

May 1, 2023

The Honorable Jim Jordan
Chairman, House Judiciary Committee
2055 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Jerrold Nadler
Ranking Member, House Judiciary Committee
2132 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Darrell Issa
Chairman, Courts Intellectual
Property & The Internet
2108 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Henry Johnson
Ranking Member, Courts, Intellectual
Property & The Internet
2240 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Jordan, Ranking Member Nadler, Chairman Issa, and Ranking Member Johnson:

Thank you for allowing us the opportunity to provide comments to the Committee as Congress considers oversight of the U.S. Patent and Trademark Office (“USPTO”), with a particular focus on the USPTO’s policymaking process and preliminary proposals to further reform the administrative review of issued patents by the Patent Trial and Appeal Board (“PTAB”).

Unified Patents (“Unified”) is a subscription-based membership organization with 250+ member companies of all shapes and sizes, ranging from small companies (*e.g.*, CD Universe, CCTV Camera Pros, and DoctorsPartner), open-source coders and regional cable companies (*e.g.*, through organizations such as Open Invention Network, the Linux Foundation, and CableLabs), and large multinational corporations (*e.g.*, Cisco, Ford, Paramount, Mastercard, Philips, Infineon, and Pinterest).¹ Members span industries and collectively represent many of the largest and smallest patentholders in America.²

Unified’s singular mission has been to improve patent quality and deter unsubstantiated, abusive patent assertions by non-practicing entities (“NPE”) worldwide. *See* <https://www.unifiedpatents.com/faq>. We achieve this mission through administrative review of invalid patents (in all available fora), analytics, prior art, patentability analysis, amicus briefs, economic surveys, essentiality studies, and public outreach. Unified monitors limited technology zones for NPE activity using all available public sources and independently acts³ to deter further abuse. Thus, Unified is as an independent deterrent to NPEs that seek to broadly monetize invalid patents in the specific technology areas that Unified operates.

¹ Members are generally listed publicly on Unified’s website, and are regularly disclosed:

<https://www.unifiedpatents.com/>

² <https://www.unifiedpatents.com/faq>

³ It does not communicate any of its intents or actions to members beforehand, and maintains strict, contractual separation from them. It is routinely the first and only party to file challenges against the patents it seeks review of.

The USPTO's recent Advanced Notice of Proposed Rulemaking ("ANPRM") proposes a sweeping set of rules that would prevent otherwise meritorious review of patents that should have never issued. These proposals exceed the USPTO's lawful authority, contradict the America Invents Act ("AIA"), and will cost the U.S. economy hundreds of millions of dollars, particularly for small and medium businesses.

The ANPRM includes an unjustified and unlawful attack on Unified—an entity filing less than 2% of all challenges annually. The ANPRM's language about "for-profit" membership organizations can most generously be said to be in response to a handful of evidence-free, *sua sponte* motivated attacks responding to the 2020 request for comments on earlier *NHK/Fintiv* proposals—comments that targeted Unified directly. This is troubling, considering more than a decade of Unified successfully seeking review of invalid patents, wholly in line with express Congressional language and intent, without issue. Unified assists the USPTO in invalidating patents that should never have been granted, which was Congress' primary goal when it created the PTAB. It is unsurprising that those with a financial interest in asserting patents that have been shown to be objectively invalid would complain.

To be clear, Unified does not believe in preferential—or deferential—treatment for *any* entity. A fair opportunity for review of the objective merits is what Congress intended and that is all that Unified and the public deserve.

Specifically, we urge you to ensure that the USPTO protects and reaffirms the following provisions of the AIA:

- Any person other than the patent owner can petition for review in line with 35 U.S.C. § 311(a) (*i.e.*, that the USPTO must not seek to implement a "standing" requirement or force petitioners to relinquish rights in other or future proceedings);
- The only entities considered in an AIA proceeding are the patent owner, petitioner, and their real party-in-interest or privy (*i.e.*, that the USPTO does not ensnare uninvolved entities under a new "substantial relationship" test); and
- To institute review, petitioners must show a "reasonable likelihood" that the patent is invalid (*i.e.*, that the USPTO cannot raise the threshold to an elevated "compelling merits" standard).

In making these requests, we urge you not only to protect the work of Congress in the face of unlawful agency overreach, but also to protect the good work of Unified (and any other entity that chooses to pursue similar efforts). Such work has proven to be beneficial to the patent system, small businesses, and the economy as a whole.

Unified Patents Serves a Necessary Public Good

Contrary to the false suggestions made by those allied with the NPE community, Unified is not a litigation solution for its member companies. Unified often challenges widely asserted patents that no one else can afford to challenge, including small and medium-sized businesses ("SMEs") that may lack the resources or expertise to navigate the complexities of the patent system. It does not and cannot serve as a proxy to settle disputes, at least because its validity challenges represent a small fraction of the thousands filed before the USPTO, *i.e.*, less than 2% of all filings—an average of just 25 a year out of 1500.

Unified, as a rule, never pays NPEs and is never paid, even to settle. Thus, it cannot be bought off. NPEs have routinely tried; they have also sought to be paid by Unified, on the mistaken assumption that Unified acts on behalf of its member companies. If Unified settles, it does so only in exchange for a zero-dollar license. This conserves Board and party resources and avoids funding NPEs. Most of its challenges result in the USPTO objectively invalidating the claims challenged. Unified thus serves as an important check on patent validity.

Unified is no proxy. It operates independently and capably, just as the AIA authorizes, and as the USPTO itself has recognized for more than a decade. Accordingly, Unified never discusses patent challenges with third parties (including its member companies) prior to filing, it never files challenges at the behest of another company, it does not have an attorney-client relationship with any of its members, and it goes so far as to have contractual provisions in place to prevent even attempted coordination.

When Unified seeks review of a patent, it is largely successful, with a significantly better record than most who file patent challenges (*e.g.*, over 90% success rate in 2022). This is a testament to Unified's ability to identify invalid patents that should have never issued in the first instance.

The patents that Unified challenges are often invalid patents that are being widely asserted by some of the worst abusers of the judicial system:

- Shipping and Transit sued almost 200 small companies (and sent thousands of demand letters) on invalid patents, for millions in profit before it declared bankruptcy and valued its 34-patent portfolio at less than \$2.00.⁴ One of their targets was CD Universe—a free Unified member (*i.e.*, one that does not pay membership fees, due to its status as a small business). Unified was the only party to ever challenge any of the asserted patents, helping end the frivolous campaign.
- Unified has deterred notorious NPE, IP Edge. IP Edge is by far the most active NPE of the past ten years, suing over 500 companies via dozens of shell subsidiaries in 2020 alone. Roughly 70% of IP Edge cases terminate within 180 days of filing, and nearly 100% terminate in less than a year, with reported settlement amounts typically an order of magnitude lower than the cost of a challenge before the USPTO—suggesting a business model of seeking settlement amounts that make a challenge by defendant-petitioners economically prohibitive. IP Edge has seemingly never had a patent challenged and found valid, and has never gone to trial; nonetheless, their business model involves routinely suing SMEs, which is the current subject of potential district court sanctions.⁵
- Unified sought review of patents asserted by Traxcell. This entity has been sanctioned repeatedly, for upwards of \$1 million, by Eastern District of Texas judges for bringing

⁴ See Voluntary Petition for Non-Individuals Filing for Bankruptcy, Case No. 18-20968-MAM, ECF 1-1, at 5 (S.D. Fla. filed Sept. 6, 2018).

⁵ See <https://news.bloomberglaw.com/ip-law/connolly-bumps-sanctions-hearing-for-ip-edge-linked-firm>; <https://www.mondaq.com/unitedstates/patent/1275958/judge-connolly-nixes-disclosure-pushback-as-devoid-of-merit-floats-possible-sanctions>.

“objectively baseless” arguments, as well as its “continual repetition of arguments that the Court has already rejected” as among the “many examples of Traxcell’s disregard of the Court’s prior reasoning and orders.”⁶ Nonetheless, Traxcell continues to assert those same patents, despite currently facing receivership for their patents in Texas state court, where counsel allegedly called a Texas Waco state court judge *ex parte* and misled the court, in an attempt to stave off payment of any bond.

Countless other companies would have been sued and drained of resources—and bad behavior like that highlighted above would have gone on unabated—had Unified not sought review of these objectively invalid patents.

Congress Enacted the AIA to Allow Everyone a More Efficient Way to Review Patent Validity

Congress enacted the AIA to help curb the unjust assertion of spurious patents. As just one of many examples from the legislative history, Senator Amy Klobuchar, an original cosponsor of the AIA, explained that the AIA “provides a modernized, streamlined mechanism for third parties who want to challenge a recently issued, low-quality patents that should never have been issued in the first place. Eliminating these potential trivial patents will help the entire patent system by improving certainty.”⁷

Congress expressly granted this new review process (35 U.S.C. § 311(a)), to anyone other than the patent owner, with one very specific, limited exception. Under 35 U.S.C. § 315(a)(1), any person other than the patent owner may request review of a patent by the PTAB if they have not previously filed “a civil action challenging the validity of a claim of the patent,” such as a declaratory judgment action. Allowing any third-party member of the public to seek review has been a basic premise of this country’s long-standing history of validity review. The legislative history is replete with record statements from Congress about the value of third-party entities in assisting the USPTO in examination and review, providing an essential validity check and effectively outsourcing some of the important work the USPTO has before it.

Validity review is critical to the fairness and efficiency of the patent system. The right to challenge validity is one of the only checks on the system. It prevents the over-patenting of things that were already in the public domain and that interfere with the free market and economic growth. As the Supreme Court has noted, the “public’s . . . paramount interest in seeing that patent monopolies . . . are kept within their legitimate scope” favors the “authoritative testing of patent validity . . . [and] removal of restrictions on those who would challenge . . . patents.”⁸

It is precisely because of this express congressional authorization that Unified has spent nearly a decade challenging low-quality, trivial patents. Unified has always observed and exceeded all applicable laws and USPTO rules, with an unwavering dedication to exceptional legal work.

⁶ *Traxcell Techs. v. AT&T Corp.*, 2:17-cv-00718-RWS-RSP 2:17-cv-00719-RWS-RSP 2:17-cv-00721-RWS-RSP (ED Tex. Mar. 29, 2022) (Payne, MJ.) (The Court finds this case “exceptional” under § 285 based on Traxcell’s pursuit of objectively baseless infringement theories and filing of meritless motions that disregarded the earlier rulings.).

⁷ 157 Cong. Rec. 131 at S5357 (Sept. 7, 2011).

⁸ *Blonder-Tongue Labs., Inc. v. Univ. of Illinois Found.*, 402 U.S. 313, 344-45 (1971).

The USPTO's ANPRM Now Seeks to Legislate Beyond its Power and Targets Unified

Unexpectedly and without objective cause, the USPTO has proposed rules that exceed its authority, contradict Congress's will, and would specifically deny Unified and many others the right to test the validity of patents.

First, the USPTO is proposing a standing requirement even though Congress contemplated and chose not to include one. Specifically, the ANPRM proposes limiting *inter partes* review (“IPR”) before the PTAB only to market competitors.⁹ This proposal is an unlawful and unwarranted attempt to target Unified, but it would also bar others. Unified is the only entity that regularly files such reviews. Although there has been a recent high-profile example of two non-market competitors abusing the system in a single matter, those rare exceptions have been ably dealt with by the Director herself using existing tools, *e.g.*, through sanctions, among other things.

Second, the ANPRM would eliminate access to the PTAB by negating the Federal law governing real party-in-interest and privity—laws governed by Article III courts. The ANPRM would preclude a wide range of third parties from validity review if they have a “substantial relationship” with a company that has previously filed a challenge. Under this agency-created inquiry, any party that has a “substantial relationship” with a challenger would forever be barred from reviewing validity even though they were not involved (or even had knowledge of) any prior challenge. The only definition provided by the ANPRM for “substantial relationship” singles out “those involved in a membership organization”—a second attempt to target Unified. But the rule would unjustly ensnare many others, including trade organizations, suppliers, customers, trading partners, and joint defendants, among others. This approach contravenes the statute's express limits, and binds petitioners to the actions of others over whom it had no control over or knowledge of. It would also invite gamesmanship, encouraging patent owners to sue parties in a staggered series, so that later defendants cannot seek USPTO review.

Third, the ANPRM's “discretionary denial” policies,¹⁰ and those that came before via unreviewed agency action, are arbitrary and capricious. The AIA sets express procedural limits on PTAB review: challengers must act promptly after they are sued (within one year, 35 U.S.C. § 315(b)); they must choose their forum and are estopped from challenging validity in district court if they use PTAB review (*id.* § 315(e)); and they are barred from seeking review if they are the real party in interest of or in privity with a party that is barred. These statutory provisions, which were heavily negotiated and carefully crafted in the AIA itself, ensure procedural fairness for patentees, while providing challengers with a reasonable opportunity to seek validity review.

Fourth, the ANPRM would essentially raise the threshold for instituting review of a patent's validity. Under 35 U.S.C. § 314, Congress dictated that the Director will institute review of a patent's validity

⁹ Review would be unavailable if the challenger: (1) is a for profit-entity; (2) has not been sued on the patent or threatened in a manner sufficient to give rise to declaratory judgment standing; (3) does not otherwise offer a product or service in the field; and (4) does not have a substantial relationship with an entity that falls outside the scope of elements (1)-(3).

¹⁰ The ANPRM also proposes expansion of discretionary denial practice to include *ex parte* reexaminations, a long-standing proceeding unrelated to the AIA.

if the petitioner “shows there is a reasonable likelihood” of success. However, the ANPRM would contradict that statute and require petitioners to meet a higher burden—“compelling merits”—in a large number of instances.

Fifth, the ANPRM further would deny review unless the challenger agrees to relinquish its right to challenge validity in parallel, ongoing district court litigation before an Article III court. In essence, any company that wanted to utilize the rights granted to it by Congress would be coerced into abdicating its rights before the judiciary.

Sixth, the ANPRM arbitrarily reduces the Congressionally mandated time period for a petitioner to seek review. Under 35 U.S.C. § 315(b), any petitioner has one year from the time it is served with a complaint, to seek review of a patent. However, the ANPRM would effectively repeal this statute and institute review if the petitioner files within six months.

These are just some examples of the unlawful agency overreach contemplated by the ANPRM. There are many other proposed rules that would reduce access to validity reviews and essentially cripple the public’s right to challenge invalid patents—as expressly granted by Congress.

The Suggested Changes Would Significantly Harm the U.S. Economy

The AIA has had a demonstrably positive impact on the U.S. economy. The PTAB has reduced NPE litigation significantly since 2012, which economists have shown led \$2.6 billion in GDP growth and tens of thousands of jobs.¹¹

Yet the proposed changes are designed to restrict public access to the PTAB, making the process more expensive and time-consuming for all parties, not least the government itself. Indeed, when the USPTO, without rulemaking, implemented merely a small subset of the policies outlined in the ANPRM (*i.e.*, the *NHK/Fintiv* rule), it led to a direct economic cost of more than \$283 million¹² and a dramatic 20% reduction in PTAB use over three years.¹³ Of course, the decrease in PTAB filings caused a +20% increase in NPE litigation over a 12-month period. That is the only time there has been a substantial increase in litigation since the AIA. Moreover, this affects SMEs the most, with recent data showing that NPEs target SMEs over 50% of the time.¹⁴

¹¹ See Perryman Group, *An Assessment of the Impact of the America Invents Act and the Patent Trial and Appeal Board on the US Economy* (June 2020), available at <https://www.unifiedpatents.com/insights/2020/6/23/the-perryman-group-releases-economic-report-an-assessment-of-the-impact-of-the-america-invents-act-and-the-patent-trial-and-appeal-board-on-the-us-economy>.

¹² See Korok, Ray, *The Economic Impact of Codifying Fintiv* (Feb. 3, 2023), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4346836.

¹³ See Docket Navigator Omnibus Report (showing over 1700 annual filings in 2015-2018, dropping to around 1350 the years following implementation of the *NHK/Fintiv* framework).

¹⁴ See Curtis, *Patent Sources and Litigation Target Characteristics* (Feb. 24, 2023), available at <https://lotnet.com/wp-content/uploads/2023/03/HTS-NPE-Risk-for-Pre-IPO-Companies.pdf> (showing that NPEs target companies with under \$25M in revenue or under 100 employees are targeted 52% of the time).



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We encourage policymakers to consider how to improve patent quality prior to issuance, but we also need mechanisms like the PTAB to catch mistakes in a cost-efficient manner. The U.S. patent system has long expected innocent third parties to incur most of the cost of removing invalid patents from the system, and the PTAB reduces those costs by an order of magnitude.

Ensuring equal access to PTAB proceedings promotes patent quality and benefits the nation's startups and small business innovators. As you reflect on the past ten years under the AIA, we urge you to remember the important role the PTAB plays in curbing abuse, balancing the system, and mitigating the harm of low-quality patents.

Sincerely,

Jonathan Stroud

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cc: The Honorable Members of the House Committee on the Judiciary Subcommittee on Courts, Intellectual Property, and the Internet