

No. 2016-0120

In the
United States Court of Appeals
for the Federal Circuit

In re: TRADING TECHNOLOGIES INTERNATIONAL, INC.,

Petitioner.

On Petition for a Writ of Mandamus to the United States Patent and Trademark
Office, Patent Trial and Appeal Board.
Case No. CBM2015-00161.

**BRIEF OF *AMICI CURIAE* UNITED INVENTORS ASSOCIATION OF THE
UNITED STATES OF AMERICA, U.S. INVENTOR, EDISON INNOVATORS
ASSOCIATION, JOHN D'AGOSTINO, PAUL MORINVILLE AND
FRANK CICIO IN SUPPORT OF PETITIONER**

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**IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

IN RE TRADING TECHNOLOGIES INTERNATIONAL, INC.
Case No. 16-0120

CERTIFICATE OF INTEREST

Counsel for the amici, United Inventors Association for the United States of America, U.S. Inventor, Edison Innovators Association, John D'Agostino, Paul Morinville and Frank Cicio, certifies the following:

1. The full name of every party of amicus represented by me is:

United Inventors Association for the United States of America
U.S. Inventor
Edison Innovators Association
John D'Agostino
Paul Morinville
Frank Cicio

2. The name of the real party in interest (Please only include any real party in interest NOT identified in Question 3. below) represented by me is:

United Inventors Association for the United States of America
U.S. Inventor
Edison Innovators Association
John D'Agostino
Paul Morinville
Frank Cicio

3. All parent corporations and any publicly held companies that own 10 percent of the stock of the amici curiae represented by me are listed below. (Please list each party or amicus curiae represented with the parent or publicly held company that owns 10 percent or more so they are distinguished separately.)

None.

4. The names of all law firms and the partners or associates that appeared for

the amici now represented by me in the trial court or agency or are expected to appear in this court (and who have not or will not enter an appearance in this case) are:

Flachsbart & Greenspoon, LLC: Robert P. Greenspoon

Date: March 15, 2016

/s/ Robert P. Greenspoon

Robert P. Greenspoon

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I. INTRODUCTION AND SUMMARY OF THE ARGUMENT

Amici agree with Trading Technologies (“TT”) that the USPTO has exceeded its jurisdiction over the types of patents that may be swept into “Covered Business Method” review. The USPTO has applied Section 18 to include patents for graphical user interfaces (“GUI’s”), even though the clearly-expressed understanding of Congress held that such patents fall within the “technological invention” exception. For that reason, CBM trial-institution clearly should never have occurred. *Amici* concur that mandamus relief should issue on the question of Section 18 scope.

Amici do not linger on that issue, but instead explain how this case, in addition, presents an excellent vehicle to address another ground entitling TT to mandamus relief. TT is a victim of the use of CBM proceedings as a tool of harassment. TT earned a patent validity victory before an Article III court on the same issue just now instituted by the PTAB. This AIA review qualifies, under the original legislative understanding, as harassment. The House Report and final Senate floor debate show that the House and the Senate understood that the USPTO would protect patent owners from such harassment – “second bites at the apple” against a tested patent.

In short, patent owners (like TT) who have successfully defended their patents in prior court or USPTO proceedings should not endure

identical challenges brought in a serial fashion before the PTAB. This Court should grant the mandamus petition to provide the Director with guidance from this Court on anti-harassment powers and duties. This case presents the first, ideal vehicle for this Court to do so.

II. STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici curiae are three associations of inventors and three individual inventors who share a common interest in a robust patent system that encourages and appropriately rewards successful inventive pursuits. Collectively, *Amici* have invested significant energy and personal resources in research and development in their fields. *Amici* rely on patents to protect those investments and to commercialize their discoveries through licensing. A large company's incentive to take a license from a small inventor is at risk if jurisdictional overreach by the PTAB allows large companies to use the process of administrative proceedings – rather than the outcomes – to circumvent the purpose of having patent rights at all.

Amici include: the United Inventors Association of the United States of America, U.S. Inventor, Edison Innovators Association, John D'Agostino, Paul Morinville and Frank Cicio.

The United Inventors Association of the United States of America (UIA) is a 501(c)(3) non-profit educational foundation. The UIA empowers

inventors and innovation through education, access and advocacy. The UIA provides support and resources as an information clearinghouse for nearly 100 inventors' clubs around the nation. It also oversees face-to-face technology transfer marketplaces at major trade fairs, where individual inventors may demonstrate the value of their new ideas to corporate buyers.

U.S. Inventor is a non-profit association of inventors devoted to protecting the intellectual property of individuals and small companies through education, advocacy, and reform. Believing the interests of larger corporations to be disproportionately overrepresented in the current discussion regarding patent reform, U.S. Inventor aims to encourage dialogue between lawmakers, inventors, and other patent stakeholders concerning the effects of past and proposed patent reform legislation and federal court decisions.

The Edison Innovators Association is a 501(c)(3) nonprofit organization that exists to provide education, assistance and networking opportunities to inventors and product innovators of all ages of the southwest Florida and national community to advance ideas to practical application and markets.

John D'Agostino is an individual inventor personally affected by the "second bite at the apple" problem in PTAB proceedings, discussed below.

Paul Morinville is a another individual inventor who has had to defend his intellectual property against accused infringers, and has personally experienced the “war of attrition” that sometimes follows when a small patentee tries to defend his rights in court.

Frank Cicio is also an inventor. He is also an emerging-technology entrepreneur who, with 35 years’ experience in bringing to market innovative technologies, has relied on the patent system to build businesses and create jobs. His startup IQ4 uses GUI-based technologies to solve business problems. Mr. Cicio is dedicated to preserving a robust patent system to protect and commercialize technology, so that small businesses with limited financial means can grow despite incumbent competitors with large resources using every tool available to stall or block small market entrants.

III. STATEMENT OF CONSENT

Under Fed. R. App. P. 29, all parties have consented to the filing of this amicus brief. No counsel for a party, other than *Amici Curiae*, authored this brief in whole or in part, or made a monetary contribution intended to fund preparation or submission of this brief.

IV. MANDAMUS REVIEW IS APPROPRIATE

The AIA empowers the Director to exercise anti-harassment discretion. 35 U.S.C. §§ 315(d), 325(d). Yet so far the Director and her subordinates have ignored reasonable pleas by many victimized patent owners to exercise that discretion. This brief provides real world examples. To a one, each refusal is nonappealable (to the extent characterized as a decision to institute). Thus only mandamus relief would be available to correct individual cases.

Amici acknowledge this Court's holding in *In re Proctor & Gamble Co.*, 749 F.3d 1376, 1379 (Fed. Cir. 2014), that in that case, the mandamus-petitioner did not show a "clear and indisputable right to this court's immediate review of a decision to institute an *inter partes* review, as would be needed for mandamus relief." Yet here the situation is markedly different. TT does not rely on an assertion that it has a "clear and indisputable right" to *immediate review* of the institution decision, since conventional appellate review at this stage is unavailable. Rather, TT has a "clear and indisputable right" to the only way that the Director might have properly *exercised non-institution discretion* when asked to intervene, after a prior Article III validity judgment over the same evidence and arguments urged by a CBM petitioner. As the Supreme Court has indicated, the "clear and indisputable

right” prong does not relate to a “review” right, but a right to “the duty sought to be enforced.” *United States v. Duell*, 172 U.S. 576, 582 (1899).

A. Anti-Harassment Legislative History

The Director’s statutory power and duty to protect patentees from harassment has a clear legislative history.

In the June 1, 2011 House Report to accompany H.R. 1249, the Committee explicitly invoked its understanding that “the USPTO is to address potential abuses . . . under its expanded procedural authority.” H.R. Rep. 112-98, at 48. The House Committee had profound concerns that the legislative changes to “current administrative processes” (*i.e.*, conversion of *inter partes* reexamination to IPRs, PGRs and CBMs) should “not be used as tools for harassment” through “repeated litigation and administrative attacks on the validity of the patent.” *Id.* The House Committee presciently warned that “[d]oing so would frustrate the purpose of the [legislation] as providing quick and cost effective alternatives to litigation [and] would divert resources from the research and development of inventions.” *Id.*

The key sponsor of the AIA in the Senate concurred. During the final Senate Debate on the AIA, Senator Pryor confronted the bill’s sponsor, Senator Leahy, with his own profound concerns about Section 18 (later

known as CBM Review). 157 Cong. Rec. S5428 (Sept. 8, 2011). The colloquy merits an extended quotation (emphasis supplied):

Mr. PRYOR. I would like to ask my colleague from Vermont, the Chairman of the Judiciary Committee and lead sponsor of the America Invents Act before us today, to further clarify an issue relating to Section 18 of that legislation. Ideally, I would have liked to modify the Section 18 process in accordance with the Cantwell amendment. It is of crucial importance to me that we clarify the intent of the process and implement it as narrowly as possible.

As I understand it, Section 18 is intended to enable the PTO to weed out improperly issued patents for abstract methods of doing business.

Conversely, I understand that Section 18 is not intended to allow owners of valid patents to be *harassed* or subjected to the substantial cost and uncertainty of the untested review process established therein. Yet I have heard concerns that *Section 18 would allow just such harassment because it enables review of patents whose claims have been found valid both through previous reexaminations by the PTO and jury trials*. In my mind, patent claims that have withstood multiple administrative and *judiciary* reviews should be considered presumptively valid. It would not only be unfair to the patent holder but would be a waste of both PTO's time and resources to subject such presumptively valid patent claims to yet another administrative review. It would be particularly wasteful and injurious to legitimate patent holders if the "transitional review" only considered prior art that was already considered in the previous administrative *or judicial* proceedings. Can the Chairman enlighten me as to *how the PTO will ensure* that the "transitional process" does not become a tool to harass owners of valid patents that have survived multiple administrative and *judicial* reviews"?

Mr. LEAHY. The proceeding created by Section 18 is modeled on the proposed post-grant review proceeding under Section 6

of the Act. As in other post-grant proceedings, the claims should typically be evaluated to determine whether they, among other things, meet the enablement and written description requirements of the act, and contain patentable subject matter under the standards defined in the statutes, case law, and as explained in relevant USPTO guidance. While the program will generally otherwise function on the same terms as other post-grant proceedings, ***the USPTO should implement Section 18 in a manner that avoids attempts to use the transitional program against patent owners in a harassing way.*** Specifically, to initiate a post issuance review under the new post grant or transitional proceedings, it is not enough that the request show a substantial new question of patentability but must establish that “it is more likely than not that at least 1 of the claims challenged in the petition is unpatentable.” The heightened requirement established by this bill means that these proceedings are even better shielded from abuse than the reexamination proceedings have been. In fact, the new higher standard for post issuance review was created to make it even more difficult for these procedures to be used as tools for harassment. Therefore, the rule that bars the PTO from reconsidering issues previously considered during examination or in an earlier reexamination still applies. While a prior district court decision upholding the validity of a patent may not preclude the PTO from considering the same issues resolved in that proceeding, ***PTO officials must still consider the court’s decision and deviate from its findings only to the extent reasonable. As a result, I expect the USPTO would not initiate proceedings where the petition does not raise a substantial new question of patentability than those that had already been considered by the USPTO in earlier proceedings.*** Does that answer my colleague’s question?”

Mr. PRYOR. I thank my colleague for that explanation.

(*Id.*, emphasis added). With these understandings of Congress planted firmly in the record, the bill passed.

B. TT Falls Within The Scope of Patentees That Congress Wanted the USPTO To Protect

TT falls within the scope of these explicit understandings of Congress.

Namely, TT won under *Alice*. It litigated and won a judgment of patent subject matter eligibility. In early 2015, an Article III Court issued its final decision that TT's patents were not invalid for claiming patent ineligible subject matter under 35 U.S.C. § 101. *See Trading Techs. Int'l, Inc. v. CQG, Inc.*, 2015 U.S. Dist. LEXIS 5938 (N.D. Ill. Feb. 24, 2015).

After winning this judicial victory, an alleged infringer filed the Petition that commenced CBM2015-00161. TT informed the PTAB of the court victory. Even so, the PTAB panel instituted trial on the § 101 issue, finding it more likely than not that the alleged infringer would prove its *Alice* defense. *Tradestation Group, Inc. v. Trading Techs. Int'l, Inc.*, CBM2015-00161, Paper No. 29 (Jan. 27, 2016). Despite even Senator Leahy's understanding that a PTAB panel "must [] consider the court's decision," and "would not initiate" under such circumstances, the PTAB panel in this case showed no sign of having "considered" TT's prior court victory. TT asked for discretionary relief in letters to the Director but the Director declined, under the circular reasoning that she had delegated her supervisory authority to exercise discretion to the very PTAB panels making the decisions she was being asked to supervise.

To *Amici's* knowledge, Trading Technologies is the first Petitioner to come to this Court in a position to seek, through mandamus relief, much-needed guideposts from this Court to instruct the Director on the limits of AIA discretion. The abuse of discretion is thus oft repeated, yet evades review. It is not typically appealed, or is otherwise not appealable. This is precisely the type of extraordinary situation meriting mandamus review.

C. The PTAB's Violation of the Understanding of Congress in How to Make Discretionary Anti-Harassment Decisions Repeats Often, Yet Evades Review

TT's aforementioned plight repeats often, yet constantly evades review. The following are just a few examples of situations in which the Director would have benefited from clear guidance from this Court on how to prevent patent owner harassment by dismissing the relevant AIA petition. Many more undoubtedly exist.

Trading Technologies: As discussed in the petition itself, the PTAB instituted review of subject matter eligibility in CBM2015-00161 after an Article III court had rejected the same attack over the same evidence in a final federal district court order. To institute review under such circumstances encourages anti-patentee harassment. To allow this to happen emboldens future Article III-adjudged infringers, or infringers with knowledge of such judgments, to flout the finality of federal court decisions

by running to an administrative agency for sanctuary. This Court's instruction that the Director must reject such petitions will protect the AIA from the risk of significant constitutional infirmities within agency actions.

Personal Audio: In IPR2014-00070, Personal Audio faced (and lost) an AIA trial after it had already received a jury verdict of no invalidity from an Article III federal district court over the same prior art advanced by the same infringer using the same expert testimony. That outcome is now on appeal in this Court (No. 16-1123). Even after an infringer's jury-loss, Personal Audio faced a PTAB proceeding whose intent was to circumvent a jury verdict, raising serious Seventh Amendment questions. Again, this Court's instruction that the Director must reject such petitions will protect the AIA from the risk of significant constitutional infirmities.

Leon Stambler: In CBM2015-00044, 82-year-old individual inventor Leon Stambler faced the seventh of seven AIA petitions raising substantially the same prior art. The petitioner / alleged infringer used the exact same prior art over which the PTAB had previously denied institution, plus one additional reference that it could have, but did not, raise in its original abandoned petition. In other words, the seventh petition embodied an improper "second bite at the apple" against an elderly patentee. He had already won on the merits, but now faced an opponent who used the

patentee's win against him as a roadmap for yet further attacks, and further clouding of his rights. The PTAB denied repeated patent owner requests for discretionary dismissal, forcing the "trial" to proceed. See CBM2015-00044, Paper Nos. 12, 16 (request for rehearing, denial of request for rehearing). This discretionary decision is likely nonappealable.

John D'Agostino: In IPR2014-00543 and IPR2014-00544, another individual inventor (and *Amicus* here), John D'Agostino, had to face an IPR "trial" that followed both denial of a CBM proceeding by the same petitioner over the exact same prior art, as well as a USPTO finding of *patentability* over the exact same prior art during co-pending *ex parte* reexamination. *See, e.g.*, IPR2014-00543, Paper No. 28 (discussing prior USPTO proceedings). Not only did the IPR petition reflect another repeated filing, and another "second bite at the apple." The PTAB also proceeded with its review even after it received word that two separate sets of examiners in the highly skilled Central Reexamination Unit had found the invalidity attack to lack merit. *Id.* The first set held that the request did not meet the low threshold of raising a "substantial new question of patentability," and the second set reaffirmed validity after full reexamination. Similar to the *Personal Audio* and *Trading Technology* decisions noted above, the PTAB proceeded with review despite the existence of decisions favoring patentability over the very

same issues, on the very same evidence. *See, e.g.*, IPR2014-00070, Paper No. 41 and CBM2015-00161, Paper No. 29. Yet the Director's subordinates did not exercise discretionary dismissal of the petition. The merits of those IPR decisions are now on appeal in this Court (Nos. 16-1592, 16-1593), though the discretionary decision to institute review is nonappealable.

Chicago Board Options Exchange: In three CBMs and three IPRs, the CBOE faced simultaneous AIA trials lodged by the same opponent (currently on appeal to this Court, Nos. 15-1728, 15-1743). The IPR resulted in a finding of no prior art invalidity. Yet the CBM resulted in an inconsistent finding, by the same panel, that the relevant patent claims were "routine and conventional." This Court's guidance could help future PTAB panels understand the availability of discretionary authority to avoid coming to simultaneous inconsistent decisions.

These are just a few examples. In each case, without this Court's firm guidance, the Director and her subordinates sensed no need and no urgency to intervene to apply the understanding of Congress. The USPTO has not heeded its mandate to protect patentees from harassment. *Amici* urge the Court to address this profound problem. Untold numbers of current PTAB proceedings should never have passed to an institution decision, and should

not exist to create a risk of clogging this Court's docket. In short, the Director's discretion should apply to dismiss petitions in situations where:

- (1) a previous pro-patentee Article III court decision on the same issues and evidence exists, and institution of AIA proceedings would risk a Separation of Powers conflict with the court outcome; and
- (2) a previous pro-patentee USPTO decision on the same issues and evidence exists, where institution of AIA proceedings would create a risk of inconsistent agency decisions.

This is not to say that this Court should impose a "bright line rule." The conditions above should merely trigger (and strongly guide) the exercise of discretion to prevent patentee harassment. The possibility always exists that extraordinary circumstances might favor institution. The Supreme Court has held it to be a duty of the circuit courts to provide guideposts for the exercise of discretion, which is all that *Amici* ask of it here.

Rather, "courts of equity must be governed by rules and precedents no less than the courts of law." *Missouri v. Jenkins*, 515 U.S. 70, 127, 132 L. Ed. 2d 63, 115 S. Ct. 2038 (1995) (THOMAS, J., concurring). See also *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417, 45 L. Ed. 2d 280, 95 S. Ct. 2362 (1975); The Federalist No. 78, p. 528 (J. Cooke ed. 1961). As Selden pointed out so many years ago, the alternative is to use each equity chancellor's conscience as a measure of equity, which alternative would be as arbitrary and uncertain as measuring distance by the length of each chancellor's foot. See 1 J. Story, Commentaries on Equity Jurisprudence 16 (13th ed. 1886).

Lonchar v. Thomas, 517 U.S. 314 (1996). The Court should act on the rare chance offered by the current mandamus Petition.

V. CONCLUSION

Amici Curiae UIA, U.S. Inventor, Edison Innovators, John D'Agostino, Paul Morinville and Frank Cicio respectfully urge that this Court grant Trading Technology's petition for a writ of mandamus.

Dated: March 15, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the page limitation of Fed. R. App. P. 21 (d) and 29(d), and contains 15 pages.

The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2010 in 14-point Times New Roman type.

/s/ Robert P. Greenspoon
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CERTIFICATE OF SERVICE

I, Rose E. Olejniczak, being duly sworn according to law and being over the age of 18, upon my oath deposes and states that:

Counsel Press was retained by Robert P. Greenspoon of Flachsbart & Greenspoon, LLC, Counsel for *Amici Curiae* United Inventors Association of the United States of America, U.S. Inventor, Edison Innovators Association, John D'Agostino, Paul Morinville and Frank Cicio in Support of Petitioner to print this document. I am an employee of Counsel Press.

On March 15, 2016, Mr. Greenspoon authorized me to electronically file the foregoing Brief of *Amici Curiae* United Inventors Association of the United States of America, U.S. Inventor, Edison Innovators Association, John D'Agostino, Paul Morinville and Frank Cicio in Support of Petitioner with the Clerk of the Federal Circuit using the CM/ECF System, which will serve e-mail notice of such filing on the following:

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Six paper copies will be filed with the Court within the time provided
in the Court's rules.

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