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September 9, 2019

The Honorable Thom Tillis, Chairman
Subcommittee on Intellectual Property
Committee on the Judiciary
U.S. Senate
224 Dirksen Senate Office Building
Washington, D.C. 20515

The Honorable Chris Coons, Ranking Member
Subcommittee on Intellectual Property
Committee on the Judiciary
U.S. Senate
152 Dirksen Senate Office Building
Washington, D.C. 20515

Dear Senators Tillis and Coons,

My name is Peter Keller. For 23 years, starting in 1996, I made a living by inventing, patenting and licensing duly issued patents [which were legally presumed valid] covering digital audio recording and playback devices – like mp3 players – to companies practicing my inventions.

After licensing my patent rights to more than two dozen consumer electronics firms – including most of the world’s largest – the America Invents Act (AIA) Patent Trial and Appeal Board (PTAB) ruled in favor of HTC, a Taiwan [Chinese] entity, finding all the claims it challenged to be “obvious” in five *inter partes* review (IPR) “trials” that were decided in late December, 2015 and in January, 2016. To justify its findings, the PTAB *imputed* claim elements and functionality not disclosed in the [cumulative] prior art cited, *overlooked* [dispositive] countervailing expert witness testimony, and *assumed* facts not in evidence regarding threats of litigation allegedly made [by me] during negotiations. These egregious legal errors would never have been permitted to see the light of day in an Article III court.

Furthermore, the PTAB used “*preponderance* of evidence” instead of “*clear and convincing* evidence” – the legal standard used in federal courts to judge patent validity for 220+ years, until IPR took effect in 2012. The PTAB also used “*broadest reasonable interpretation*” (BRI) to construe [interpret] claims instead of the “*plain and ordinary meaning*” the courts use. The PTAB’s original BRI standard was changed prospectively back to the court standard effective November 13, 2018. Other “after-the-fact” PTAB rule changes have since mitigated *some* of the bias against patent owners inherent in IPR “trials” conducted after mine. For example, as the Patent Owner, we were not permitted to submit *any* expert witness testimony *at all* prior to PTAB’s decision to institute its “trials.” Petitioners, however, were allowed to file 5000+ pages of expert testimony. That rule also has since been changed prospectively effective May 2, 2016 to permit both sides to file preliminary expert testimony.

My patents all were applied for long before the America Invents Act was signed into law on September 16, 2011. The effective filing date for my patents is July 9, 1997. My intellectual property was thus invalidated by *retroactive* application of the AIA and its Article I PTAB administrative tribunal IPR procedures, without the historical protections of due process.

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On January 18, 2017, the PTAB denied five rehearing requests timely filed in January, 2016 [within 30 days of PTAB’s decisions]. The *only* course of action AIA permits is to file with the Court of Appeals for the Federal Circuit (CAFC). The CAFC issued its one-word ruling without opinion on May 7, 2018 (in case number 17-1748): “**AFFIRMED. See Fed. Cir. R. 36.**”

On August 3, 2018, Advanced Audio Devices, L.L.C. (AAD) – the company I founded in 1997 – filed a petition for Writ of Certiorari in the United States Supreme Court presenting a question the Court reserved in *Oil States v. Greene’s Energy* on April 24, 2018 (in case number 16-712):

Whether *inter partes* review (“IPR”) of patents filed before enactment of the Leahy-Smith America Invents Act (“AIA”) violates the Takings Clause of the Fifth Amendment to the U.S. Constitution.

Two supporting briefs were filed September 10, 2018; one jointly by Security People, Inc. and US Inventor, Inc. The second was filed by the Eagle Forum Education & Legal Defense Fund (founded in 1981 by Phyllis Schlafly). AAD’s Supreme Court case number is 18-183¹.

On Tuesday, October 9, 2018, the Supreme Court denied AAD’s petition. Justice Kavanaugh – sworn into office on Saturday, October 6, 2018 – took no part in the Order List consideration or the decisions that had been made the day before, on Friday, October 5, 2018.

The question we presented needs to be addressed. By not addressing it, the apparent suggestion is that patents are *not* “property” for purposes of the Takings Clause. The Constitution charged Congress: “To promote the Progress of Science and useful Arts, by securing for limited Times to...inventors...the exclusive Right to their...Discoveries;” [U.S. Const., Art. I, Sec. 8, cl. 8].

The devastating administrative extermination of my and many others’ intellectual property rights is the direct result of an increasingly powerful administrative state; namely PTAB Article I Administrative Patent Judges who are not “judges” at all. Their jobs depend on continuing to find patents “obvious” under standards never contemplated in the first 220+ years of U.S. law.

AAD Background

I personally financed all of AAD’s prototype development efforts and initial patent applications. That required liquidating every asset I and my immediate family owned (including our principal residence). In addition, I incurred several hundred thousand dollars of [mostly] high interest debt.

Eventually I ran out of money. In the “dot com” world of that time, AAD was unable to raise venture capital. A University of Chicago Graduate School of Business professor advised AAD to pursue private equity funding, i.e., minority investments, as opposed to seeking venture capital. AAD successfully completed two “friends and family” financing rounds in 2002/3 and 2005.

¹ <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/18-183.html>

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AAD's first U.S. patent issued January 9, 2001. From 2003-2013 seven more U.S. patents issued in addition to numerous foreign counterparts in Canada, Mexico, Korea and Russia.

In 2005-2009, AAD licensed its patents to most (20+) manufacturers of mp3 players and other products covered by its patents. From 2010 to 2013, AAD licensed several large cellular phone manufacturers whose products also provide digital audio player functionality, without litigation. To date, AAD has licensed 25+ companies and settled with several others (without a license) that ceased producing devices covered by its patents.

More than half the 25+ license agreements AAD entered into involved amicable negotiations, without litigation. Prior to the AIA, AAD's last lawsuit settled amicably in 2009. Since the AIA took effect in 2012, no accused infringer would enter into good faith license negotiations on terms even remotely comparable to those in AAD's pre-AIA agreements.

Once HTC filed its five IPR petitions on July 11, 2014, AAD's licensing campaign ceased and its expenses increased astronomically. Legal fees and expenses incurred during the IPR process and related high court filings to defend the validity of AAD's issued U.S. patents caused AAD to cease operations effective June 30, 2019. All the company's net profits from previous patent licensing activities were consumed by the cost of defending the validity of its income producing assets in the post-AIA, anti-inventor world of today.

Going Forward

My home is again up for sale as a result of having relied on U.S. patent protection, as embodied in pre-AIA law. I have shut down the company that I founded 22+ years ago, and am currently preparing/filing its final tax returns. How did this happen? Well, I hired top quality legal talent, followed all the rules, paid all the fees, and relied upon a presumption of validity for patents duly examined and issued over the course of about fifteen years of rigorous prosecution. That process cost many hundreds of thousands of dollars. All of my applications were examined and allowed by one of the most senior examiners in my art department ... and then killed by a tribunal.

Given today's anti-inventor, anti-entrepreneur environment, I would never recommend anyone consider pursuing any U.S. patent protection or divulging any element of any invention or any proprietary process in a U.S. patent application. I have been asked to tell and told my story to a local Inventors and Entrepreneurs club. It has since disbanded... with good reason.

The AIA is bad law. It is deleteriously impacting American innovation and many entrepreneurs. It should either be repealed or be renamed the "Anti-Inventor Act."

Sincerely,

ADVANCED AUDIO DEVICES, LLC



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