SILICON VALLEY BRIBES PATENT OFFICE EXECUTIVES TO HELP THEM RAPE AMERICAN INVENTORS

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Inventors marched on the U.S. Patent and Trademark Office's Alexandria headquarters, holding signs and burning their patents in August 2017. Inventors say the rulings often seem arbitrary and are particularly irked by what they see as a pro-corporate bent among the administrative law judges. (Photograph by Elizabeth Malone)

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Fed up with what he perceived as bureaucracy run amok at the U.S. Patent and Trademark Office, Paul Morinville staged a striking protest this summer, with inventors marching on the agency's Alexandria headquarters, holding signs and burning their patents.

He said too many patents approved by the agency had been revoked by administrative law judges at the Patent Trial and Appeal Board, which he said tends to side with major technology companies in disputes with independent inventors.

"If you like to steal other inventors' stuff, then you must love PTAB," said Mr. Morinville, managing director of U.S. Inventor Inc., an organization advocating for stronger patent protections for startups.

Since its creation by Congress in 2012, the board has angered the inventing community, which says the review process is biased.

One judge, for example, represented Apple Inc. in private practice and then ruled in favor of the tech giant 17 times after joining the court. Another judge represented AT&T Inc. as a private lawyer and later presided over a case involving the telecommunications company.

Mr. Morinville estimates that the review board has invalidated patents in 92 percent of the cases it has resolved.

Eyebrows were raised this summer when a lawyer representing the patent office in a federal court appeal of a board decision acknowledged that the agency had added extra judges to reviews in order to achieve the desired outcome. The patent

office attorney said the move was necessary to “ensure the [director’s] policy positions are being enforced.”

The Supreme Court will take up the issue in a case that asks the justices to declare the appeals board process unconstitutional.

Oral arguments in the case, Oil States Energy Services v. Greene’s Energy Group, are scheduled for Nov. 27.

Congress created the Patent Trial and Appeal Board to address complaints that the patent office was approving too many applications that were vague or overly broad. The board was expected to be cheaper and more efficient than courts to resolve patent disputes.

It handles contested patent cases through administrative proceedings known as inter partes reviews. All cases are managed by panels of three to five administrative law judges.

Inventors say the rulings often seem arbitrary and are particularly irked by what they see as a pro-corporate bent among the administrative law judges. They say anyone can bring a challenge, and the judges can continue a case even if the complaint is withdrawn.

The appeals board is not subject to review by the regular court system, which the inventor community says leaves it with little recourse.

“There is no code of conduct for PTAB judges,” Mr. Morinville said. “There is no rule of law in the PTAB, and that is what really

angers people in terms of the invalidation which should rely on the rule of law."

The patent office's chief information officer did not respond to multiple requests for comment.

The test case before the Supreme Court involves Houston-based Oil States, a company that provides equipment for the oil and gas industry. It received a patent for a tool that pumps fluid into an oil well without fluid making contact with the wellhead.

Greene's Energy Group of Imperial, Pennsylvania, challenged that patent through a review, and the board invalidated it. Oil States asked the board if it could amend the patent, but that motion was denied. The company then filed an appeal with the U.S. Court of Appeals for the Federal Circuit.

Oil States said the review process is unconstitutional because a patent is a form of private property and the same agency that grants a property right can eliminate it without a jury trial in federal court.

The Federal Circuit rejected Oil States' argument and affirmed the board's decision. Oil States petitioned the Supreme Court, which agreed to hear the case.

The Supreme Court denied similar requests over the past few years to determine the constitutionality of the Patent Trial and Appeal Board's reviews.

Some patent analysts said Justice Neil M. Gorsuch may be the reason the court chose to hear Oil States. Justice Gorsuch, who

was confirmed to the court this year, has expressed concerns about administrative adjudication in judicial opinions.

“Clearly, the court took this on to not just leave things as status quo,” said Art Monk, vice president of patent transactions at TechInsights, a San Jose, California-based provider of patent data. “They could do something radical like invalidate the entire America Invents Act or do something more benign like provide guidance on how property rights need to he handled.”

If the Supreme Court decides the board’s reviews are unconstitutional, then the ruling could restrict other federal agencies’ uses of administrative tribunals to resolve disputes. The Federal Election Commission, Securities and Exchange Commission and Federal Communications Commission are among the agencies that rely on such systems, known as administrative adjudication.

“A ruling striking down PTAB would show the Supreme Court wants to tighten the constraints on administration adjudication and could lead to challenges over other well-established forms of adjudication,” said Greg Reilly, who teaches patent law at Chicago-Kent College of Law.

Small companies and independent inventors say patents are property rights and can be revoked only by a federal court. Several groups, including conservative organizations and a coalition of patent law professors, have filed briefs in support of Oil States.

“We have judicial opinions written over the past 150 years affirming patents as private property rights,” said Greg Dolin, a patent law professor at the University of Baltimore Law School

who filed a brief in support of Oil States. “Court after court and justice after justice keep saying patents are private property rights that can only be adjudicated in courts.”

Large tech companies contend that patents are public property and the same government that recognizes them can regulate how they are adjudicated.

The Patent Trial and Appeal Board system gives challengers more leeway to invalidate a patent based on the portion of the technology used instead of the entire patent.

“The PTAB and its review process are constitutional,” Mr. Reilly said. “Patents are created by federal statute, which also gives Congress the right to specify administrative adjudication. Inter parties reviews are appealable to Federal Circuit which protects due process concerns.”

Even if the court finds the review process unconstitutional, it’s not clear what would happen to the patents the PTAB has already invalidated.

“I think we could have a situation in which changes to the law don’t apply retroactively. I think there is still a lot of uncertainty surrounding this case,” Mr. Reilly said.

The debate over the Patent Trial and Appeal Board has attracted attention on Capitol Hill. In June, Sen. Christopher A. Coons, Delaware Democrat, introduced legislation dubbed the Stronger Patents Act. Delaware is the nation’s busiest jurisdiction for patent disputes. More than 6,500 patent cases were filed in federal court in Delaware in 2014, according to the

most recently available data from PwC, the brand name for PricewaterhouseCoopers.

Mr. Coons said the bill would bring more balance to the board's reviews. If passed, the bill will attempt to bar patent challengers from seeking both a Patent Trial and Appeal Board review and a district court hearing, limit board reviews to one claim per patent, and ensure a challenger has a business or financial reason to attack a patent.

"The bill requires the PTAB to use the same standards that a district court applies when evaluating if a patent claims something truly new and nonobvious, standards that are fairer because they account for the fact that inventors have already had to prove to a patent examiner that they deserve a patent," Mr. Coons said.