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Discretion to Institute Trials Before the Patent Trial and Appeal Board

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Comment from Jordan Williams

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General Comment

I oppose the U.S. Patent and Trademark Offices proposed regulations changing the nature of PTAB trials., Docket No. PTO-C-2020-0055.

Bad patents have caused issues for many open source software projects I work with and use. For example, patent trolls attempted to extort the Shotwell application, a free and open source project. Such a project does not have enough money to be subject to long, drawn out court proceedings where the bigger wallet wins, all too often through unfair patent claims.

First, if the regulations are adopted, people and companies wont be able to challenge patents through the IPR process when they need to. The PTAB will be able to deny IPRs simply because of the timing of district court cases. This will allow patent holders to game the system and file strategic litigation to avoid IPRs. The PTAB should not give any consideration to the status of court proceedings when deciding whether to initiate an IPR.

Second, the regulations limit the number of petitions that can be filed against the same patent.

That makes no sense. There will often be multiple challenge to the same patent, especially if its being asserted aggressively. Different challenges raise different evidence and sometimes address different claims. Congresss intent in the America Invents Act was to reduce the amount of unnecessary patent litigation by allowing the PTAB to weed out invalid patents before a trial takes place. There should be no arbitrary limits on the number of petitions per patent.

The rights of technology developers and users are no less important than the rights of patent owners. When patents are evaluated in federal court, nearly half of them are found to be invalid.

Overall, PTAB trials must be fair, affordable, and accessible. When petitions are likely to succeed on the merits, they should be granted. What happens in the courts, or to other petitions, shouldnt matter.

These proposed regulations will destroy the U.S. system for post-grant patent challenges. Wrongly granted patents are a major burden on the economy and drain on innovation. Every week, theyre used to threaten small businesses with extortionate licensing demandsespecially people who make and use technology. To promote innovation, the Patent Office needs to improve the quality of granted patents, and to do that, we need the robust IPR system Congress designed.