

2015-1091

**United States Court of Appeals
for the Federal Circuit**

MCM PORTFOLIO LLC,

Appellant,

v.

HEWLETT-PACKARD COMPANY,

Appellee.

*Appeal from the United States Patent and Trademark Office, Patent Trial
and Appeal Board, in No. IPR2013-00217.*

**BRIEF FOR AMICUS CURIAE J. CARL COOPER
IN SUPPORT OF NEITHER PARTY**

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January 28, 2015

CERTIFICATE OF INTEREST

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

J. Carl Cooper

2. The name of the real party in interest I represent is:

J. Carl Cooper and his exclusive licensee eCharge Licensing, LLC

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

None.

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I. STATEMENT OF INTEREST

Amicus Curiae J. Carl Cooper (“Mr. Cooper”) is a prolific inventor. He owns several patents currently subject to *inter partes* review (IPR) proceedings (IPR2014-00156, -00157, -00158). He previously filed a civil rights action in the United States District Court for the Eastern District of Virginia, seeking a holding that IPRs are unconstitutional: *Cooper v. Lee*, 1:14-cv-672 (E.D.Va.). That court has not yet decided cross motions for summary judgment on the question.¹

Mr. Cooper filed his civil rights action and moved for summary judgment in the district court *before* Appellant appealed to this Court in the present case. Within those district court proceedings, the Department of Justice has asked the district court not to reach the unconstitutionality question because of alleged application of administrative exhaustion. The Department of Justice position has been that only this Court may reach the IPR-unconstitutionality question, and that no district court is empowered to do so.

¹ Mr. Cooper is simultaneously filing a motion for leave to submit this *amicus* brief. This brief and accompanying motion were authored entirely by the undersigned counsel. No party or party’s counsel, nor any person other than *amicus curiae*, contributed money that was intended to fund preparing or submitting this brief.

II. STATEMENT OF CONSENT

Mr. Cooper has sought consent from all parties (Appellant, Appellee and Intervenor). As of the filing of the brief, Intervenor Lee has consented.

III. SUMMARY OF THE ARGUMENT

IPRs are indeed unconstitutional (as Appellant argues). But it is not necessary to overrule *Patlex Corp. v. Mossinghoff*, 758 F.2d 594 (Fed. Cir. 1985), to reach that conclusion. Nor does the Court need to stop IPRs from happening in order to minimally remedy the Constitutional harm. Consistent with Appellant's cited Supreme Court authority – *McCormick Harvesting Mach. Co. v. Aultman*, 169 U.S. 606, 609 (1898) – IPRs can go on as before. It is only the *effect of the final written decision* that, at a minimum, needs Constitutional correction. As in *McCormick*, such final written decisions may stand as advisory opinions, to be treated by district courts as noncontrolling on the question of patent validity.

IV. ARGUMENT

A. The Supreme Court Has Always Treated Patent Invalidation, Whether for Land or Invention Patents, as Subject Solely to the Judicial Power under Article III

A patent, upon issuance, is not subject to revocation or cancellation by any executive agent (*i.e.*, the USPTO or any part of it, such as the PTAB). *McCormick*, 169 U.S. at 609. While *ex parte* reexamination has so far been

held to avoid a Separation of Powers bar, *see Patlex*, 758 F.2d 594, that decision rested on classification of the *grant* of a patent right in the reexamination context as a “public” right. *See Joy Techs., Inc. v. Manbeck*, 959 F.2d 226 (Fed. Cir. 1992), *cert. denied*, 506 U.S. 829 (1992) (confirming that it is the “grant” or “issuance” of a patent that is a public right, not the revocation or invalidation).

The Supreme Court decided on numerous occasions during the nineteenth century that a patent for either invention or land, once issued, has left the authority of the granting office. Patents for invention and patents for land are treated the same way under the relevant law. “The power . . . to issue a patent for an invention, and the authority to issue such an instrument for a grant of land, emanate from the same source, and although exercised by different bureaux or officers under the government, are of the same nature, character and validity” *United States v. Am. Bell Tel. Co.*, 128 U.S. 315, 358-59 (1888) (comparing Art. I, § 8, para. 8, with Art. IV, § 3, para. 2). “A patent for an invention is as much property as a patent for land. The right rests on the same foundation and is surrounded and protected by the same sanctions.” *Patlex*, 758 F.2d at 599 (citing *Consolidated Fruit Jar Co. v. Wright*, 4 Otto 92, 96, 94 U.S. 92, 96 (1876)).

The United States Supreme Court has repeatedly and emphatically held that it is an unconstitutional encroachment on Article III courts for the Executive to affect an issued patent in any way. For example, in 1888 the Court stated in *American Bell*:

A patent is the highest evidence of title, and is conclusive as against the Government, and all claiming under junior patents or titles, until it is set aside or annulled by some *judicial tribunal*. . . . Patents are sometimes issued unadvisedly or by mistake, where the officer has no authority in law to grant them, or where another party has a higher equity and should have received the patent. *In such cases courts of law will pronounce them void*. The patent is but evidence of a grant, and the officer who issues it acts ministerially and not judicially. If he issues a patent for land reserved from sale by law, such patent is void for want of authority. *But one officer of the Land Office is not competent to cancel or annul the act of his predecessor. That is a judicial act, and requires the judgment of a court.*

Am. Bell, 128 U.S. at 365 (citing *United States v. Stone*, 2 Wall. 525, 69 U.S. 525, 535 (1864) (emphasis added)). Importantly, *American Bell* addressed patents for invention, but the Court discussed extensively the analogousness of patents for land. *See id.* at 358-59. The Court revisited the issue ten years later in *McCormick*, and underscored the importance of this foundational principle. Specifically, the Court held that it is an invasion of the province of Article III courts for the Executive branch to cancel a patent as invalid upon the patentee's application for reissue. *McCormick*, 169 U.S. at 612.

However, the opinion makes clear that the Court’s reasoning is not limited to reissuance proceedings.

[W]hen a patent has received the signature of the Secretary of the Interior, countersigned by the Commissioner of Patents, and has had affixed to it the seal of the Patent Office, *it has passed beyond the control and jurisdiction of that office, and is not subject to be revoked or cancelled by the President, or any other officer of the Government.* *United States v. Am. Bell Telephone Co.*, 128 U.S. 315, 363. It has become the property of the patentee, and as such is entitled to the same legal protection as other property.

Id. at 608-09 (additional citations omitted). Although “*a suit may be maintained by the United States to set aside a patent for lands improperly issued by reason of mistake, or fraud[, even that is only] the case where the Government has a direct interest, or is under obligation respecting the relief invoked.*” *Id.* at 609 (emphasis added) (citing *United States v. Missouri, Kansas & Texas Railway*, 141 U.S. 358 (1891)). The Executive therefore cannot cancel or amend an issued patent in any way without going through Article III courts. The *McCormick* Court continued:

The only authority competent to set a patent aside, or to annul it, *or to correct it for any reason whatever*, is vested in the courts of the United States, and not in the department which issued the patent. *Moore v. Robbins*, 96 U.S. 530, 533; *United States v. Am. Bell Telephone Co.*, 128 U.S. 315, 364; *Michigan Land & Lumber Co. v. Rust*, 168 U.S. 589, 593. And in this respect a patent for an invention stands in the same position and is subject to the same limitations as a patent for a grant of lands.

Id.

The Court disposed of a virtually identical question multiple times in the land context prior to both *McCormick* and *American Bell*, reaching the same conclusion. For example, in *United States v. Stone*, the Court discussed an Article I tribunal's authority to void a patent for land where evidence of fraud, mistake, or absence of legal authority was presented. 69 U.S. 525 (1864). The Court unequivocally rejected this argument, and, as cited above, *Stone's* reasoning applied to protect patents for invention against the same type of Executive overreaching in *American Bell* more than twenty years later.

In 1878, the Court decided *Moore v. Robbins*, which centered on whether the Secretary of the Interior could rescind a patent for land where multiple parties claimed ownership over the same tract. 96 U.S. 530 (1877).

The Court was similarly unwavering in its reasoning:

While conceding for the present . . . that when there is a question of contested right between private parties to receive from the United States a patent for any part of the public land, it belongs to the head of the Land Department to decide that question, *it is equally clear that when the patent has been awarded to one of the contestants, and has been issued, delivered, and accepted, all right to control the title or to decide on the right to the title has passed from the land-office. Not only has it passed from the land-office, but it has passed from the Executive Department of the government.* A moment's consideration will show that this must, in the nature of things, be so. . . . With the title passes away all authority or control of the Executive Department over the land, and over the title which it has conveyed. *It would be as reasonable to hold that*

any private owner of land who has conveyed it to another can, of his own volition, recall, cancel, or annul the instrument which he has made and delivered. If fraud, mistake, error, or wrong has been done, the courts of justice present the only remedy. These courts are as open to the United States to sue for the cancellation of the deed or reconveyance of the land as to individuals; and if the government is the party injured, this is the proper course.

Id. at 532-33 (emphasis added). The Court restated this principle yet again in 1890 to prevent officers of the Land Department from requiring two competing land owners to appear regarding the patents' validity. *See Iron Silver Mining Co. v. Campbell*, 135 U.S. 286, 293 (1890) (“[Patent validity] is *always* and ultimately a question of judicial cognizance.”) (emphasis added). The *Iron Silver* Court elaborated:

We have more than once held that when the government has issued and delivered its patent for lands of the United States, the control of the department over the title to such land has ceased, and the only way in which the title can be impeached is by a bill in chancery; and we do not believe that, as a general rule, the man who has obtained a patent from the government can be called to answer in regard to that patent before the officers of the land department of the government.

Id. at 301-02 (citing *Ex parte Schurz*, 102 U.S. 378 (1880)).

In each of these cases, the dispute centered on a patent for either invention or land that was arguably invalid due to a mistake in the office from which it originated. Clearly, granting the same piece of land to two separate individuals is a particularly egregious example of such a

governmental mistake. But the Court's treatment remained consistent: mistake on the part of the granting office does not in any way excuse a violation of separation of powers principles.

B. Adjudications of Validity are Seventh Amendment-Protected Private Rights

IPRs are adjudications of validity, without question. They therefore violate the Seventh Amendment because they deprive patentees of jury trials. The PTAB's "Judicial Panel" (as it is known internally) enters an initial scheduling order concurrent with the decision to institute a trial. 37 C.F.R. § 42.25. All deadlines are subject to that order. The parties then file mandatory notices regarding real parties-in-interest and related matters, 37 C.F.R. § 42.8(b), and provide initial disclosures that are expressly modeled after Fed. R. Civ. P. 26(a)(1). *See* 37 C.F.R. § 42.51; Office Patent Trial Practice Guide, 77 Fed. Reg. 48,761 (Aug. 14, 2012). The PTAB's regulations provide for depositions, and authorize parties to "seek such discovery as the Patent Office determines is otherwise necessary in the interest of justice." *See Abbott Labs v. Cordis Corp.*, 710 F.3d 1318, 1326 (Fed. Cir. 2013). Routine discovery includes cited documents, cross-examination of declaration testimony, and information inconsistent with positions advanced during the proceeding. *See* 37 C.F.R. § 42.51(b)(1). A party may compel testimony and production with the PTAB's prior

authorization, 37 C.F.R. § 42.52, and may also have a certified court reporter present for depositions and conference calls. *See* 37 C.F.R. § 42.53; Ex. E). Oral argument is also permissible. 37 C.F.R. § 42.70.

The parties then file objections, motions *in limine*, and motions to exclude arguably inadmissible evidence at the close of fact discovery. 37 C.F.R. § 42.64. Throughout the process, as with an Article III court the parties are expressly prohibited from having *ex parte* communications with the Judicial Panel on substantive matters. 37 C.F.R. § 42.5(d). At the end of this clearly judicial process, the result may be patent cancellation. 37 C.F.R. § 42.73(b)(2). The PTAB is performing the role of the Judicial Branch, and Article III courts are only called upon to review the PTAB's decision under a deferential standard. *See* 35 U.S.C. § 141(c); *Dickinson v. Zurko*, 527 U.S. 150, 152 (1999).

Though they adjudicate validity, *inter partes* review proceedings also depart from important standards that have been developed over centuries of law adjudication in Article III courts. For example, when invalidity is raised in a declaratory judgment action or as a defense in an Article III court, the patentee enjoys a presumption of validity that must be overcome by the accused infringer or declaratory judgment plaintiff. *See* 35 U.S.C. § 282 (“A patent shall be presumed valid. Each claim of a patent . . . shall be presumed

valid independently of the validity of other claims. . . . The burden of establishing invalidity . . . shall rest on the party asserting such invalidity”) The standard of review is clear and convincing evidence. *Microsoft Corp. v. i4i Ltd. P’ship*, 131 S. Ct. 2238, 2242 (2011). By contrast, the petitioner in an *inter partes* review must only prove invalidity by a preponderance of the evidence. See 35 U.S.C. § 316(e). In addition, the USPTO construes claims under the “broadest reasonable interpretation,” see, e.g., *In re Morris*, 127 F.3d 1048, 1054-55 (Fed. Cir. 1997), whereas courts look for the *correct* interpretation. See *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312-14 (Fed. Cir. 2005) (*en banc*). Plaintiffs are stripped of the benefits of their private property from the time the *inter partes* review is instituted. These departures from historical and procedural norms in matters of wholly private property add constitutional insult to constitutional injury.

This Court in *Patlex* excused *ex parte* patent reexaminations in the USPTO only because “the *grant* of a valid patent is primarily a public concern.” *Patlex*, 758 F.2d at 604 (emphasis added). Note that the public “right” was the public’s “interest” in ensuring that the patent was properly *granted*. *Id.* The court held that because reexamination is directed to “correct errors made by the government, to remedy defective governmental (not private) action, and if need be to remove patents that should never have been

granted,” *id.*, re-doing the *examination process* qualified as a public right. The Court in *Joy* repeated this rationale. 959 F.2d at 228.

IPRs do not do the very thing that allowed *ex parte* reexamination to pass muster: operate as a legal fiction that the USPTO is reexamining the patent to correct a governmental mistake. What the PTAB *does* do is conduct a court-like trial without the protections enjoyed by Article III courts (*e.g.*, life tenure, protection against salary reduction and involvement of the political process, and senate confirmation in appointments). For example, the trial includes initial scheduling orders, mandatory notices, initial disclosures modeled after Fed. R. Civ. P. 26(a)(1), depositions, additional discovery as the USPTO determines is otherwise necessary “in the interest of justice,” cross-examination, compelled testimony and document production, oral argument, as well as objections, motions *in limine*, and motions to exclude arguably inadmissible evidence. After the parties have finished the entire adversarial process, the Judicial Panel issues a decision, which may cancel the patent.

In sum, *inter partes* review is virtually identical to what would happen if the party challenging the validity of the patents chose to bring a declaratory judgment action in an Article III court instead. This Court in *Joy* stated that a private right involves the liability of one individual to another,

which contrasts with cases that “arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments.” *Joy Techs.*, 959 F.2d at 229 (internal quotation marks omitted) (citing *Crowell v. Benson*, 285 U.S. 22, 50 (1932)). *Inter partes* review is the epitome of a private dispute, and was designed by Congress to lack the features of reexamination that made the latter a proceeding just between the Government and a person. The PTAB assumes that the adversaries will bring the best prior art, and does not conduct any examination as part of the proceedings. Its decision is based entirely on the parties’ arguments, to such an extent that patentees are not subject to the duty of disclosure like they are in reexamination. This stands in stark contrast to *ex parte* reexaminations, which were the only USPTO proceedings considered in *Patlex* and *Joy*.

This is also why Appellant’s Seventh Amendment rights are also being abridged in a way not present in *Patlex* or *Joy*. The Seventh Amendment protects the right to a jury trial on issues of patent validity that may arise in a suit for patent infringement. *Patlex* 758 F.2d at 603 (citing *Swofford v. B & W, Inc.*, 336 F.2d 406, 142 USPQ 291 (5th Cir. 1964), *cert. denied*, 379 U.S. 962 (1965)). “Congress may devise *novel* causes of action involving public rights free from the strictures of the Seventh Amendment if

it assigns their adjudication to tribunals without statutory authority to employ juries as factfinders. But it lacks the power to strip parties contesting matters of private right of their constitutional right to a trial by jury.” *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 51-52 (1989) (emphasis added). Stated another way, the public rights exception cannot apply where a right has a long line of common-law jury-trial forebears. *Id.* at 52. “The Constitution nowhere grants Congress such puissant authority.” *Id.* Instead, the claim must “originate in a newly fashioned regulatory scheme.” *Id.*

“[T]he Seventh Amendment . . . applies to actions brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century” *Id.* at 41-42 (citing *Curtis v. Loether*, 415 U.S. 189, 193 (1974) (internal quotation marks omitted)). Since *Tull v. United States*, courts look to whether the claim involves legal, or equitable remedies. 481 U.S. 412, 417 (1987) (stating that Seventh Amendment requires a jury trial on the merits in actions that are analogous to “Suits at common law.”). In making this determination, the Court must examine both the nature of the action and of the remedy sought. *Id.*

Patent infringement suits have a long history in the common law. *See, e.g., Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 377 (1996)

“Equally familiar is the descent of today’s patent infringement action from the infringement actions tried at law in the 18th century, and there is no dispute that infringement cases today must be tried to a jury, as their predecessors were more than two centuries ago.” (citation omitted); *In re Lockwood*, 50 F.3d 966, 976 (Fed. Cir. 1995) (discussing eighteenth- and nineteenth-century patent adjudication in England and the United States); *In re Tech. Licensing Corp.*, 423 F.3d 1286, 1289 (Fed. Cir. 2005) (citing *Lockwood* for the proposition that under both English and American practice it was the patentee who decided whether a jury trial on the factual questions relating to validity would be compelled.).

In analyzing whether a right to a jury trial exists in a particular patent case, courts look to whether it most closely resembles an action at law, or in equity. *See In re Lockwood*, 50 F.3d at 974. Although the Federal Circuit in *Joy* rejected the appellant’s argument that a reexamination proceeding is most like a declaratory judgment action filed by the USPTO, and should therefore be treated the same way (and require a jury as factfinder), that was only because the appellant conceded that the USPTO could not have brought such a suit. *Joy Techs.*, 959 F.2d at 229. In contrast, an *inter partes* review is virtually identical to a declaratory judgment action for an invalidity finding filed by the petitioner, which is analyzed by looking at whether a jury would

be available if the case were inverted. *See In re Lockwood*, 50 F.3d at 972.

This means that even the analysis of *Joy* leads to a conclusion of constitutional infirmity for adversarial *inter partes* reviews.

V. CONCLUSION AND PROPER REMEDY

So what should this Court do? Appellant asks to overrule *Patlex*, but that may disrupt settled expectations about *ex parte* reexamination. *McCormick* itself supplies the answer. The USPTO activities, such as they are, may continue. All that needs correction is to deprive “final written decisions” of the effect of canceling an issued patent. It will then rest with the sound discretion of the various United States District Courts to decide what to do with such “special master” type advisory opinions handed down by the Executive.

Dated: January 28, 2015 /s/ Robert P. Greenspoon

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**United States Court of Appeals
for the Federal Circuit**

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CERTIFICATE OF SERVICE

I, John C. Kruesi, Jr., being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by FLACHSBART & GREENSPOON, LLC, Attorneys for Amicus Curiae to print this document. I am an employee of Counsel Press.

On **January 28, 2015** counsel has authorized me to electronically file the foregoing **Brief for Amicus Curiae J. Carl Cooper** with the Clerk of Court using the CM/ECF System, which will serve via e-mail notice of such filing to all counsel registered as CM/ECF users, including any of the following:

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Paper copies will also be mailed to the above principal counsel at the time paper copies are sent to the Court.

Upon acceptance by the Court of the e-filed document, six paper copies will be filed with the Court within the time provided in the Court's rules.

January 28, 2015

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