

No. 15-1330

IN THE
Supreme Court of the United States

MCM PORTFOLIO LLC,
Petitioner,

v.

HEWLETT-PACKARD COMPANY, and
MICHELLE K. LEE, DIRECTOR, U.S. PATENT
& TRADEMARK OFFICE,

Respondents.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Federal Circuit**

**AMICUS CURIAE BRIEF OF
HOUSTON INVESTORS ASSOCIATION
IN SUPPORT OF PETITIONER**

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INTEREST OF *AMICUS CURIAE*¹

The Houston Inventors Association (HIA) submits this brief *amicus curiae* in support of Petitioner on the two questions presented in the case. The HIA has more than 200 paid members and many non-members who attend monthly meetings. Houston stands fifth in the world for cities producing patents, and both members and participating non-members have a strong interest as to how the validity of patents are determined.

SUMMARY OF ARGUMENT

The HIA supports Petitioner's request to grant *certiorari* to address the constitutionality of *inter partes* review (IPR), a new adjudicatory proceeding created by the Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011) (the AIA) that allows third parties to challenge the validity of granted patents before a panel of administrative judges rather than an Article III court even after a patent owner has filed a lawsuit and has elected a jury trial on all issues, directly and indirectly, including the issue of validity.

The AIA confounds the reliance of patent owners on the separation powers between the Supreme Court and Congress. The Supreme Court has the right to

¹ Pursuant to Supreme Court Rule 37.2(a), notice of *amicus curiae*'s intent to file this brief was received by counsel of record for all parties at least 10 days prior to the due date of this brief and all parties consent to the filing of this *amicus curiae* brief. The undersigned further affirms that no counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, its members, or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

establish Courts and Rules for the Courts such as Fed. R. Civ. P. 38 which permits a party to elect to have all triable issues decided by a jury. The Supreme Court has determined that the correct criteria for Courts to determine invalidity, “clear and convincing” evidence.

Congress has thwarted the rights of patent owners by enabling a party, not the patent owner, to remove the issue of validity from the jury and have it decided by an administrative judges. This has a great attraction to “patent pirates”, companies who infringe patents and then deny liability, because the IPR has a high rate of success for “patent pirates” to invalidate patents. Congress has ignored the Supreme Court and has replaced the “clear and convincing” Rule with a “preponderance of evidence”, a much easier basis for finding invalidity. The Supreme Court specifically rejected a “preponderance of evidence” as a test for invalidity.

In addition, the IPR expands the scope of claims to its broadest meaning to enable the administrative judges to find invalidity despite a Court construction limiting the scope of claims. “Patent pirates” take advantage of this disadvantage to patent owners.

Thus, Congress has exceeded its authority to undermine patents to give “patent pirates” encouragement to infringe patents in the well supported historical expectation that the IPR is likely to invalidate the patents.

ARGUMENT**I. ARTICLE III HAS VESTED JUDICIAL
AUTHORITY IN THE SUPREME COURT,
AND NOT CONGRESS**

Article III established that the judicial power of the United States shall be vested in the Supreme Court. The Supreme Court has the absolute authority to establish courts and rules for the courts. The Supreme Court pursuant to Amendment VII created District Courts with jurisdiction over patent infringement and validity, and Fed. R. Civ. P. 38 which allows a party such a patent owner in Federal Litigation to elect to have a jury trial on all triable issues. This Court has determined that the proper test for invalidity is “clear and convincing evidence” in *Microsoft Corp. v. i4i Limited Partnership et al.*, 131 S. Ct. 2238. In addition, this Court stated:

Since 1984, the Federal Circuit has read §282 to require a defendant seeking to overcome the presumption to persuade the factfinder of its invalidity defense by clear and convincing evidence.

Here, the Court was referring to the jury as the “factfinder”.

Congress has overstepped its authority by the AIA allowing a Defendant to overrule Rule 38 and remove the issue of invalidity to an administrative tribunal after a patent owner has elected to have a jury. In addition, Congress has disregarded the *Microsoft* Decision, and replaced the test of invalidity with a weak requirement of a “preponderance of evidence”. See 35 U.S.C. § 316(e). This Court specifically rejected this weak standard as a substitute requirement in its *Microsoft* Decision.

II. CONGRESS HAS CREATED A PLAN TO INVALIDATE PATENTS OWNED BY INDIVIDUALS AND SMALL COMPANIES TO BENEFIT “PATENT PIRATES”

The Supreme Court has enabled inventors and small companies to enforce patent rights in a judicial system equally fair to all patent owners and other parties. The AIA has enabled “patent pirates”, infringers, to remove the issue of validity from the courts to an administrative tribunal that by law favors infringers through low standards for establishing invalidity. This is basically legalized “forum shopping” against patent owners and perverts the system once fair to both ordinary inventors and major corporations endeavoring to enforce traditional patent rights against “patent pirates”.

III. THE IPR CHANGES THE WELL ESTABLISHED JUDICIAL RULE OF REQUIRING A DETERMINATION OF THE SCOPE OF A CLAIM THROUGH CLAIM CONSTRUCTION, TO THE BROADEST SCOPE OF A CLAIM TO ENHANCE “PATENT PIRATES” OPPORTUNITIES TO INVALIDATE A PATENT

It appears that Congress did not believe that the IPR was sufficient for invalidating patents through a reduced measure of a “preponderance of evidence”. The additional approach of the broadest scope of a claim enables an enhanced opportunity for a “patent pirate” to invalidate a patent on another basis contrary to the well established judicial process. Thus, after parties in patent litigation have argued the issue of claim construction, and the court has carefully considered the issues to determine claim construction, the IPR completely ignores the claim construction,

thereby enabling the “patent pirate” to succeed even though the patent owner would have prevailed in court. Hence, the IPR is fundamentally unfair and contrary to the judicial process well developed by judicial decisions defining the applicable law fairly.

CONCLUSION

The HIA urges this Court to grant *MCM Portfolio’s* Petition in this case in order for this Court to clarify its Rule of Law for the judicial process as applied to the issue of patent validity.

Respectfully submitted,

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