those of earlier years reveals a marked shift away from strategically critical technologies that depend on patents (new semiconductor technologies, for example) toward consumer products, fashion, smart phone applications, and the like.⁹ No one would argue that this latter group of businesses is not important to our economy, but these are not the industries that are fundamental and critical for the health, safety and well-being of our citizens. The People's Republic of China has targeted a number of critical technologies that China intends to dominate in the years to come, including carbon free energy production, artificial intelligence, robotics, quantum computing, gene manipulation and several others, any of which can pose an existential threat to Americans. This nation needs its most talented inventors and entrepreneurs as never before. These individuals are not now and never were "patent trolls," and public policy that assumes otherwise is a great disservice to our nation.

The effect of a weakened patent system combined with the singular focus of large technology companies on nothing more than their own profitability has been predictable. A company with billions of dollars in the bank and a trillion-dollar market cap in the stock market can easily outlast a far smaller startup trying to develop new technology, so fewer and fewer startups are willing even to try and assert their patents against these companies. The term "efficient infringement" has become a mantra for this group and translates into a message more or less as follows: "we are so vastly more powerful and wealthy than even the largest of venture capital investors and the startups that they foster that we can run rampant over their legal rights because they cannot afford to litigate against us and either will fail or sell out to us for pennies on the dollar; ergo it is more 'efficient' for us to infringe than to honor the property rights in their patents." This point of view may be good for the corporate giants; it is devastating to entrepreneurs and inventors.

One of the techniques fostered by "efficient infringement" is pretending to be interested in doing business with a creative startup and then using information gleaned from what appears to the startup to be a real commercial opportunity merely to steal the technology without paying for it. A recent Wall Street Journal article describes how Amazon operatives met with and even invested in a startup involved in processing cloud data, DefinedCrowd, absorbing sufficient information to be able simply to steal the technology and launch a copycat product. The startup has sued Amazon and perhaps in a few years – if it can last long enough – will collect a small portion of the actual value of its commercial innovation. Amazon, in the meantime, will continue to enrich its senior executives at the expense of this small creative company, and

⁹ A recently released study of venture capital investing trends by Professor Mark F. Schultz, who serves as Director, Intellectual Property and Technology Law Program, at the University of Akron School of Law, analyzes this trend with both data and interviews. Professor Schultz's report, entitled "The Importance of an Effective and Reliable Patent System to Investment in Critical Technologies," is available on the USIJ website – <https://www.usij.org/research/2020/8/3/usij-releases-report-on-the-importance-of-an-effective-and-reliable-patent-system-to-critical-technologies>.

more importantly, in derogation of the entrepreneurial spirit that has driven our country since its founding <https://www.wsj.com/articles/amazon-tech-startup-echo-bezos-alexa-investment-fund-11595520249?>

The DefinedCrowd story is not a singular example – in fact it exemplifies one of today’s dirty little secrets about the Big Tech industry. Another example relates to Sonos, a small company that developed a brilliant technique for using the internet and wi-fi routers inside a home to replace the need for speaker wires. Sonos recently sued Google (along with Amazon as its seller) based on a fact pattern remarkably similar to the DefinedCrowd story. Employees of Google met with Sonos pretending to be interested in working together to implement the Sonos sound system on the Google platform, only to take the operational information gleaned from Sonos to launch a competing product on Amazon at a lower price, Sonos patents notwithstanding. <https://www.nytimes.com/2020/01/07/technology/sonos-sues-google.html>. Had this behavior occurred 15 years ago, Sonos would have stood a reasonably good chance of obtaining a preliminary injunction against the infringement of its patents and been in a position to shut down the Google operation or be properly compensated. Given the 2006 decision of the U.S. Supreme Court in *eBay v. MercExchange*, however, it will be years before Sonos can get to the end of litigation against Google, and even then, the compensation will be trivial compared to the full value to Google of the stolen technology.

Apple behaves similarly. Using the pretense of a potential partnership and after numerous meetings with a small company called Valencell, which makes a biosensor that Apple wanted to add to its watch, Apple employees surreptitiously began downloading information from the Valencell website and then simply copied the relevant technology. When sued, Apple launched legal attacks in “scorched earth” fashion against numerous of Valencell’s patents and began using litigation tactics having the apparent objective of making it so expensive for Valencell to litigate that Valencell would go away. Although Apple protects its settlements with fearsome and draconian NDA’s, one of the contributors to USIJ’s efforts published a description of how this two trillion-dollar company deals with an innovative potential competitor. Carlson, “Weaponizing IPRs,” *LANDSLIDE MAGAZINE*, a Publication of the ABA Section of Intellectual Property Law, Volume 12, No. 1 (Sept/Oct 2019). <https://www.robinskaplan.com/-/media/pdfs/weaponizing-iprs.pdf?la=en>

As noted, the STRONGER Patents Act, if enacted, would begin to heal some of the wounds inflicted on the U.S. patent system by well-funded public relations campaigns and the Justices, judges and governmental officials who fell for the slogans without any serious inquiry into the underlying merits. Of particular importance to post-issuance reviews, the bill (i) would codify the rule change adopted by the current Director requiring the PTAB to use the same standard for claim construction as is used in district court litigation; (ii) would apply the same evidentiary standard for finding an issued patent claim invalid as is required in district court litigation; (iii) would impose a standing requirement to eliminate gaming of the process by hedge fund operators and the use of surrogates by infringers to avoid the estoppel provisions in the AIA; (iv) would codify procedures designed to prevent abusive and repetitive attacks on the same patent; (v) would stay post-issuance proceedings in situations where a district court had already reviewed the validity of the patent and an appeal was pending; and (vi) would require that an institution decision be made by a different panel of administrative patent judges than would decide the matter on the merits.¹⁰ Most importantly, Section 106 would restore the rebuttable presumption that an injunction is proper where a patent has been adjudicated as infringed and the infringer has not shown it to be invalid.

¹⁰ Apart from the inescapable unfairness in the current practice, it also creates an improper economic incentive for PTAB judges to institute review, because institution will increase the number of cases that those same judges are being paid to handle.

To address abusive litigation practices, where these are deemed to exist, the bills would empower the Federal Trade Commission to issue cease and desist orders where appropriate.

We strongly urge this Committee to resist the calls from a few corporate giants to weaken further the integrity of U.S. patents, and instead to take appropriate steps to restore the gold standard that our patent system has always provided to our most creative and innovative inventors.

Sincerely,

Chris Israel
Executive Director
Alliance for U.S. Startups and Inventors for Jobs



Exhibit A – USIJ Members

- Aegea Medical
- Array Photonics
- BioCardia
- DivX, LLC
- EarLens Corporation
- ExploraMed
- Fogarty Institute for Innovation
- Headwater Research
- Lauder Partners, LLC
- Materna Medical
- MedicalCue
- Moximed
- Original Ventures
- Precision Biopsy
- Prescient Surgical
- Puracath Medical
- Rearden Studios
- Siesta Medical
- Soraa
- Tallwood Venture Capital
- The Foundry