



The Costs of Patent “Reform”: The Abuse of the PTO’s Administrative Review Programs

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EXECUTIVE SUMMARY

In recent years there has been much discussion about patent quality. With the Leahy-Smith American Invents Act of 2011 (“AIA”), Congress attempted to improve patent quality by creating new administrative review programs at the Patent and Trademark Office (“PTO”) that can be used to invalidate previously-granted patents.

Unfortunately, in establishing these new programs, Congress failed to fully appreciate their costs. As we increase the number of chances to invalidate potentially improperly-granted patents, we also increase the corresponding danger of invalidating legitimate patents. The AIA was supposed to give the PTO a “toolbox” of new proceedings to weed out so-called “low quality patents,” but in doing so, it impaired the rights of legitimate patent holders by substantially increasing the costs of defending properly-issued patents, and by creating ample opportunities for abuse.

The early data on the PTO’s new post-issuance review programs is very troubling. As of November 20, 2014, 78% of *inter partes* review (“IPR”) petitions that had been evaluated by the Patent Trials and Appeals Board (“PTAB”) were ordered into trial. Of the IPR cases adjudicated at trial, 77% resulted in *every* challenged claim being cancelled, 10% of cases resulted in some claims being cancelled, and only 13% of cases resulted in all of the challenged claims being upheld. Out of a total of 1,962 claims before the Board, 1,572 (80%) were found to be invalid. This is a staggering rate, especially considering that the only issues the Board is allowed to consider in IPR proceedings are novelty and obviousness.

The data on the PTO’s covered business method review program (“CBMR”) is even less encouraging for patent holders. As of November 20, 2014, the PTO received 255 CBMR petitions and processed 149 of them to determine whether to institute a trial. The Board chose to institute a trial in 76% of the cases it considered. Of the cases that have gone to trial, the Board has issued a final decision in seventeen cases covering over 339 claims. Of these seventeen, not a single case so far has resulted in all of the challenged claims being upheld. Fifteen cases (88%) resulted in *every* challenged claim being cancelled, and two cases (12%) resulted in *some* claims being cancelled. The total claim invalidation rate in CBMR tops 96%.

PTAB Trials

*As of November 20, 2014

Final Determinations by Case

	IPR	CBMR
Total Number of Cases Adjudicated	134	17
All Claims Cancelled	103 Cases (77%)	15 Cases (88%)
Some Claims Cancelled	13 Cases (10%)	No Cases
No Claims Cancelled	18 Cases (13%)	2 Cases (12%)

Final Determinations by Number of Claims

	IPR	CBMR
Total Number of Claims	1,962	339
Claims Cancelled	1,572 (80%)	327 (96%)
Claims Upheld	390 (20%)	12 (4%)

Making matters worse still is the fact that IPR and CBMR are often not the first bite at the apple for patent challengers. A number of AIA challenges were brought against patents that had been re-affirmed in previous litigation or *ex parte* reexamination proceedings. Despite the patent holders’ repeated success in confirming their patent rights, the Board invalidated those patents at the same rate as the other patents that came before it. Nor is the PTAB solicitous of motions to amend claims. Indeed, the PTAB denied *every* contested motion to amend claims that were subject to an IPR or

CBMR. Considering the data as a whole, it is not a surprise that former Chief Judge Rader of the U.S. Court of Appeals for the Federal Circuit recently remarked that the new post-issuance review procedures are “acting as death squads, killing property rights.”

Additionally, the post-issuance review procedures are rife with opportunities for abuse against legitimate patent holders. Proceedings can be instituted for rent-seeking purposes, as retaliation, or simply to increase a party’s leverage in related (or unrelated) negotiations. Seriatim attempts at invalidation place a further unfair burden on patent holders, allowing challengers to keep patents in limbo for years. Furthermore, the AIA’s estoppel provisions and time bars can be evaded with ease, leaving little to nothing that legitimate patent holders can do to prevent abuse. Sadly, instead of fixing existing problems of abuse, the AIA increased the opportunities for challengers to abuse the system.

Almost immediately after the AIA was signed into law, and long before we had any sense of the effects of the new post-issuance review proceedings, we started hearing calls for an additional round of so-called patent “reform.” Last year, the House of Representatives passed sweeping patent legislation, and President Obama announced his support for patent legislation in the 2014 State of the Union Address. The stated purpose of this next round of legislation is to reduce “frivolous litigation” fueled by “low quality” patents. But while the stated goal is laudable, the proposed legislative changes are deeply flawed. The AIA’s post-issuance review proceedings have already stacked the deck against patent holders. Additionally, in the interim we have seen several Supreme Court decisions that tilt the playing field even further against patent holders. Piling on legislative intervention at this point would further unbalance the patent system and provide added avenues for abusive practices by infringers.

The broad lesson to be drawn here is that no legislation is cost-free, and while the benefits of certain measures may be real, they should be weighed against their true costs. The early data on the AIA shows that the new system of post-issuance review is susceptible to abuse in ways that Congress did not anticipate. Passing additional wide-ranging legislation may end up imposing unnecessary and exceedingly high costs on legitimate patent holders. It is a lesson that Congress would be well-advised to heed as it debates yet another round of patent legislation.

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I. Introduction

Mark Twain once wrote “that a country without a patent office and good patent laws was just a crab, and couldn’t travel any way but sideways or backwards.”¹ This attitude was shared by our country’s founders and generations since, and it is not surprising that throughout our history Congress has tried various approaches to improve our patent laws. In recent years there has been much discussion about patent quality, and the 2011 Leahy-Smith America Invents Act (“AIA”)² included several provisions ostensibly geared toward improving patent quality.

With the AIA, Congress attempted to improve patent quality by increasing the opportunities for the United States Patent & Trademark Office (“PTO”) to reevaluate its own patent grants. Specifically, Congress created new administrative review programs at the PTO that could be used to invalidate previously-granted patents. Unfortunately, in establishing these new programs, Congress focused almost exclusively on the purported quality benefits of the “second look” to weed out “bad” patents, but failed to fully appreciate the costs of these new programs. Making matters worse, what Congress created was not just a “second look” but also a third, fourth, fifth, etc., look. As we increase the number of chances to invalidate potentially improperly-granted patents, we also increase the corresponding danger of invalidating legitimate patents.³ The AIA was supposed to give the PTO a “toolbox” of new proceedings to weed out “low quality patents,” but in doing so, it impaired the rights of legitimate patent holders by substantially increasing the costs of defending properly-issued patents, and by creating opportunities for abuse.

At the outset, it is worth noting that today’s clamor over “low quality patents” is by no means a new complaint. Indeed, allegations that the Patent Office issues “useless patents” that result in “onerous litigation” have been with us for over 200 years.⁴ And while it is true that the PTO can make mistakes or be defrauded by unscrupulous applicants, there is no evidence that “low quality” patents

are overly-prevalent today or that they cause any significant economic problems.⁵ Indeed, there is not even a settled definition of what constitutes a “low quality” patent (as opposed to “high” or “medium quality” one).⁶ To be sure, there are plenty of anecdotes and popular press stories about silly patents, such as patents claiming a “method for exercising a cat” or a “method for swinging on a swing.” What is absent is any reliable empirical evidence that low quality patents actually present a significant problem in our patent system.

All of this means that when Congress created the AIA’s post-issuance review mechanisms to solve the “problem” of low quality patents, it was far from clear that there was actually a problem in need of solving. Even assuming that there was a problem, and that it was serious enough to warrant a legislative solution, the solution offered ended up imposing costs on legitimate patent holders that appear way out of proportion to the alleged problem of bad patents. Moreover, the AIA’s post-issuance review mechanisms have significantly amplified opportunities for patent challengers to abuse the system to the detriment of legitimate patent holders. To understand why, it helps to first look at the arsenal of weapons that are available to invalidate a patent at the PTO.

II. Avenues for Patent Invalidation

a. *Ex Parte* Reexamination

Historically, when the government issued a patent, the patent had a presumption of validity and only a court could invalidate it.⁷ In 1981, after decades of debating the issue, Congress created a new system that allowed patents to be invalidated in administrative proceedings—the *ex parte* reexamination process (“reexamination”).⁸ Congress’s primary goals in creating the reexamination process were (1) providing more certainty about patent validity, and (2) creating a cheaper substitute for litigation.⁹

In many ways, the reexamination process resembles the procedure used to obtain a patent in the first place. Once

the PTO orders the patent into reexamination, the process proceeds *ex parte* and the patent holder is put in the same position as a patent applicant, which includes the ability to amend the claims.¹⁰ The only major difference between reexamination and the original process for obtaining a patent is the limits placed on reexamination. Whereas an initial patent application can be rejected for failure to comply with any of the Patent Act’s requirements, reexamination can only address questions of novelty and obviousness (Sections 102 and 103 of the Patent Act, respectively).¹¹ This limitation has generated significant criticism over the years. As soon as reexamination was created, a leading patent practitioner argued that “reexamination will come up short, and actually fail to perform its intended function of ‘improv[ing] the reliability of reexamined patents.’”¹² Importantly, because of its limited nature, reexamination is not a full substitute for litigation. At the same time, the reexamination procedure can be, and frequently is, used to impose significant costs and delays on patent holders.¹³

The reexamination process begins with a patent challenger submitting a petition to the PTO that outlines why the patent in question is invalid in light of prior patents or publications (the “prior art”). The PTO then evaluates the petition and grants reexamination if there appears to exist a “substantial new question of patentability” with respect to any of the patent claims identified in the petition. While on the surface, the “substantial new question of patentability” seems like a significant bar, in reality it isn’t. The PTO grants more than 90% of all reexamination petitions.¹⁴

Once a reexamination petition is granted, the process is conducted without participation by the third-party requester. That means that the cost to the requester of the examination is simply the fee for the request plus the cost of the prior art search and the opinion letter explaining why the claims are invalid in view of the discovered prior art.¹⁵ The cost to the patent holder, on the other hand, is much more significant. Not only does the patent holder have to respond to the initial reexamination filing, he also has to spend significant resources to essentially re-prosecute the claims in the Patent Office.¹⁶

Furthermore, even if the patent holder successfully defends against a reexamination challenge, that does not insulate him from subsequent challenges. Indeed, some attorneys have advised their clients to withhold a handful of prior art references during the initial reexamination request so that they can request additional reexaminations (at substantial

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cost to the patent holder) should the first proceeding be resolved in the patent holder’s favor.¹⁷ The marginal cost to the challenger for these piecemeal submissions is minimal (beyond another reexamination request fee), but the cost to the patent holder is roughly the same for each individual proceeding. This reexamination “stacking” allows challengers to keep patents in limbo for indefinite periods of time. And while a patent in the midst of a reexamination does remain enforceable, in practice most judges will stay litigation while reexamination is pending. All of these factors result in reexamination being an *adjunct* rather than an *alternative* to litigation.¹⁸

The upshot is that reexamination failed to achieve Congress’s goals. Because of its limited nature, it failed to provide a substitute to litigation. As a result, it *increased*, rather than decreased the costs and duration of disputes,¹⁹ in direct contradiction of Congress’s intent in creating the system. It also failed to provide more certainty about the validity of issued patents. Surviving reexamination does not insulate a patent holder against litigation, nor does winning a judgment of validity in litigation insulate against reexamination.²⁰ Indeed, on average, a patent that is subject to reexamination is reexamined twice, with some being reexamined as often as four, five, or even six times.²¹ All of these shortcomings stemmed from the following flaws in the patent reexamination system: 1) the lack of a meaningful threshold to initiate the process; 2) the lack of estoppel provisions either in civil suits or in subsequent proceedings at the PTO; which in turn results in 3) the lack of certainty about the validity of the patent following reexamination; 4) disproportionate costs on the patent holders; and 5) excessive length of the process itself.

b. The AIA’s New Administrative Review Procedures

Congress sought to address each of these shortcomings in the new administrative review procedures it created under the AIA. The AIA was supposed to give the Patent Office a “toolbox” of new proceedings to “weed out low quality

patents ... includ[ing] post-grant review, *inter partes* review, supplemental examination, and derivation proceedings, as well as a transitional post-grant review program for certain business methods patents.”²² Each of these procedures provided new avenues for patent challengers to attack issued patents, and did so without closing the option of an *ex parte* reexamination. As of 2014, the two most used proceedings are the *inter partes* review (“IPR”) and *covered business method review* (“CMBR”) programs. The new post-grant review (“PGR”) program is only applicable to patents with a filing date of March 16, 2013 or later.²³ Given that very few patents filed on or after that date have issued already, PGR is not yet prevalent. Nonetheless, as more and more patents filed after that date are issued, all of the criticisms identified below may well be applicable to the PGR procedure as well.

The new review mechanisms are exacerbating rather than solving pre-existing problems

Both IPR and CBMR sought to address the complaints about reexamination while creating low-cost alternatives to litigation.²⁴ To that end, both mechanisms created estoppel provisions and deadlines for resolving disputes.²⁵ Unfortunately, the estoppel provisions are proving to be easily avoidable, and the new review mechanisms are exacerbating rather than solving pre-existing problems.

i. Inter Partes Review (IPR)

An *inter partes* review can be filed by any person (other than the patent holder) and can be used to challenge any claim of an issued patent.²⁶ IPR cannot be requested if the petitioner has previously filed a suit in federal court challenging the validity of the patent, but it is permissible to file an IPR request first and then subsequently file suit in federal court.²⁷ While an IPR is pending, the federal court action is automatically stayed unless the patent holder either waives a stay or brings his own infringement counterclaims.²⁸ After a challenger requests an IPR, the patent holder has a right to file a preliminary response to explain why the IPR petition ought to be rejected, and the Patent Office then must decide whether to grant the petition, which it may only do if the petition “demonstrate[s] that it is more likely than not that at least 1 of the claims challenged in the petition is unpatentable.”²⁹ No appeal (save for a motion for reconsideration) lies from the decision to either

grant or deny the petition. If a petition is *denied*, however, a new one can be filed by the same (or different challenger) at any time during the patent’s enforceability period.³⁰ If the Patent Office grants the petition and institutes an IPR proceeding, the matter goes to trial before the Patent Trials and Appeals Board (“PTAB” or the “Board”), which must render its final decision within twelve months of the decision to institute the proceedings.³¹

It’s worth noting that the seemingly quick turnaround time required by statute is actually not that quick. Taking into account the time for filing an IPR request, the time allowed for opposition, and the time the PTO has to decide whether to grant the petition, the total time that a patent can spend in limbo waiting for resolution of an IPR proceeding is up to 27 months (or 33 months if the deadline for rendering the decision is extended). The 27–33 month timeframe is roughly equivalent to a district court litigation timeframe. Thus, though IPR may be cheaper and more streamlined, it is not necessarily faster, especially if one considers the time spent in additional litigation resolving issues of infringement and invalidity that were not addressed in the IPR process.

From the challenger’s perspective, the key difference between trials at the PTAB and trials in district court is the compressed schedule and lower burden of proof. Whereas district court proceedings require “clear and convincing evidence” to invalidate a patent,³² PTAB proceedings apply a “preponderance of evidence” standard.³³ Much like *ex parte* reexamination, the potential bases for invalidity in IPR proceedings are limited to lack of novelty under Section 102 and obviousness under Section 103 of the Patent Act.³⁴

IPR proceedings have estoppel consequences. A petitioner who requests an IPR is estopped from subsequently asserting claims and theories which the PTAB rejects. The estoppel applies both to federal court litigation and future administrative proceedings (such as other PTO review proceedings), and includes issues that “reasonably could have been raised” before the Board. The parties covered by the estoppel include not only the petitioner, but also the real party in interest (that must be identified in every petition) and anyone in privity with the petitioner.³⁵ Importantly, other third parties are not estopped from challenging the same claims on the same theories that have already been addressed before the PTAB, either through additional PTAB proceedings or in litigation. Nor is the

initial petitioner estopped from seeking additional rounds of administrative review or litigation with respect to *different* claims in the patent.

ii. Covered Business Method Review (CBMR)

CBMR is in many respects similar to IPR, but it applies to a narrower range of patents and allows for consideration of a broader set of issues. Unlike IPR, CBMR validity challenges can be based on any section of the Patent Act, not just Sections 102 and 103.³⁶ CBMR grew out of lawmakers’ frustration with “business method” patents, in particular patents that covered the method for electronically processing and clearing personal checks. It is noteworthy that although proponents of CBMR have claimed that business method patents are “anathema to the protection the patent system provides” and that they only exist to target innocent companies in frivolous lawsuits, the patents that initially animated the push for the CBMR provision have been repeatedly upheld in litigation and reexamination.³⁷ Despite this record, Congress decided to subject “business method” patents to a more scrutinizing post-issuance review.

Given the difficulty in defining with any level of precision what constitutes a “business method” (a problem that the Supreme Court recognized in *Bilski v. Kappos*), Congress settled for a seemingly narrow definition of patents eligible for CBMR. Under the statute, challengers can use CBMR against patents that “claim[] a method or corresponding apparatus for performing data processing or other operations used in the practice, administration, or management of a financial product or service, except that the term does not include patents for technological inventions.”³⁸ Unfortunately, “financial services” is left undefined. The PTO has stated that it will interpret this section broadly and apply it to “activities that are financial in nature, incidental to a financial activity or complementary to a financial activity.”³⁹ Likewise, the AIA does not define “technological innovations.” For this term, the PTO has concluded that it will proceed on a “case by case basis” and consider “whether the claimed subject matter as a whole recites a technological feature that is novel and unobvious over the prior art; and solves a technical problem using a technical solution.”⁴⁰ This tautological definition has resulted in further litigation over the PTO’s authority to order certain patents into CBMR and has cast a cloud of uncertainty over a broad range of patents.

Procedurally, CBMR is similar to IPR, with some important exceptions. First, unlike IPR, where any person can challenge a patent claim, CBMR challengers must satisfy standing requirements identical to those that would be applicable in federal court. Second, although CBMR does have estoppel provisions, they are much less far-reaching. Most importantly, estoppel does not attach to arguments that “could have been raised” in CBMR proceedings; rather it only attaches to arguments actually raised.⁴¹

Challengers can request multiple reexaminations and then follow them up with an IPR or CBMR. In that way, a determined challenger can keep a patent, and consequently the patent holder’s ability to enforce or license it, in perpetual limbo.

The creation of these new procedures (along with PGR) did not disturb the existing *ex parte* reexamination. Thus, reexamination co-exists with the new AIA procedures. What’s worse is that the AIA estoppel provisions are a one-way street. They apply to reexaminations that have been instituted after a decision has been rendered in an IPR or CBMR, but they do not apply in reverse. A challenger can thus request a reexamination and then an IPR or CBMR without fear of estoppel. Indeed, challengers can request multiple reexaminations and then follow them up with an IPR or CBMR. In that way, a determined challenger can keep a patent, and consequently the patent holder’s ability to enforce or license it, in perpetual limbo.

III. Early Data

As of November 20, 2014, just over 2,000 petitions for IPR have been filed. The Patent Office has preliminarily evaluated just over a half of the filed petitions to decide whether or not to institute a trial. Of the ones that were preliminarily evaluated, 78% were ordered into trial.⁴² The PTAB has issued 134 final determinations in 166 cases covering just under 2,000 separate patent claims. (Some cases were joined for a single decision, which is why there are fewer decisions than cases). Of the cases adjudicated, 103 cases (77% of adjudications) resulted in *every* challenged claim being cancelled,⁴³ thirteen cases (10%) resulted in *some* claims being cancelled, and only eighteen cases (13%) resulted in all of the challenged claims being upheld.

Considering the data as a whole, it is not a surprise that former Chief Judge Rader of the U.S. Court of Appeals for the Federal Circuit recently remarked that the new post-issuance review procedures are “acting as death squads, killing property rights.”

Another way of looking at the data is to consider the percentage of challenged claims that have been invalidated by the PTAB. Out of a total of 1,962 claims before the Board, 1,572 (80%) were found to be invalid. This is a staggering rate, especially considering that the only issues the Board is allowed to consider are novelty and obviousness. By comparison, in district court litigation, claims are invalidated for obviousness or lack of novelty about one third of the time, (less than half the PTAB rate).⁴⁴ That the PTAB invalidates patents at more than double these rates may indicate that it is giving short shrift to the vested patent rights of inventors.

The CBMR data is even less encouraging for patent holders. Admittedly, the data is significantly more sparse, because only a small subset of patents are eligible for CBMR. Nonetheless, the trends are fairly evident. As of November 2014, the PTO received 255 CBMR petitions and processed 149 of them to determine whether to institute a full-blown trial. The Board chose to institute trial in 76% of cases it considered. Of the cases that have gone to trial, the Board issued a final decision in seventeen cases covering 339 claims.⁴⁵ Of these seventeen, not a single case so far has resulted in all of the challenged claims being upheld. Fifteen cases (88%) resulted in *every* challenged claim being cancelled, and two cases (12%) resulted in *some* claims being cancelled. The total claim invalidation rate in CBMR tops 96%.

Making matters worse still is the fact that IPR and CBMR are often not the first bite at the apple for patent challengers. A number of the AIA challenges were brought against patents that had been re-affirmed in previous litigation or *ex parte* reexamination proceedings. Despite the patent holders’ repeated success in confirming their patent rights, the Board invalidated those patents at the same rate as the other patents that came before it. Nor is the PTAB solicitous of motions to amend claims. Indeed, the PTAB denied *every* contested motion to amend claims that were subject

to an IPR or CBMR. Considering the data as a whole, it is not a surprise that former Chief Judge Rader of the U.S. Court of Appeals for the Federal Circuit recently remarked that the new post-issuance review procedures are “acting as death squads, killing property rights.”⁴⁶

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IV. Abuses in the System

The *ex parte* reexamination system and the new AIA post-issuance review proceedings are rife with opportunities for abuse against patent holders. In enacting the AIA, instead of fixing existing problems of abuse against patent holders, Congress actually increased the opportunities for challengers to abuse the system. While the statistics above tell part of the story, a few specific examples of abuse are illustrative. These stories of abuse are necessarily anecdotal, but they shed light on broad weaknesses in the system and suggest avenues to ameliorate the problems created by the AIA.

The new AIA post-issuance review proceedings are rife with opportunities for abuse against patent holders

a. Rent-Seeking

Some patent challengers have used the post-issuance review system as a pure rent-seeking mechanism. Recognizing the high likelihood that a petition for review will be successful (both at the initial grant stage and at the merits stages), these challengers use the threat of filing a petition for review as a way to make patent holders pay them large sums of money in exchange for not filing the petition.

A clear case of such behavior involved four patents owned by VirnetX. After VirnetX won a substantial infringement suit against Apple⁴⁷ (and while an appeal was pending at the Federal Circuit), an unrelated entity called New Bay Capital, LLC filed an IPR request against the patents VirnetX had asserted against Apple.⁴⁸ Prior to filing the IPR request, however, New Bay made an offer to VirnetX—for 10% of VirnetX’s jury verdict against Apple, it was willing to forego filing the IPR petition. Neither New Bay nor its parent company were ever involved in any litigation with VirnetX, nor was New Bay ever threatened with any patent enforcement actions by VirnetX. Yet, because of the lack of any standing requirement to file an IPR petition, New Bay was able to engage the PTO’s machinery in its quest to extort money from VirnetX. Although VirnetX refused New Bay’s demand for a payoff, it paid a high price when New Bay carried through on its threat. Within a week of the IPR petition being filed, VirnetX’s stock price fell by 25%, a \$250 million loss in market capitalization.⁴⁹

Whatever the reason for New Bay’s payoff demand and subsequent IPR request, it illustrates that the system can be used to destroy not just the value of a patent, but the value of a patent holder’s entire enterprise. Furthermore, this damage can be accomplished at the relatively low cost of an IPR filing. Because the cost to the challenger of filing an IPR request is modest, the threat of going through with it is almost always credible.⁵⁰ Given the potentially high costs imposed on the patent holder, the patent holder is in a lose-lose situation—either submit to the challenger’s demands, or risk suffering losses on the market. The challenger, on the other hand, is in a win-win situation. It need not even prosecute the challenge to completion (indeed, New Bay

abandoned its challenge before the PTAB even decided whether to institute an IPR, and it is likely that it profited from taking a short position on VirnetX’s stock).⁵¹

Machinations like these defeat the purposes of having post-issuance review proceedings in the first place. Abandoned challenges don’t weed out “low quality” patents, nor do they provide certainty about the validity of “high quality” patents – and given that nothing is resolved in the process, it is impossible to talk about increased speed or decreased cost for dispute resolution. Unfortunately, the setup of the AIA’s post-issuance proceedings almost ensures that more “New Bays” will come about. The opportunity to make money by shorting the market or by extracting rents from patent holders is simply too great to pass up. And because it is the most valuable patents that are preferentially subject to such requests, it is the value of the truly innovative companies that will likely suffer at the hands of this rent-seeking behavior.

b. Evasion of Estoppel and Time Bars

The AIA ostensibly sought to rein in *seriatim* requests for post-issuance review by patent challengers by requiring that request be brought within one year of the challenger being sued for infringement and by forbidding re-litigation of issues that were or could have been raised in the first PTO proceeding that resulted in a final judgment.⁵² As it turns out, however, these bars can be evaded with relative ease.

The most prominent case of attempts to evade such strictures also stems from the VirnetX patents. While New Bay’s IPR petitions were pending, Apple—the losing party in District Court litigation—filed its own IPR petition. As it happens, however, Apple’s petition was not timely because VirnetX sued Apple more than one year prior to Apple’s IPR request. The PTAB dismissed it, and that should have been the end of the story. But it wasn’t.

As soon as New Bay’s IPR petitions were withdrawn, seven additional IPR requests were filed by RPX Corporation.⁵³ RPX “is the leading provider of patent risk solutions, offering defensive buying, acquisition syndication, patent intelligence, insurance services, and advisory services.”⁵⁴ It is a membership-based organization that provides the aforementioned services to its members. One of the services it provides is participation in post-issuance review in an attempt to invalidate patents. Although such attempts are clearly meant to benefit RPX’s member-clients, ostensibly RPX files petitions in its own name. By using this approach,

RPX attempted to evade the time bars applicable to one of its clients—Apple.

In its petition for IPR of VirnetX's patents, RPX asserted that it was the real party in interest and was therefore not bound by any time bars or estoppel provisions that may be applicable against Apple.⁵⁵ After receiving half a million dollars from Apple and engaging the same law firm Apple used to defend itself against VirnetX's infringement claims, RPX decided, supposedly in the exercise of its "sole discretion," that VirnetX's patents were "of questionable validity" and should be challenged before the PTO.⁵⁶ The PTAB eventually held that on the very specific facts of RPX's petition, the real party in interest was Apple. However, that holding was predicated on a particularly strong intertwining of Apple's work and needs with RPX's actions. It is not clear from the Board's opinion that the mere fact of Apple's membership in RPX would have been sufficient to bind RPX with Apple's deadlines.⁵⁷ And if so, that raises opportunities for multiple rounds of reviews initiated not just by RPX itself, but by any of its members. In other words, the mere fact that RPX's member-client may benefit from RPX's decision to seek post-issuance review will likely be insufficient to conclude that such a member-client is the true "real party in interest."

RPX's actions, however, are not limited to evading estoppel and time bars in post-issuance review proceedings. They also serve to enable each of their members (who happen not to be subject to any bars) to share costs and information on the potential lines of attack against a patent. That information can then be deployed piecemeal against a patent holder, keeping the patent under a constant and continuous IPR threat. A company like RPX can pool the resources of its members in order to compile a dossier on a patent that the members wish to invalidate. Then that dossier can be made available to all members who can proceed in piecemeal fashion against a patent holder. That is precisely what happened to at least some of VirnetX's patents, and it is likely that such a system will flourish going forward.

c. *Seriatim* Attempts at Invalidation

Patents that are subject to a post-issuance review request often face more than one such request. When these requests are filed simultaneously, the burden on the patent holder is somewhat alleviated because the PTAB tends to consolidate multiple pending requests into a

single adjudicatory proceeding (although even in these circumstances, the challenger is in a better position because it can stagger its filings in such a way as to keep the patent holder's attorneys busy drafting responses to numerous post-issuance review petitions). The larger problem occurs when, after having failed in one post-issuance review proceeding, the challenger is able to trigger yet another one. One way to do that is to ask for an *ex parte* reexamination first, followed by the AIA-created procedures. Another way is to seek IPR first, followed by CBMR. This approach is not precluded by the estoppel provisions because certain lines of attack that are available in CBMR are not available in IPR, meaning that they are not issues that "could have been raised" in the previous proceeding. Yet another tactic is to challenge different *claims* in separate IPR or CBMR proceedings. This too doesn't trigger any estoppel provisions, because the estoppel provisions are applied on a *per claim* rather than per patent basis.

A good example of this behavior involved a patent owned by Zillow, an online real estate database directed to property valuation. In October 2012, Microstrategy, Inc., a business that has little apparent connection with real estate, filed an IPR request with respect to all 40 claims in Zillow's patent.⁵⁸ The Board granted the request in part, instituting review with respect to 29 out of the 40 claims.⁵⁹ In March 2014, the Board cancelled 25 of the 29 claims and upheld the remaining four. Zillow retained 15 total claims following the conclusion of the IPR.⁶⁰ That should have allowed Zillow to breathe at least a partial sigh of relief. Instead, almost immediately following this partial victory, Zillow was dragged back before the PTO by Trulia—a competitor in the on-line real estate valuation market. In April 2014, a mere two weeks after Zillow managed to retain 15 out of 40 claims challenged by Microstrategy, Trulia filed a CBMR petition asking for a review of 14 of the claims in Zillow's patent. Furthermore, nine of the identified claims were ones that the PTAB declined to even institute a trial on in the previous IPR proceedings.⁶¹

Despite having prevailed previously on the issue (albeit against a different petitioner), Zillow had to defend its right to the claims at issue all over again. The PTAB promptly instituted trial on all but one of the challenged claims.⁶² Zillow's patent has thus been under a consistent cloud since October 2012, (nearly two years as of this writing), and will spend additional time in limbo until the Board issues its final decision on Trulia's CBMR petitions.

Of course, these petitions could be followed with yet other ones challenging any remaining claims. In that way, Zillow’s patent could be kept in limbo for significantly longer than it would take to resolve district court litigation.

Unfortunately, Zillow is not the only victim of such tactics.⁶³ Furthermore, even though patents in the midst of IPR or CBMR continue to be enforceable, judges may stay any infringement actions while IPR or CBMR proceedings are ongoing.⁶⁴ As a result, while PTO review and any appeals therefrom are ongoing, patent holders may be *de facto* barred from actually enforcing their patents. In this environment, challengers have every incentive to “stack” their IPR and CBMR petitions so as to make life harder for patent owners and potentially deprive them of their ability to fully and consistently enforce their patent rights. Given the structure of the IPR and CBMR review processes, there is little to nothing that patent holders can do to prevent such abuse.

d. Retaliation and Leverage

Post-issuance review proceedings can also be used to settle scores with patent owners or to strong-arm companies into more favorable licensing deals. The Zillow patent discussed in the preceding subsection is an example of such “score-settling.” Recall that Microstrategy, the first challenger to the Zillow patent, was a company with no relationship to Zillow or the technology protected by its patent. Nor was the challenger an RPX-type company that has patent invalidation as one of its stated goals. As it turns out, Microstrategy was involved in another, entirely unrelated patent litigation against an unrelated third party on an unrelated patent. The only thing that connected that litigation to Zillow was the fact that Zillow’s attorneys (the large law firm Susman Godfrey) also happened to represent Microstrategy’s opponents—Vasudevan Software, Inc., also

known as VSi. During the course of negotiations between VSi and Microstrategy, Microstrategy threatened that unless VSi dropped their infringement lawsuit, not only would they seek PTO review of all of VSi’s patents, they would also retaliate against Susman Godfrey by going after their other clients. When VSi’s lawsuit was not dropped, Microstrategy followed through on its threat and filed an IPR petition against Zillow.⁶⁵ This behavior exemplifies how the system can be used for improper purposes and as a tool to browbeat patent owners, even ones who have nothing to do with whatever has raised the petitioner’s ire.

Another egregious example is the case of ImmunoGen, a company that works “to develop innovative, effective anticancer therapies that meaningfully improve the lives of patients with cancer.”⁶⁶ Several patents on antibodies that are useful in cancer therapies resulted from ImmunoGen’s work and were licensed to Genentech (a large biotechnology company), which in turn practiced the patents. The relationship between ImmunoGen and Genentech was quite productive. Separately, Genentech was sued by Phigenix, Inc., a company that holds a patent on a method of treating a certain type of breast cancer. In its suit, Phigenix claimed that the sale and use of the drug marketed by Genentech (and covered by ImmunoGen’s patent) infringed its method patents.⁶⁷ However, in addition to suing Genentech, Phigenix also filed an IPR request against ImmunoGen’s patents.⁶⁸ ImmunoGen does not appear to have ever asserted its patents against Phigenix. This makes sense, as Phigenix does not manufacture any pharmaceutical products, and therefore invalidating ImmunoGen’s patents in and of itself would not benefit Phigenix. Instead, by threatening ImmunoGen’s assets, it looks like Phigenix was simply hoping to obtain more favorable licensing terms in its unrelated negotiation with Genentech.

These examples illustrate how the post-issuance review system can be used as a tool for retaliation and leverage. When such abuse occurs, instead of reducing litigation and associated costs, the system actually increases costs by allowing companies like ImmunoGen to be dragged into the fray by companies like Phigenix (who have no actual complaint against them and who would be unable to file suit against them in district court). This behavior also imposes additional costs on the public. Instead of spending its time, money, and other resources developing “innovative, effective anticancer therapies that meaningfully improve the lives of patients,” ImmunoGen was forced to spend

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time defending its patents before the PTAB. (The PTAB has now instituted a trial, thus creating litigation costs where none would have existed in the absence of the IPR process).⁶⁹ It would be one thing if such costs were offset by the possibility that invalidation would lead the challenger to enter the market with a competing, cheaper product, but Phigenix doesn't compete with ImmunoGen and had no intentions of developing an alternative to ImmunoGen's patented antibodies. Thus, win or lose at the PTO, society will be left with an innovative company that will have less money to dedicate to further research and development of cancer treatment. It is hard to fathom that that is what was intended by the patent "reformers."

V. Lessons To Be Drawn

Almost immediately after the AIA was signed into law, we started hearing calls for an additional round of patent legislation. President Obama announced his support for patent legislation in the 2014 State of the Union Address, and the House of Representatives passed a wide-ranging patent bill in late 2013.⁷⁰ This next round of legislation is designed to make it harder to enforce patents, which will purportedly strengthen the patent system by reducing "frivolous litigation" fueled by so-called "low quality" patents.⁷¹ But while the stated goal of reducing frivolous litigation is laudable, the proposed legislative changes are deeply flawed.

As discussed above, the latest round of patent legislation (the AIA) has already stacked the deck against patent

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holders by permitting challengers multiple and sequential avenues at patent invalidation, often under very permissive standards. Additionally, in the interim we have seen several Supreme Court decisions that tilt the playing field even further against patent holders. Piling on legislative intervention at this point would further unbalance the patent system and provide additional avenues for abusive practices by infringers.

The broad lesson to be drawn here is that no legislation is cost-free, and while the benefits of certain changes may be real, they should be weighed against their true costs. The early data on the AIA shows that the current system of post-issuance review is susceptible to abuse in ways that Congress did not anticipate. Passing additional sweeping legislation to protect against the alleged (but unproven) epidemic of "frivolous patent litigation" and "low quality patents" is a dubious approach because it may end up imposing unnecessary and exceedingly high costs on legitimate patent holders. It is a lesson that Congress would be well-advised to heed as it debates yet another round of patent legislation.

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ENDNOTES

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- 17 S. REP. 111-18 at 56 (2009); Robert Greene Sterne, *et al.*, *Reexamination Practice with Concurrent District Court Litigation or Section 337 USITC Investigations*, 11 SEDONA CONF. J. 1, 45 (2010).

- 18 See Randall R. Rader, *Addressing The Elephant: The Potential Effects of the Patent Cases Pilot Program and Leahy-Smith America Invents Act*, 62 AM. U. L. REV. 1105, 1109 (2013); James L. Wamsley, *A View of Proposed Amendments to Patent Reexamination Through the Eyes of A Litigator*, 36 IDEA 589 (1996).
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- 26 35 U.S.C. § 311.
- 27 *Id.* § 315(a)(1).
- 28 *Id.* § 315(a)(2).
- 29 *Id.* § 314(a).
- 30 *Id.* § 314(d).
- 31 *Id.* § 316(a)(11).
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- 33 35 U.S.C. § 316(e). On the other hand, from the patent holder's perspective, the key difference, at least in theory, is the ability to amend his claims in PTAB proceedings, but not in district court. In practice, however, this opportunity is merely illusory, as the PTAB thus far has denied every contested motion to amend a patent holder's claims.
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- 35 35 U.S.C. § 315(e).
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- 37 157 Cong. Rec. S1053 (daily ed. Mar. 1, 2011) (statement of Sen. Schumer); Both of the patents that gave rise to this provision were subject to reexamination and litigation. See U.S. Patent No. 6,032,137 (issued Feb. 29,

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- 41 Pub. L. No. 112-29, § 18(a)(1)(D), 125 Stat. 283, 330.
- 42 See U.S. PATENT & TRADEMARK OFF., *AIA Progress as of November 20, 2014*, available at http://www.uspto.gov/ip/boards/bpai/stats/112014_aia_stat_graph.pdf. The 78% overall grant rate for IPR is appreciably lower than the 93% grant for *ex parte* reexamination, suggesting that Congress did succeed in raising the threshold for instituting post-issuance review proceedings. That said, and though the current trend is favorable, the data on reexamination is richer than that for IPR so the numbers may yet equalize, especially considering that after a drop to 77% grant rate in FY2014, the FY2015 rate is back up to 86%.
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