

## Comments by Advanced Audio Devices LLC Meeting with USPTO Director Andrei Iancu

My name is Peter Keller. I am **not** a patent troll. I am president of Advanced Audio Devices, a company I founded in 1997. Since then, I've made a living by inventing, patenting and licensing my duly issued patents – legally presumed to be valid – covering devices like mp3 players.

### **PTAB**

In late 2015 and early 2016, an America Invents Act (AIA) Patent Trial and Appeal Board (PTAB) tribunal ruled in favor of a Taiwan Chinese entity named HTC finding all challenged claims in five *inter partes* reviews to be obvious. To justify its obviousness finding, among other errors that it made, the PTAB **imputed** claim elements and functionality *not disclosed* in the cumulative art cited, **ignored** dispositive *countervailing expert witness testimony* and **assumed** facts not in evidence regarding *threats I allegedly made* in license negotiations with other parties. I am informed that such egregious legal errors would never be allowed in an Article III court.

The PTAB also used “*preponderance of evidence*” instead of “*clear and convincing evidence*” – the legal standard courts have used to judge patent validity for 220 years. The PTAB also used “*broadest reasonable interpretation*” (BRI) to construe my claims, rather than their “*plain and ordinary meaning*” that the courts use. After killing my patents, the PTAB’s BRI standard was changed to the court standard last year, prospectively effective on November 13, 2018. Other “after-the-fact” rule changes made since my trials ended have mitigated *some* of the bias inherent against patent owners in *inter partes* review (IPR). For example, as the Patent Owner, AAD was not permitted to submit **any** expert witness testimony before the PTAB’s decision to institute. Petitioners filed over 5,000 pages of expert testimony before the institution decision was made, effectively sealing my fate. That obviously biased rule was also changed, again prospectively, effective May 2, 2016, so that now both sides may provide expert testimony before institution.

### **Background**

Starting in 1996, I personally financed all of AAD’s prototype development and initial patent prosecution work. That required liquidating every asset I and my family owned, including our home. Eventually, I ran out of money. Back in the Y2K “dot.com” world, AAD could not raise venture capital. We were a “not com.” A University of Chicago Graduate Business School professor suggested I pursue minority interest equity investment rather than institutional venture capital. AAD completed two “friends & family” financing rounds in 2003 and 2005.

AAD’s first US patent issued in January 2001. Seven more US patents and numerous foreign counterparts have issued since then. From 2005 to 2009, AAD licensed its patent rights to about fifteen mp3 player manufacturers. Some were small... but most were very large. Early on, some litigation was required; all of our lawsuits got settled amicably. From 2010 on, with no more litigation, AAD negotiated license agreements with more mp3 player manufacturers and several multinational smart phone companies whose products provide digital audio player functionality. In all, AAD has entered into license agreements with over two dozen consumer electronics firms – including most of the world’s largest – and several non-license settlement agreements with multinational consumer electronics firms that ceased making covered devices.

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AAD has always followed the rules, paid all its fees, and relied upon a presumption of validity for duly examined and issued patents, during 15+ years of prosecution. Getting my first few patents issued cost me several hundred thousand dollars. My applications all were rigorously examined and ultimately allowed by a very senior examiner in my art department. Foreign patent counterpart applications also were rigorously examined and allowed.

AAD has always negotiated licenses on fair and reasonable terms, litigating only when absolutely necessary. Over half its license agreements and over three quarters of its revenues have come from licenses negotiated without litigation. The validity of AAD's patents was well established by the obvious success of its licensing campaign.

When HTC filed its IPR petitions on July 11, 2014, AAD's licensing campaign ended. Our revenues cratered and operating expenses increased dramatically. Legal fees, costs and expenses related to the IPRs and follow-on proceedings have caused AAD to cease operations. AAD's net profits from all prior patent licensing activities were consumed by defending the validity of its income producing assets in today's post-AIA, anti-inventor world.

AAD's patents all were applied for – and all but one was issued – well before AIA became law in 2011. The effective filing date is July 1997. AAD's patents were *retroactively invalidated* by a PTAB death squad procedure, absent many due process protections that previously existed.

### Appeals

Almost a full year after AAD filed its 5 rehearing requests the PTAB consolidated and denied them. The *only* remaining course of action was the Court of Appeals for the Federal Circuit (CAFC). On May 7, 2018, only four days after oral argument, the CAFC issued its rubber-stamp Rule 36 decision, without opinion. {Case # 17-1748: “**AFFIRMED. See Fed. Cir. R. 36.**”}

On August 3, 2018, AAD filed its Petition for Writ of Certiorari to the US Supreme Court, presenting a question the Court reserved in *Oil States* (case # 16-712, on April 24, 2018):

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 amicus briefs were filed in support of AAD's petition.<sup>1</sup> One was jointly filed by Security People, Inc. and US Inventor, Inc.; and the other by Eagle Forum Education & Legal Defense Fund, founded by Phyllis Schlafly in 1981 (who incidentally was a fervent supporter of patent rights and inventors).

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

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The US Supreme Court denied AAD's petition on October 9, 2018. Justice Kavanaugh had been sworn in three days earlier (on Saturday, October 6) and took no part in the Order List consideration or decisions of Friday, October 5<sup>th</sup>.

The question we presented really should be addressed. By not doing so, the suggestion is *patents are not "property rights" for purposes of the 5<sup>th</sup> Amendment's Takings Clause*. The Constitution, of course, charged Congress: "To promote the Progress of Science and useful Arts, by securing for limited Times to...inventors...the exclusive Right to their...Discoveries" [Art I, Sec 8, cl 8].

### Summary

Once IPR took effect, no potential licensee would enter into good faith negotiations on terms even remotely comparable to those in AAD's pre-AIA agreements. After many years of rigorous patent prosecution and a successful licensing campaign involving the world's largest and most sophisticated consumer electronics manufacturers, AAD's income producing assets were *summarily executed* by a PTAB death squad without due process... then that decision was "rubber stamped" by the CAFC...and a related cert petition was ignored by the Supreme Court.

The devastating *administrative extermination* of AAD's patents and those owned by many others, is the result of an increasingly powerful administrative state, namely Administrative Patent Judges who are not really "judges" at all. Their jobs depend largely on continuing to find patents "obvious," under subjective, ill-conceived, biased procedures and legal standards never before contemplated for use in adjudicating validity during the 220 years of US patent law.

A PTAB death squad simply cannot be expected to act impartially.

I turned 72 years of age last month. My home is again up for sale as the result of my relying on US patent "protection" I believed was guaranteed by the US Constitution and pre-AIA law. The company I founded 22 years ago has shut down and we're preparing its final tax returns.

### Takeaway

In today's anti-inventor, anti-innovation, anti-entrepreneur, anti-patent environment, I would never recommend anyone consider pursuing any US patent protection, or divulging any element of any invention or any proprietary process in a US patent application. I was asked to tell my story – and have told it – to a local Inventors and Entrepreneurs club. That club has disbanded... with good reason.

Simply, the AIA is bad law. Since enactment, the AIA has devastated many small inventors, innovators, entrepreneurs and damaged start-up investors... all in the name of "efficiency."

The AIA really is a modern-day Bill of Attainder favoring big infringers. It has disenfranchised far too many small independent patent owners who have only done their best to follow the law.

The AIA either should be repealed or be renamed the "Anti-Inventor Act."

## Helpful Definitions

### kan·ga·roo court

*noun*

1. an unofficial court held by a group of people in order to try someone regarded, especially without good evidence, as guilty of a crime or misdemeanor.  
"they conducted a kangaroo court there and then"

From [https://www.lexico.com/en/definition/kangaroo\\_court](https://www.lexico.com/en/definition/kangaroo_court)

Via <http://english.oxforddictionaries.com/kangaroo%20court>

### Kangaroo court

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From Wikipedia, the free encyclopedia [https://en.wikipedia.org/wiki/Kangaroo\\_court](https://en.wikipedia.org/wiki/Kangaroo_court)

A **kangaroo court** is a court that ignores recognized standards of law or justice, and often carries little or no official standing in the territory within which it resides.<sup>[1]</sup> The term may also apply to a court held by a legitimate judicial authority who intentionally disregards the court's legal or ethical obligations. The defendants in such courts are often denied access to legal representation and in some cases, proper defence and the right of appeal.

Prejudicial bias of the decision-maker or from political decree are among the most publicized causes of kangaroo courts.<sup>[citation needed]</sup> Such proceedings are often held to give the appearance of a fair and just trial, even though the verdict was already decided before the trial actually began.

A kangaroo court could also develop when the structure and operation of the forum result in an inferior brand of adjudication. A common example of this is when institutional disputants ("repeat players") have excessive and unfair structural advantages over individual disputants ("one-shot players").<sup>[2]</sup>

### kangaroo court

*noun*

1. a self-appointed or mob-operated tribunal that disregards or parodies existing principles of law or human rights, especially one in a frontier area or among criminals in prison.
2. any crudely or irregularly operated court, especially one so controlled as to render a fair trial impossible.

From <https://www.dictionary.com/browse/kangaroo-court>

### Bill of Attainder

A **bill of attainder** (also known as an act of **attainder** or writ of **attainder** or **bill** of pains and penalties) is an act of a legislature declaring a person or group of persons guilty of some crime and punishing them, often without a trial. As with [attainder](#) resulting from the normal judicial process, the effect of such a bill is to nullify the targeted person's [civil rights](#), most notably the right to own property (and thus pass it on to heirs), the right to a title of nobility, and, in at least the original usage, the right to life itself.

From <https://en.m.wikipedia.org/wiki/Attainder>