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Request for Comments on Discretion to Institute Trials Before the Patent Trial and Appeal Board

Comment On: PTO-C-2020-0055-0001
Discretion to Institute Trials Before the Patent Trial and Appeal Board

Document: PTO-C-2020-0055-0228
Comment from Kyle Delaney.

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General Comment

I oppose the U.S. Patent and Trademark Offices proposed regulations changing the nature of PTAB trials., Docket No. PTO-C-2020-0055.

I work in software engineering, and I've seen that patents are frequently granted on generic or conventional processes in software. These bad patents are used to extort money from or shut down actual innovators. This makes it very difficult and expensive for any company to develop new software. I wouldn't be surprised if this has been a factor in the concentration of power into the major tech companies that are now under antitrust investigation. We need a strong review process to make sure that patents don't inhibit innovation and block the entry of new small businesses into the tech industry.

First, if the regulations are adopted, people and companies wont be able to challenge patents through the IPR process when they need to. The PTAB will be able to deny IPRs simply because of the timing of district court cases. This will allow patent holders to game the system and file strategic litigation to avoid IPRs. The PTAB should not give any consideration to the status of court proceedings when deciding whether to initiate an IPR.

Second, the regulations limit the number of petitions that can be filed against the same patent. That makes no sense. There will often be multiple challenges to the same patent, especially if its being asserted aggressively. Different challenges raise different evidence and sometimes address different claims. Congresss intent in the America Invents Act was to reduce the amount of unnecessary patent litigation by allowing the PTAB to weed out invalid patents before a trial takes place. There should be no arbitrary limits on the number of petitions per patent.

The rights of technology developers and users are no less important than the rights of patent owners. When patents are evaluated in federal court, nearly half of them are found to be invalid.

Overall, PTAB trials must be fair, affordable, and accessible. When petitions are likely to succeed on the merits, they should be granted. What happens in the courts, or to other petitions, shouldnt matter.

These proposed regulations will seriously undermine the U.S. system for post-grant patent challenges. Small software and tech companies are being abused by the holders of invalid patents regularly, and it's a drain on the economy. To promote innovation, the Patent Office needs to improve the quality of granted patents, and to do that, we need the robust IPR system Congress designed.