

# MINNESOTA LAWYER

October 24, 2016

MINNLAWYER.COM

Vol. 20 No. 43 | \$6.00

## Patent Jury Trials: Do Administrative Proceedings at the U.S. Patent Office Undermine Patent Owners' Right to a Jury?

By Minnesota Lawyer Sponsor

The U.S. Supreme Court has said that patent infringement cases must be tried to a jury. A patent owner's Seventh Amendment right to a jury is a powerful tool against infringers.

Case in point: a jury awarded VirnetX \$302 million against Apple in September, finding FaceTime infringes two patents. This was the third jury verdict in favor of the online security firm against Apple in the companies' long-running dispute. Juries in patents cases also gained strength this June when the U.S. Supreme lowered the requirements needed to show willful infringement. Juries will now have a greater role in deciding whether infringement was willful.

Despite constitutional support, efforts to unseat patent juries persists. The greatest current challenge to a patent owner's right to jury may be administrative proceedings before the Patent Trial and Appeal Board (PTAB), part of the U.S. Patent Office. Created by the 2011 America Invents Act, the Patent Trial and Appeal Board was intended to strengthen the patent system by giving patent holders and challengers a quick and inexpensive way to resolve disputes as an alternative to the courts.

The PTAB allows a petitioner to challenge an issued patent under a standard lower than that required by a federal district court in an action for infringement. Courts assume that a patent is valid until a challenger provides "clear and convincing" evidence to the contrary. The PTAB requires only that challengers show that it's more likely than not (i.e., a "preponderance of the evidence") that patent should not have been issued.

Following enactment, accused infringers have flocked to the PTAB as a way to overturn patents that courts and juries would find infringed. By June 2015 the PTAB invalidated at least some claims of 86% of the patents it reviewed, and 72% of all claims on which review had been instituted. The PTAB received the nickname "patent death squads."

A recent petition to the U.S. Supreme Court challenged whether the PTAB's reviews violate the U.S. Constitution. The petition for certiorari filed by flash memory patent owner MCM Portfolio LLC urged the U.S. Supreme Court to take on its case against HewlettPackard Co. so the high court could rule on whether the PTAB's reviews violate the



Seventh Amendment to the Constitution. The Supreme Court, however, declined take up the issue in October 2016.

For now, the "new normal" for patent owners taking legal action against infringers is be ready to face litigation on two fronts—once in a federal district court and a second concurrently in an administrative litigation before the PTAB.

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[1] Markman v. Westview Instruments, Inc. 517 U.S. 370 (1996.)

[2] Halo Electronics, Inc. v. Pulse Electronics, Inc., No. 14-1513, June 13, 2016.