



by **VANCE WOODWARD**

PATENT INNOVATION

The Leahy-Smith America Invents Act has introduced many welcome reforms to American patent law

THE LEAHY-SMITH America Invents Act (AIA), enacted in 2011, commenced a two-year rollout of the most comprehensive revision of patent law since the Patent Act of 1952.¹ Its best-known feature switched the U.S. patent system from “first to invent” to “first to file,” bringing the U.S. system in line with the rest of the world.² The act also substantially modified many of the procedures involved in obtaining and defending patents.

U.S. patent law now applies the first-to-file system to patent applications filed on or after March 16, 2013. More accurately, it applies the first-to-file system to any patent applications with an effective filing date of March 16, 2013, or later. An effective filing date is the earlier of 1) the actual filing date and 2) the filing date of the earliest application to which the current application can piggyback, known as the priority date.³ Subject to certain time limits, a priority date could be, for example, the date on which an inventor filed a patent application for the same invention in a different country. A priority date could also result if an inventor filed a prior patent application with the U.S. Patent and Trademark Office (USPTO) and the patent examiner found the application to cover multiple groupings of inventions, each of which

required a separate application. The inventor would then file a divisional application that would cover a portion of the original application. That divisional application would have an effective filing date matching the filing date of the original application.

With the first-to-file rule, whoever first makes it to the patent office gets the patent, which gives inventors reason to maintain secrecy regarding their inventions in development, but there are nuances. For example, an inventor may publicly disclose an invention up to a year before filing a patent application.⁴ This is because only inventions that are novel may be patented, and novelty depends on finding that nobody already publicly disclosed the same invention. Novelty is evaluated by considering the prior art—the collection of preexisting inventions and technology (patented and not) that would show whether or not a claimed invention is in fact new to the public. Prior art is anything that is “patented, described in a printed publication, or in public use, on sale, or otherwise available to the public before the effective filing date of the claimed invention.”⁵ If prior art covers a claimed invention, the USPTO will not issue a patent for the invention because the prior art demonstrates that the

invention, as of the patent application’s effective filing date, was not new to the public. Notably, before the AIA, the meaning of patent-defeating prior art was in certain respects limited to what was known, used, or on sale in the United States. Now, the definitional scope of prior art has been expanded to include public disclosures anywhere in the world.

Generally, any public disclosure of relevant information—even by the inventor—is prior art, which could potentially render an invention non-novel and unpatentable at the time of filing a patent application. However, inventors are afforded a one-year grace period. Inventors may publicly disclose their invention up to one year before the effective filing date of a patent application, and such public disclosure (along with repetitions by anyone else) will not be considered prior art. Similarly, if somebody privately obtains “the subject matter disclosed...from the inventor” and publicly discloses it, that public disclosure will not be considered prior art so long as the inventor files an application with an effective filing date within one year of the public disclosure.⁶

Vance Woodward is a patent attorney in Los Angeles.

Better still, if the inventor publicly discloses the invention, and somebody else independently discovers the same invention and discloses it, even that will not be considered prior art, at least not for one year.⁷ In other words, the one-year deadline for filing a patent application starts running upon the first public disclosure of the invention by anyone. From then on, no subsequent public disclosure matters, even if that subsequent disclosure derives from independently inventive sources.⁸

Public disclosure will always serve as prior art with respect to anyone other than the inventor from which the disclosure derived, even those who could otherwise show that they first discovered or at least independently discovered the invention but kept it secret. Consequently, once any inventor publicly discloses the invention, the first-to-file rule does not strictly apply. For the succeeding year, only the first inventor to disclose may potentially obtain a patent. Meanwhile, nobody else could normally obtain a patent, not even the first inventor if there is one (unless the first inventor can show that the second inventor derived the invention from the first inventor).⁹ If, however, anyone publicly discloses an invention and then the inventor waits more than a year to file an application, the public disclosure will serve as prior art and therefore preclude anyone from obtaining a patent for the invention, for a failure of novelty.¹⁰

In sum, generally, nobody but the first one to publicly disclose may obtain a patent because the public disclosure immediately becomes prior art to all except the first to disclose. After a year elapses, the disclosure acts as prior art to all. In this sense, the new system could be called a first-to-disclose system rather than a first-to-file system.

Preissuance Proceedings

In addition to adopting a first-to-file rule, the AIA also modified preissuance proceedings, which take place before a patent is granted, and postissuance proceedings, which take place after a patent is granted. Significantly, the law now allows for preissuance submissions by third parties. This change promotes transparency and public participation, which is an improvement over the alternative in which third parties had to look to the courts to challenge patents after thousands of dollars and several years had been consumed in obtaining patents. Specifically, the AIA enables anyone to submit any patent, patent application, or any other publication of potential relevance to the patent examiner during the examination of a patent application.¹¹ A third party could do this to show that prior art renders an invention non-novel and therefore unpatentable, thereby saving the third party potential licensing expenses for use of the possibly-about-to-be-patented invention.

There are time limits for filing preissuance submissions.¹² At the latest, third parties must submit materials before the issuance of a notice of allowance (the document notifying the applicant that the applicant may obtain a patent upon payment of issuance fees). Meanwhile, if the USPTO patent examiner rejects any claims during prosecution of the application (which often happens because patent attorneys typically ask for more than they expect to get) and if the patent application is published (which always happens), the deadline for preissuance submissions will be set at the last of those two events—i.e., before the notice of allowance issues. This is an incentive for interested third parties to act should they want to submit potentially relevant material for consideration in connection with other parties' patent applications. This, in turn, creates an incentive for full disclosure and efficiency.

Another of the AIA's innovations is the derivation proceeding, which replaces what was called an interference. The derivation proceeding addresses situations in which two separate parties file two separate patent applications for the same invention.¹³ The second applicant can petition for a derivation proceeding to be allowed to bring evidence that the first applicant derived the invention from the second applicant. If successful, the second applicant could therefore establish priority over the invention without regard to who filed first. However, a second applicant may expect to succeed with a derivation proceeding only if the second applicant can show that the first applicant actually derived the invention from the second applicant. Nothing is accomplished by showing that the second applicant was the first to invent. If an inventor independently invented second but disclosed or filed first, it is the second inventor who gets the patent, if one issues.

Postgrant Proceedings

The AIA also created a new set of postgrant procedures that partially replace and partially supplement the previous procedures under which patentees and third parties could contest or validate a patent. The new procedures are postgrant review, inter partes review, supplemental examination, and a transitional postgrant review of covered business method patents. Any person other than the patentee may petition for a newly created postgrant review to contest the validity of the patent.¹⁴ The petitioner may submit evidence in support and participate in the review.¹⁵ Postgrant review is available up to nine months after a patent is granted.¹⁶ The USPTO will undertake a postgrant review only if the petition establishes that it is more likely than not that at least one patented claim will be defeated.¹⁷

An inter partes review replaces what was called inter partes reexamination. An inter partes review is available only after the up-to-

nine-month period for initiating postgrant review.¹⁸ Inter partes review is designed to be an alternative to litigation. Accordingly, if a patentee launches an infringement suit, the alleged infringer has a one-year deadline to petition for inter partes review, which will often earn a stay of the federal court proceedings.¹⁹ However, if the infringer launches a declaratory relief action first (seeking a ruling that the at-issue patent is invalid), the infringer may not subsequently petition for inter partes review.²⁰

Another difference between postgrant review and inter partes review is that petitions for postgrant review may be based on many grounds for contesting the validity of a patent, including but not limited to lack of novelty (same invention already existed beforehand), obviousness (prior inventions existed that are so similar that the disputed invention was obvious to anyone familiar with the art), and a failure to comply with formalities.²¹ Conversely, petitions for inter partes review may only be based upon a lack of novelty and obviousness, and they may only rely on prior art.²² Another difference is that postgrant review will commence only if the petitioner is "more likely than not" to defeat at least one claim,²³ whereas inter partes review commences upon showing a "reasonable likelihood" of prevailing,²⁴ an easier standard to meet. There are other differences as well.

For example, the AIA created a program specifically for the postgrant review of covered business method (CBM) patents. CBM patents claim as the patented invention a method, apparatus, or operation used in the practice, administration, or management of a financial product or service.²⁵ This distinguishes CBM patents from patents for technological inventions, which are patents that claim a novel and unobvious technological feature that solves a technical problem using a technical solution.²⁶ A distinguishing feature of postgrant review of CBM patents is that a third party may petition for a CBM postgrant review only after the patentee has asserted an infringement claim against that party.²⁷ Postgrant review in general (like inter partes review) is not subject to that limitation. Consequently, members of the general public cannot petition for CBM postgrant review unless the patentee claims infringement against them. Also, CBM postgrant review is not subject to the nine-month deadline that generally applies to postgrant review.²⁸ CBM postgrant review is a transitional program, set to terminate on September 16, 2020.²⁹ A subsequent bill that would have made the program permanent was recently shelved.³⁰

A newly created supplemental examination may be instituted only at the request of a patentee.³¹ It is approximately the patentee's counterpart to the third party's postgrant review, at least in terms of the scope of issues that can be raised. A patentee would initiate a supple-

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1. The Leahy-Smith America Invents Act (AIA) commenced a two-year rollout of the most comprehensive revision of patent law since the Patent Act of 1952.
True.
False.
2. U.S. patent law now applies the first-to-file system with respect to patent applications filed before March 16, 2013.
True.
False.
3. "Prior art" is anything that is "patented, described in a printed publication, or in public use, on sale, or otherwise available to the public before the effective filing date of the claimed invention."
True.
False.
4. Because of the AIA, "prior art" is now limited to what was known or used or on sale in the United States.
True.
False.
5. Public disclosure of an invention before filing a patent application renders the invention unpatentable.
True.
False.
6. Because of the AIA, third parties may now submit patents, patent applications, and other publications of potential relevance to the patent examiner during examination of a patent application before issuance of a patent.
True.
False.
7. A derivation proceeding—which addresses situations in which two separate parties file two separate patent applications for the same invention—replaces what was called an interference.
True.
False.
8. Any person other than the patentee may petition for a newly created postgrant review to contest the validity of a patent.
True.
False.
9. The USPTO will undertake a postgrant review only if the petition establishes that it is more likely than not that at least one patented claim will be defeated.
True.
False.
10. Inter partes review can be initiated at any time to contest the validity of a patent.
True.
False.
11. Petitions for inter partes review may only be based upon obviousness and lack of novelty, and they may only rely on prior art.
True.
False.
12. Business method patents relate to a method, apparatus, or operation used in the practice, administration, or management of a financial product or service.
True.
False.
13. A third party must petition for a covered business method postgrant review before the patentee has asserted an infringement claim against that party.
True.
False.
14. A supplemental examination may be instituted only at the request of a patentee.
True.
False.
15. The USPTO will grant the request for supplemental examination only if the request raises a substantial new question of patentability.
True.
False.
16. The AIA modified the parameters of the prior-use defense so that it is available only to those who can show that they commercially used the invention within the United States 1) at least one year before the effective filing date of the application for the at-issue patented invention and 2) at least one year before the invention was disclosed to the public.
True.
False.
17. Because of the AIA, only parties that suffered a competitive injury as a result of the false marking may bring suit.
True.
False.
18. In a declaratory relief action brought by an alleged infringer, the burden of proof is on the patentee-defendant to show infringement.
True.
False.
19. Defending a patent infringement suit in federal court on the basis that the infringed patent is invalid requires the defendant to bring clear and convincing evidence of invalidity.
True.
False.
20. Less than 50 percent of all patent applications result in a patent being issued.
True.
False.



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20. True False

mental examination to have the USPTO consider or correct any information that may be relevant to patent validity. A patentee would do this to clarify and better delineate the scope of a patent, thereby forestalling attacks from potential infringers. The USPTO will grant the request for supplemental examination only if the request raises “a substantial new question of patentability,” often abbreviated as SNQP,³² which is an easier burden to meet than reasonable-likelihood and the more-likely-than-not standards applicable in other proceedings.

Meanwhile, a request for reexamination continues to be a device by which anybody may request the reexamination of a patent based on newly submitted prior art.³³ The USPTO will commence the request for reexamination only upon meeting the SNQP standard.³⁴ The USPTO itself can also initiate a reexamination.³⁵ If the patentee makes the request, and it is granted, the reexamination is called an *ex parte* reexamination because it is a proceeding between the patentee and the USPTO alone. For the patentee, this is similar to a supplemental examination, the difference being that the narrower *ex parte* reexamination is done in the case of newly discovered prior art, whereas a patentee would request the broader supplemental examination to have the USPTO consider or correct any information that may be relevant to patent validity.

A third party may also submit a request for reexamination. But unlike postgrant review

and *inter partes* review (which a third party can initiate), the third party plays no role in the reexamination. In a sense, the third party launches the reexamination by submitting the alleged prior art and then stands back.

Prior Use and False Marking

Before the AIA, patent law provided a defense to prior users of an invention patented by someone else. Under the old law, those defending against infringement suits concerning a class of utility patents called method (or process) patents could show that they 1) had begun practicing the at-issue patented method in the United States more than a year before the effective filing date of the patent and 2) had begun commercially exploiting that method before the effective filing date of the patent. Under the AIA, this prior-use defense is still available, but it has slightly more stringent requirements.

Specifically, the defense is available to those who can demonstrate that they commercially used the invention in the United States 1) at least one year before the effective filing date of the application for the at-issue patented invention and 2) at least one year before the invention was disclosed to the public.³⁶ Under the AIA, the prior-use defense is broader than before, now applying to any kind of utility patent (not only process but also machine, manufacture, and composition of matter), and to internal commercial use of an invention

(for example, a trade secret or nonpublic use), affording greater protection to prior users.

The AIA also has updated the law regarding false marking, which is the counterfeiting of a patented or trademarked invention. False marking occurs when someone makes or obtains goods and marks them with the name of the patentee or the patent number to falsely indicate that the goods were sourced or authorized by the patentee. Before the AIA, members of the general public could bring qui tam lawsuits to challenge false marking. The AIA basically has abolished qui tam suits for false marking. Now, only parties that suffered a competitive injury as a result of the false marking may bring suit.³⁷ This measure may be regarded as a correction to an area of patent law that was subject to abusive litigation known as one form of patent trolling.³⁸

Another form of what is sometimes called patent trolling is done by nonpracticing entities (NPEs), also known as patent-assertion entities (PAEs). These entities 1) own patent portfolios, 2) sue infringers, and 3) do not typically manufacture or distribute any of their patented technology but rather license their patented technology to others. Controversy has arisen about whether these entities that neither discover nor utilize inventions should be so named. Similar to real estate owners that lease space to businesses rather than operating the businesses themselves, trolls simply charge licensing fees to those who use their intellectual real estate, and they evict squatters. The analogy breaks down, however, when considering that real property is limited and measured, whereas intellectual property has no physical limit and can flutter into and out of physical objects.

In any case, PAEs can be said to exist for a reason: Inventing new technology, manufacturing that technology, and licensing and enforcing patents through litigation are very different skill sets. Inventors specialize in invention, not necessarily in mass-scale manufacturing, and not likely in litigation. Manufacturers specialize in creating and distributing products on a massive scale. PAEs specialize in licensing and enforcing patent rights. PAEs are therefore a natural and positive feature of an efficient intellectual property market, and it is difficult to argue that the law should require entities to use patents in order to enforce them. That would be similar to requiring real estate owners to personally manage the businesses operating in their properties rather than renting the properties to other businesses.

Whatever one's opinion of PAEs, a balance must be struck to disincentivize the assertion of dubious claims of patent infringement. The stakes of litigation are high. Deep pockets can and do threaten individuals and small entities with financial disaster, regardless of the validity of the asserted patent. The need for a cheap,



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quick, and reliably predictable process is clear. The AIA contains no explicit antitrolling provisions, but it does contain provisions limiting joinder of parties to suits involving a common question of fact,³⁹ which arguably limits abusive trolls more than legitimate patent enforcers.⁴⁰ However, it arguably does nothing more than correct a few federal district court misinterpretations of Federal Rule of Civil Procedure 20, which calls for the same limitation on permissive joinder.⁴¹ In late 2013, a major antitrolling initiative known as the Innovation Act passed through the House of Representatives. That bill recently met its likely demise in the Senate.⁴² Another recently proposed antitrolling bill would, if passed, limit access to the International Trade Commission.⁴³

Immediately before the AIA, patent lawsuit filing briefly spiked, probably as plaintiffs sought to avoid the rule that limits joinder of defendants.⁴⁴ Otherwise, it is doubtful the AIA significantly affected the litigation landscape. For example, the AIA neither impeded nor accelerated a trend in which PAEs are taking an increasing proportion (from operating companies) of the mix of litigants bringing infringement suits. Likewise, the number of new patent defendants sued per month is somewhat higher now than it was before the AIA, but that may also be attributable to preexisting trends rather than the AIA.⁴⁵ Furthermore, the AIA's switch from first to invent to first to file did not affect a frequently occurring issue.

Meanwhile, frequently litigated issues went largely unaltered by the AIA, including whether or not an invention falls within the statutory definition of patentable matter⁴⁶ (which the AIA did not touch),⁴⁷ and whether or not specific prior art defeats the novelty⁴⁸ or non-obviousness⁴⁹ of a patented invention, which is a factual analysis also fundamentally unaffected by the AIA). Recent significant Federal Circuit and Supreme Court cases have also considered the exceptional cases doctrine (which allows for an award of attorney's fees in exceptional patent cases),⁵⁰ the conditions under which a party is liable for inducing patent infringement (it does not happen where a seller performs some steps of a patented method and a buyer performs the remaining steps),⁵¹ and the burden of proof on a declaratory relief action brought by a purported infringer (it stays with the party claiming infringement).⁵² Many of these cases were significant. But the issues involved were not affected by the AIA.

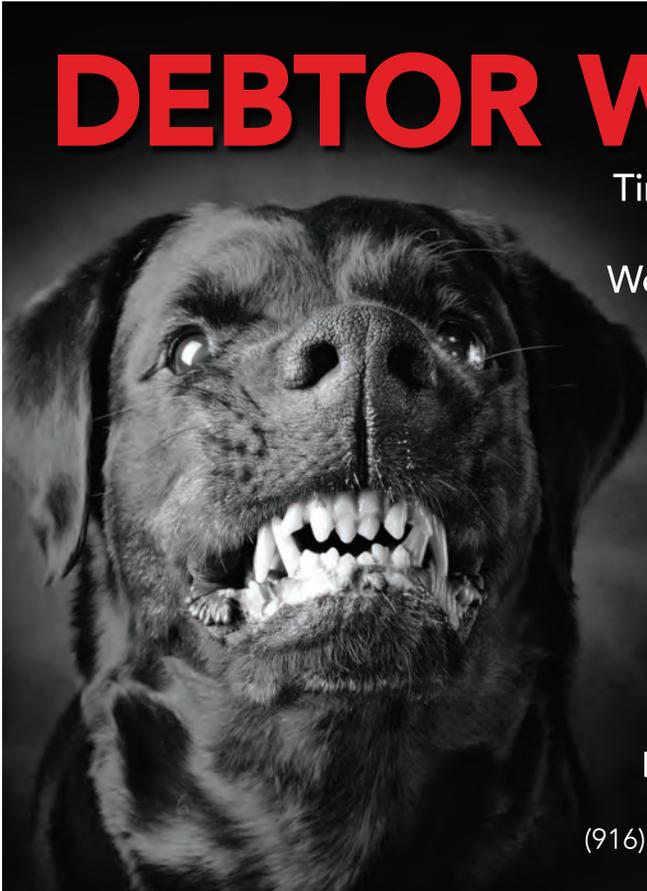
One frequently litigated issue that the AIA does partially address is claim construction,⁵³ which is the proper method of constructing patent claims so as to determine whether an invention, as claimed in the patent, covers an allegedly infringing activity or product. For example, the USPTO's newly created Patent Trial and Appeal Board (which replaces the Board of Patent Appeals and Interferences) construes patent claims by giving them their "broadest reasonable interpretation,"⁵⁴ which

is, as one might expect, broader than the more reserved standard applied by the federal courts to give the "patent its true and final character and force."⁵⁵

The AIA also affected the standards to be met before initiating certain types of review, at least notionally. For instance, ex parte reexamination will commence only after meeting the SNQP standard mentioned above (as was the case with the now-replaced inter partes reexamination procedure). The new inter partes review will commence only if the third-party petitioner establishes a "reasonable likelihood of prevailing," which is a tougher standard to meet. Similarly, the newly created postgrant review will occur only upon showing a reasonable likelihood of success, which is also a tougher standard than the SNQP standard. Meanwhile, the SNQP and reasonable-likelihood-of-prevailing standards used by the USPTO to decide whether to commence further proceedings are easier to meet than is the applicable clear-and-convincing evidentiary standard used to invalidate patents in federal court.⁵⁶ It does not appear that these modifications to the applicable standards of claims construction and evidentiary burdens of proof are giving rise to significant amounts of new litigation that would not otherwise exist.

Estimating Costs

Ideas are cheap. Patents are not. The AIA made substantial changes to the patent law, but the



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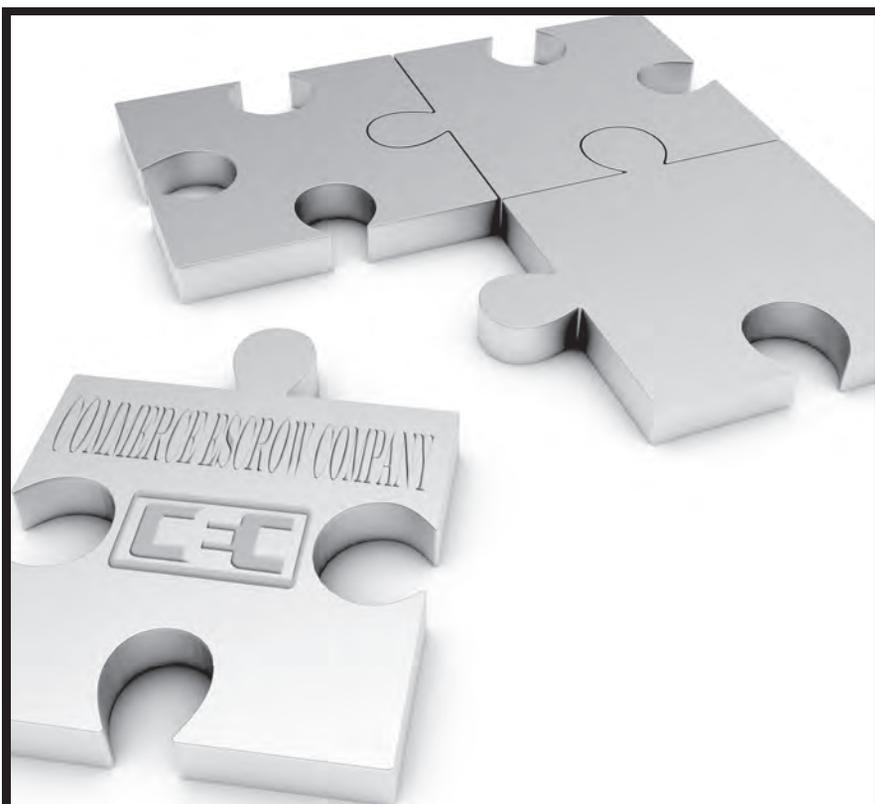
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question remains of whether a patent is worth the price of obtaining one. Generally, an invention should stand to be worth a small fortune to make patent prosecution financially worthwhile. To obtain a utility patent for a very simple invention—for example, something like a pencil—will usually cost at least \$6,000.⁵⁷ At least \$10,000 is likely to get a final decision from the USPTO, which could be a denial. A complex invention can run up a bill of tens of thousands of dollars. Even so, many may consider a patent for its prestige. Another factor, however, is that less than 50 percent of all patent applications ever result in a patent being issued.⁵⁸

Also, if a patent gets challenged in the courts by an alleged infringer, the patent has roughly a 24 percent chance (for NPEs asserting infringement) to a 34 percent chance (for practicing entities asserting infringement) of making it through the litigation-and-appeal gauntlet intact.⁵⁹ It is unclear what percentage of granted patents get challenged, but one can safely assume that patents on high-value inventions get challenged in court far more frequently than patents on low-value inventions. Patents worth tens of millions of dollars and more face a near certainty of being copied, litigated, and appealed at some point, if not constantly.

Therefore, not knowing anything about a particular invention, one can figure a less-than-50-percent chance of the patent application ever becoming a patent. If the patented invention does anything of much value, at least one interested member of the public is likely to challenge the validity of the patent, and it has only a 24-to-34-percent chance of surviving the challenge. In other words, a potentially high-value invention has something like a 15 percent chance of ever being successfully patented, and that will likely come with a price tag of hundreds of thousands of dollars in patent prosecution and litigation fees.

Fortunately, a new solution to the pricey and dicey patent prosecution process is emerging. Public input, or crowdsourcing, can assist in discovering relevant prior art and commenting on patent claims, which thereby defines and clarifies the scope of, and establishes quality of, each patent that issues from the USPTO. Pilot programs engaging what is sometimes called the peer-to-patent system have been tried and are likely to continue.⁶⁰ The USPTO is also engaging in projects designed to improve the patent prosecution process and its results. Recently, for example, the USPTO launched a glossary initiative pilot program to expedite prosecution of applications that contain a glossary of terms that satisfies certain requirements.⁶¹ Overall, the AIA's reforms are welcome and may create the impetus for more positive changes. ■

¹ See William B. Raich, *Strategic Planning in the Wake of the New Prior Art Provisions in the America Invents*

Act, CIPA J. (Dec. 2011), available at <http://www.finnegan.com>.

² See, e.g., The Global Impact of the America Invents Act (Dec. 2011), at http://www.wipo.int/wipo_magazine/en/2011/06/article_0002.html.

³ 35 U.S.C. § 100(i).

⁴ 35 U.S.C. § 102(b)(1)(A).

⁵ 35 U.S.C. § 102(a).

⁶ 35 U.S.C. § 102(b)(1)(A).

⁷ 35 U.S.C. § 102(b)(1)(B).

⁸ *Id.*

⁹ 35 U.S.C. §§ 102(b)(1)(A), 135.

¹⁰ 35 U.S.C. § 102(a).

¹¹ 35 U.S.C. § 122(e).

¹² 35 U.S.C. § 122(e)(1).

¹³ 35 U.S.C. § 135.

¹⁴ 35 U.S.C. § 321.

¹⁵ 35 U.S.C. § 322(a)(3)(B).

¹⁶ 35 U.S.C. § 321(c).

¹⁷ 35 U.S.C. § 324(a).

¹⁸ 35 U.S.C. § 311.

¹⁹ 35 U.S.C. § 315(b).

²⁰ 35 U.S.C. § 315(a).

²¹ 35 U.S.C. §§ 282(b), 321.

²² 35 U.S.C. § 311.

²³ 35 U.S.C. § 324(a).

²⁴ 35 U.S.C. § 314(a).

²⁵ 37 C.F.R. § 42.301.

²⁶ *Id.*

²⁷ Leahy-Smith America Invents Act (AIA), Pub. L. 112-29, 125 Stat. 284, 329 (Sept. 16, 2011), at § 18(a)(1)(B).

²⁸ 35 U.S.C. § 321(c); AIA § 18(a)(1)(A).

²⁹ AIA § 18(a)(3)(A).

³⁰ Patent Quality Improvement Act of 2013, S. 866, 113th Cong. (2013-14).

³¹ 35 U.S.C. § 257.

³² 35 U.S.C. § 257(b).

³³ 35 U.S.C. § 302.

³⁴ 35 U.S.C. § 303(a).

³⁵ *Id.*

³⁶ 35 U.S.C. § 273(a).

³⁷ 35 U.S.C. § 292. See also PricewaterhouseCoopers, LLP, *2013 Patent Litigation Study: Big cases make headlines, while patent cases proliferate*, at 3 [hereinafter PWC Patent Litigation Study], available at <http://www.pwc.com>.

³⁸ See, e.g., *Pequignot v. Solo Cup Co.*, 608 F. 3d 1356, 1359, 1359 n.1 (Fed. Cir. 2010), *reh'g and reh'g en banc denied*, 2010 U.S. App. LEXIS 21187 (Fed. Cir. Sept. 15, 2010).

³⁹ 35 U.S.C. § 299.

⁴⁰ Tracie L. Bryant, *The America Invents Act: Slaying Trolls, Limiting Joinder*, 25-2 HARVARD J.L. & TECH. 673 (Spring 2012).

⁴¹ See Quinn Emanuel Urquhart & Sullivan, LLP, *Multi-Defendant Joinder Under the America Invents Act: Much Ado About Nothing?*, available at <http://www.jdsupra.com>.

⁴² See Edward Wyatt, *Legislation to Protect Against Patent Trolls Is Shelved*, N.Y. TIMES, May 21, 2014, available at <http://www.nytimes.com>.

⁴³ Trade Protection Not Troll Protection Act, H.R. 4763, 113th Cong. (2013-14).

⁴⁴ See Robin Feldman, Tom Ewing & Sara Jeruss, *The AIA 500 Expanded: The Effects of Patent Monetization Entities*, UC Hastings Research Paper No. 45 (2013), at 68-70, available at <http://papers.ssrn.com>.

⁴⁵ *Id.* at 55-60.

⁴⁶ See, e.g., *Alice Corp. v. CLS Bank Int'l*, 134 S. Ct. 2347, 573 U.S. ___ (2014); *Ultracommercial, LLC v. Hulu, LLC*, 722 F. 3d 1335, 1338-49 (Fed. Cir. 2013), on remand from *WildTangent, Inc. v. Ultracommercial, LLC*, 132 S.Ct. 2431 (2012) (vacating earlier decision); *Mayo Collaborative Servs. v. Prometheus Labs.*, 132 S. Ct. 1289 (2012).

⁴⁷ 35 U.S.C. § 101.

⁴⁸ *Cheese Sys., Inc. v. Tetra Pak Cheese and Powder Sys., Inc.*, 725 F. 3d 1341, 1351-52 (Fed. Cir. 2013).

⁴⁹ See, e.g., *Leo Pharm. Prods., Ltd v. Rea*, 726 F. 3d 1346, 1353-59 (Fed. Cir. 2013); *Apple Inc. v. ITC*, 725 F. 3d 1356, 1364-67 (Fed. Cir. 2013).

⁵⁰ *Highmark v. Allcare Health Mgmt. Sys.*, 134 S. Ct. 1051, (2014); *Octane Fitness v. Icon Health and Fitness*, 134 S. Ct. 1749 (2014); 35 U.S.C. § 285.

⁵¹ *Limelight Networks v. Akamai Techs.*, 133 S. Ct. 2879 (2014); 35 U.S.C. § 271.

⁵² *Medtronic v. Mirowski Family Ventures*, 133 S. Ct. 2879 (2014).

⁵³ See, e.g., *Cheese Sys.*, 725 F. 3d at 1351-52.

⁵⁴ Manual of Patent Examining Procedure § 2111, available at <http://www.uspto.gov>.

⁵⁵ *Lighting Ballast Control LLP v. Philips Elecs. N. Am. Corp.*, 744 F. 3d 1272, 1279 (Fed. Cir. 2014).

⁵⁶ See, e.g., *Microsoft Corp. v. i4i Ltd. P'ship*, 131 S. Ct. 2238, 2242 (2011).

⁵⁷ American Intellectual Property Law Association, *Report of the Economic Survey 2013*, at 27. See also IP Watchdog, *The Cost of Obtaining a Patent in the U.S.*, available at <http://www.ipwatchdog.com>; Patent Resources for Inventors, *How much does it cost to patent an idea?*, available at <http://patentfile.org/howmuchdoesitcosttopatentanidea>.

⁵⁸ See U.S. Patent Statistics Chart, *Calendar Years 1963-2013*, available at <http://www.uspto.gov>.

⁵⁹ See PWC Patent Litigation Study, *supra* note 37, at 12.

⁶⁰ See <http://www.peertopatent.org>; http://www.uspto.gov/patents/init_events/peerpriorartpilotindex.jsp; see also BETH SIMONE NOVECK, *WIKI GOVERNMENT: HOW TECHNOLOGY CAN MAKE GOVERNMENT BETTER, DEMOCRACY STRONGER, AND CITIZENS MORE POWERFUL* (2009).

⁶¹ See http://www.uspto.gov/patents/init_events/glossary_initiative.jsp.

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