

THIRD PARTY STANDING AT THE FEDERAL CIRCUIT: A PATENT CHALLENGE DISPARITY

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INTRODUCTION

Article III of the United States Constitution and its derivative doctrinal requirements define the scope of authority for the federal judiciary. This Note explores the confines of the standing doctrine and Article III judicial power as exercised in patent cases, particularly in appeals at the Court of Appeals for the Federal Circuit (“Federal Circuit”), an Article III appellate tribunal, that originate from the Patent Trial and Appeal Board (“PTAB”), an Article I administrative tribunal. More specifically, this Note focuses on appeals from those PTAB petitioners classified as “third parties.” These include parties that are neither competitors in the same industry nor potential infringers, but rather academics, industry alliances, public-interest groups, or other related non-practicing entities.

Article III standing demands a showing of injury in fact through a concrete and particularized harm—a prerequisite for jurisdiction that third parties can rarely show. And because third parties cannot establish injury in fact, they lack the requisite standing under Article III to appeal from PTAB procedures. A lack of appellate standing, however, could significantly limit the role of third parties in these PTAB challenges,

leading to potentially unforeseen consequences, including the issuance and enforcement of more bad patents and appellate right imbalances.

I. STANDING LIMITATIONS

A. General Standing Doctrine

“[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.”¹ Over the years, the Supreme Court has explained that the irreducible constitutional minimum of standing consists of three elements: the plaintiff must have (1) suffered an injury in fact; (2) that is fairly traceable to the challenged conduct of the defendant; and (3) that is likely to be redressed by a favorable judicial decision.”² Additionally, Article III demands that an actual controversy “persist throughout all stages of litigation,”³ so the standing inquiry remains as relevant at the appellate stage as below.

For patent appeals, the injury in fact requirement provides the most likely hurdle to standing. To establish injury in fact, a plaintiff must show that he or she has suffered “an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical.”⁴ An injury in fact must be both concrete *and* particularized—concrete meaning “real and not abstract,” and particularized meaning the injury “must affect the plaintiff in a personal and individual way.”⁵ That said, a concrete injury need not be tangible.⁶

B. Standing Doctrine at the Federal Circuit

In 2014, the Federal Circuit first addressed the issue of standing from PTAB appeals in *Consumer Watchdog v. Wisconsin Alumni Research*

¹ *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

² *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citing *Lujan*, 504 U.S. at 560–61).

³ *See Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013).

⁴ *Spokeo*, 136 S. Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560) (internal quotations omitted).

⁵ *See id.*

⁶ *See id.* at 1549 (citing *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) (recognizing free speech as concrete injury)).

Foundation.⁷ In that case, the public interest group Consumer Watchdog sought appeal of its unsuccessful challenge of WARF's patent through the pre-AIA procedure, *inter partes* reexamination.⁸ The Federal Circuit, however, concluded that Consumer Watchdog lacked standing to appeal.⁹ In particular, the court concluded that Consumer Watchdog's dissatisfaction with the PTAB's decision did not constitute injury in fact, as the group possessed no right to a favorable outcome and thus was not denied anything to which it was entitled.¹⁰ Even the "statutory grant of a procedural right [to appeal]" failed to compensate for the lack of any concrete interest.¹¹

Moreover, in *Phigenix v. ImmunoGen*,¹² the Federal Circuit extended the reasoning of *Consumer Watchdog* to the *inter partes* review ("IPR") context.¹³ And since *Phigenix*, the court has consistently applied this same rationale to a swath of similar cases on PTAB appeal standing for third parties.¹⁴ One of the Federal Circuit's most recent—though unpublished—decisions on the matter seems to have garnered the Supreme Court's attention: *RPX v. ChanBond*.¹⁵ RPX describes its core business as resolving patent disputes through acquiring patent rights on the open market and in litigation, which includes filing IPR patent petitions.¹⁶ RPX sought review of an IPR decision, but the Federal Circuit found that RPX lacked standing to appeal, again invoking the reasoning from *Consumer Watchdog*¹⁷ and *Phigenix*.¹⁸ RPX argued two additional harms

⁷ *Consumer Watchdog v. Wis. Alumni Res. Found.*, 753 F.3d 1258 (Fed. Cir. 2014).

⁸ *Id.* at 1260.

⁹ *Id.* at 1263.

¹⁰ *Id.* at 1261–62.

¹¹ *Id.* at 1262 (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009)).

¹² *Phigenix, Inc. v. ImmunoGen, Inc.*, 845 F.3d 1168 (Fed. Cir. 2017).

¹³ *Id.* at 1175.

¹⁴ Compare *JTEKT Corp. v. GKN Auto. Ltd.*, 898 F.3d 1217, 1220–21 (Fed. Cir. 2018) (concluding that JTEKT failed to establish standing on appeal from a PTAB IPR for failing to show that development of its product created a concrete and substantial risk of infringement), with *Altaire Pharms., Inc. v. Paragon Biotech, Inc.*, 889 F.3d 1274, 1282–83 (Fed. Cir. 2018) (reasoning that Altaire had met its burden of showing appellate standing from a PTAB PGR by sufficiently establishing future risk of infringement).

¹⁵ *RPX Corp. v. ChanBond LLC*, No. 17-2346 (Fed. Cir. Jan. 17, 2018).

¹⁶ *RPX*, slip op. at 2.

¹⁷ *Id.* at 4 ("As to a right to compel cancellation of claims on unpatentable inventions, this issue was settled in *Consumer Watchdog*.") (citation omitted).

¹⁸ *Id.* at 4–5.

that the court had not addressed before: (1) injury to its status relative to its competitors; and (2) injury to its reputation of successfully challenging wrongfully issued patent claims. In response to RPX's first challenge, the Federal Circuit concluded that "RPX has not demonstrated that the Board's determination increased or aids the competition in the market of the non-defendant IPR petitioners."¹⁹ As to the second, the court found RPX's evidence insufficient to show that it would suffer a concrete and particularized harm of injury to reputation.²⁰ RPX filed a petition for certiorari to the Supreme Court, and the petition is currently pending.²¹

II. THIRD PARTY STANDING IN PTAB APPEALS

A. Adverse Decision

Congress has definitively spoken on one's right to appeal from a final written decision of the PTAB: "A party dissatisfied with the final written decision of the [PTAB] under section 318(a) may appeal the decision Any party to the [IPR] shall have the right to be a party to the appeal."²² The language is unambiguous: Congress sought to grant any party to an IPR the right to appeal the decision and to also remain a party on appeal.

But this language is irrelevant if Congress has acted outside the bounds of its constitutional power. Although some have asserted that the grant of this statutory right makes this "an easy case . . . to establish constitutional standing,"²³ this argument simply misses the point. Yes, the grant is clear in its language. But the Supreme Court explained in *Lujan v. Defenders of Wildlife* that this type of language confers merely a procedural right, and those denied it would suffer only a procedural injury.²⁴ Thus, while Congress plays a role in recognizing justiciable

¹⁹ *Id.* at 5.

²⁰ *Id.* at 6.

²¹ This petition was pending at the time this was written. On October 1, 2018 the Supreme Court invited the Solicitor General to submit a brief expressing the views of the United States. See *RPX Corp. v. ChanBond LLC*, 139 S. Ct. 306 (2018).

²² 35 U.S.C. § 319 (2012) (emphasis added). Note that 35 U.S.C. § 318(a) refers to the completion of an *inter partes* review proceeding.

²³ Charles Macedo, et al., *Rethinking Article III Standing in IPR Appeals at the Federal Circuit*, PATENT QUALITY INITIATIVE I, II (2018), <http://www.patentqualityinitiative.com/-/media/pqi/files/articles/rethinking-article-iii-standing-in-ipr-appeals.pdf>.

²⁴ See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 571–72 (1992).

rights, identification and elevation of an intangible harm by Congress does not mean “that a plaintiff automatically satisfies the injury in fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right.”²⁵

Instead, a plaintiff must allege that the procedural violation causes both concrete and actual or imminent harm.²⁶ This is because a violation of one of the procedural requirements imposed by the challenged act might fail to result in a legally cognizable injury.²⁷ And the procedural violation of disallowing appeal does not inevitably lead to concrete harm. Foremost in support of this notion is that this “statute did not guarantee a particular outcome favorable to the requester.”²⁸ Stated differently, an outcome which dissatisfies the petitioner of an IPR may not be one of actual harm, for a decision which upholds the patentability of challenged claims (necessarily one which would dissatisfy a petitioner arguing otherwise) does not automatically result in a wrongfully upheld patent.

Although an IPR decision upholding a potentially “bad” patent could be damaging to society, this harm is common to all members of the public and thus presents only a non-particularized “generalized grievance.”²⁹ The Court has differentiated between generalized grievances of harm to the public and those harms personalized and concrete to an individual, but widely shared.³⁰ The former do not confer standing, while the latter may. Here though, a public interest in the proper administration of the patent system through the conferral of protection only for valid patent claims parallels the generalized grievance found in cases like *United States v. Richardson*.³¹ It is unlike the particularized interest in obtaining campaign information to aid the petitioner’s voting choices recognized in *FEC v. Akins*,³² or the interest in obtain-

²⁵ *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016).

²⁶ *Id.*

²⁷ *See id.* at 1550.

²⁸ *Consumer Watchdog v. Wis. Alumni Res. Found.*, 753 F.3d 1258, 1262 (Fed. Cir. 2014).

²⁹ *See, e.g., Lujan*, 504 U.S. at 573–74; *Allen v. Wright*, 468 U.S. 737, 755–56 (1984).

³⁰ *See FEC v. Akins*, 524 U.S. 11, 23–25 (1998).

³¹ *See United States v. Richardson*, 418 U.S. 166, 176–77 (1974) (concluding that the alleged harm of the inability to obtain information about CIA expenditures was merely a general grievance common to all members of the public, so petitioners lacked standing).

³² *See Akins*, 524 U.S. at 21.

ing information about ABA committee meetings to aid the petitioners in the judicial selection process recognized in *Public Citizen v. United States Dep't of Justice*.³³ In both of these latter cases, the Court recognized a concrete interest in the inability to obtain information that would impact the petitioner's public participation as an injury personal to the petitioner, even if shared by many. In contrast, an interest in invalidating "bad" patents for society amounts merely to a generalized harm that does not particularly impact the third-party petitioner. As such, third-party petitioners will likely be unable to show a legally cognizable injury to meet the standing requirements.

B. Estoppel Provisions

Third-party litigants have also argued that the estoppel provisions which attach from § 315(e) are enough to serve as a concrete and particularized harm.³⁴ Yet as the Federal Circuit has correctly settled, these provisions do not constitute injury in fact when the appellant is not engaged in any activity that would give rise to a possible infringement suit.³⁵ This conclusion finds its basis in the concept of immediacy required to form injury in fact,³⁶ as a concrete injury can be satisfied by either an actual injury or by the real risk of harm.³⁷ The Court has acknowledged that while imminence is "a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending."³⁸

An estoppel provision inherently requires a future application. That is, a party may, in a future proceeding, assert a claim or defense; and then—and only then—may the opposing party raise in response a potential estoppel argument. This future application is one step of conjecture in most situations, but in patent law, an additional layer of future uncertainty is added when the precluded (estopped) instances are those that

³³ See *Public Citizen v. United States Dep't of Just.*, 491 U.S. 440, 449–50 (1989).

³⁴ See 35 U.S.C. § 315(e) (2012).

³⁵ See, e.g., *JTEKT Corp. v. GKN Auto. Ltd.*, 898 F.3d 1217, 1221 (Fed. Cir. 2018); *Phigenix, Inc. v. ImmunoGen, Inc.*, 845 F.3d 1168, 1175–76 (Fed. Cir. 2017); *Consumer Watchdog v. Wis. Alumni Res. Found.*, 753 F.3d 1258, 1262 (Fed. Cir. 2014).

³⁶ See, e.g., *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564 (1992).

³⁷ See *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016).

³⁸ *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (citations omitted).

only arise in the context of infringement litigation. Accordingly, parties have struggled to meet the high burden of imminence in IPR appeals.

The Federal Circuit's varying outcomes in *JTEKT v. GKN*³⁹ and *Altaire v. Paragon*⁴⁰ manifest the burden of these barriers. In *JTEKT*, the Federal Circuit concluded that JTEKT failed to show that its planned product would create a "substantial risk of future infringement."⁴¹ Compare this result to that in *Altaire*, where the court found that Altaire's risk of injury—namely, a real and imminent risk of infringement—demonstrated injury in fact.⁴² In reaching its contrary conclusion, the court noted that Altaire was currently involved in declaratory judgment litigation, that Altaire had declared their intent to file an ANDA,⁴³ and that an executive at Altaire had testified as to the likelihood of an infringement suit.⁴⁴ And so unlike *JTEKT*, the estoppel provisions—in addition to the substantial likelihood of an infringement suit—sufficed to confer standing.⁴⁵

Third parties which are not competitors or potential infringers themselves will generally be unable to show a substantial risk of infringement. By definition, third parties are those disconnected from the competitive regime, usually representing the interest of the public. The assertion of rights in the interest of others is exactly the type of claim that the standing doctrine seeks to eliminate. Therefore, without risk of infringement for these third parties, their claims as to the harm inflicted by the estoppel provisions is simply too hypothetical to arise to injury in fact. Contrary to their goal, opponents demonstrate the speculative nature of these provisions—"If not allowed an opportunity to timely appeal . . . such a petitioner will be estopped *down the road during the 20-year life [sic] the patent.*"⁴⁶ But down-the-road intentions are simply too conjectural to confer standing.⁴⁷

³⁹ *JTEKT*, 898 F.3d at 1220–21.

⁴⁰ *Altaire Pharms., Inc. v. Paragon Biotech, Inc.*, 889 F.3d 1274, 1282–83 (Fed. Cir. 2018).

⁴¹ *JTEKT*, 898 F.3d at 1221.

⁴² See *Altaire*, 889 F.3d at 1282–83.

⁴³ An ANDA is an Abbreviated New Drug Application, and filing one is a required step in the pharmaceutical patent dance.

⁴⁴ See 889 F.3d at 1282–83. It should also be noted that Paragon, the respondent here, refused to stipulate that it would not sue for infringement.

⁴⁵ *Id.* at 1283–84.

⁴⁶ Macedo, *supra* note 24, at 13.

⁴⁷ See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564 (1992).

III. CONSEQUENCES

A. *More “Bad” Patents?*

Eighty percent of IPR petitions have led to at least some claims being found unpatentable.⁴⁸ This statistic indicates that although initial patent grant determinations are frequently incorrect, many claims could possibly remain enforceable as an exclusive right to the patent owner without IPRs. The presence of these “bad” patents regrettably imposes significant institutional costs. Bad patents can lead to higher costs for goods and services, reduce consumer access to goods and services, and impede downstream research.⁴⁹ Furthermore, these social costs remain whether the patent is enforced or merely extant.⁵⁰ But even if bad patents are a harmful but inevitable consequence of a patent administration, the question remains as to whether the potential for *less* IPRs filed will truly mean *more* bad patents. The popularity and high success rate of IPR and other post-grant petitions suggests yes, but these are not the only means for challenging patent validity.

While Professor Mark Lemley argues that interested party challenges are a necessary means for invalidating bad patents,⁵¹ third parties are not the only interested parties that might file a post-grant review petition. Moreover, their participation in the system is not fully removed even if appellate rights are eliminated. Other means exist for third-party participation in the system, such as the ability to submit relevant prior art before the issuance of a patent application.⁵² Some have suggested that the right to appeal is crucial to third-party participation in post-grant review procedures, as demonstrated through the limited use of pre-AIA *ex parte* reexamination.⁵³ However, as the AIA’s legislative history sug-

⁴⁸ See United States Patent & Trademark Office, *Patent Trial & Appeal Bd., Trial Statistics IPR, PGR, CBM*, DEPARTMENT OF COMMERCE I, II (Sept. 2018), https://www.uspto.gov/sites/default/files/documents/trial_statistics_20180930a.pdf.

⁴⁹ See Sapna Kumar, *Standing Against Bad Patents*, 32 BERKELEY TECH. L.J. 87, 101–04 (2017).

⁵⁰ See Michael J. Burstein, *Rethinking Standing in Patent Challenges*, 83 GEO. WASH. L. REV. 498, 538–39 (2015) (citation omitted).

⁵¹ See Mark A. Lemley, *Rational Ignorance at the Patent Office*, 95 NW. U. L. REV. 1495, 1508–11 (2001).

⁵² See 35 U.S.C. § 122(e) (2012).

⁵³ See Brief for Askeladden LLC as *Amicus Curiae* in Support of Petitioner, RPX Corp. v. ChanBond LLC, *appeal docketed*, (No. 17-1686) (U.S. Mar. 27, 2018).

gests, a number of factors likely contributed to this procedure's limited popularity. These include the limited grounds one could raise for unpatentability, the limited participation allowed by the petitioner, and the lack of appellate rights.⁵⁴ But even when Congress included appellate rights in creating *inter partes* reexamination, the procedure remained largely underutilized because it was “troublesomely inefficient and ineffective as a truly viable alternative for resolving questions of patent validity.”⁵⁵ Contrary to the claims of third parties, the popularity of IPRs may not rise or fall with appellate rights.

B. *Appeal Imbalances*

One odd result of third parties lacking standing occurs when a third-party IPR petitioner wins at the PTAB, and the opposing patent holder seeks to appeal. The Federal Circuit addressed this question in *Personal Audio v. Electronic Frontier Foundation*,⁵⁶ where the petitioner below was a non-profit organization representing the public interest.⁵⁷ The court concluded that it could indeed hear the appeal, reasoning that only the party seeking entry to the court (here, Personal Audio) needs to have Article III standing.⁵⁸

Personal Audio leads to an imbalance in appellate rights. That is, had petitioner EFF lost its IPR challenge, it would not have had standing to appeal the decision. But, since EFF won at the PTAB, it was able to participate in the appeal initiated by Personal Audio. And while EFF won at the Federal Circuit on the merits, had it *lost*, an appeal to the Supreme Court would likely have been dismissed on standing grounds.⁵⁹ Thus, the system allows for additional bites at the apple for the patent owner, but not for the challenger. This case therefore highlights the systemic irregularities that occur as a result of third-party standing issues.

⁵⁴ See S. Rep. No. 110-259, at 18–19 (2008); H.R. Rep. No. 112-98, pt. 1, at 45 (2011).

⁵⁵ S. Rep. No. 110-259 at 19 (noting only the lengthy time frame for resolution and limited bases for challenging as the continued inefficiencies of *inter partes* reexamination).

⁵⁶ *Pers. Audio, LLC v. Elec. Frontier Found.*, 867 F.3d 1246, 1249 (Fed. Cir. 2017).

⁵⁷ See *id.* at 1249.

⁵⁸ *Id.* at 1249–50; see also *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617–18 (1989).

⁵⁹ *But see ASARCO*, 490 U.S. at 617–20 (discussing how an adverse judgment of a lower court may serve as injury in fact).

C. *Alternative Avenues*

Whether a third party has Article III standing is a highly fact-specific inquiry. As such, the Federal Circuit has allowed for third parties to supplement the record to substantiate their standing claims.⁶⁰ Certain evidence including concrete plans for future activity that creates a substantial risk of future infringement,⁶¹ plans for a proceeding where the estoppel provisions would apply,⁶² or evidence that a party is an actual or prospective licensee of the patent,⁶³ can bolster a standing claim. *RPX* illuminates yet another possible avenue for a successful showing of standing—economic and competitive loss.⁶⁴ The Supreme Court has likewise recognized that a party who suffers economic or competitive loss as a result of government action that increases competition or aids the plaintiff's competitors may have standing to challenge that government action.⁶⁵ Nonetheless, this barrier may be a high one. The *RPX* court was unconvinced by *RPX*'s evidence, finding that it spoke too generally and speculatively about the potential harm incurred.⁶⁶ However, simply because *RPX* failed does not necessarily imply that other third parties will too. Third parties seeking standing should hence look to put forth evidence of direct economic and competitive harm as a result of the PTO upholding the patent claims.

D. *Normative Considerations*

Congressional intent in passing the AIA stands in complete opposition to denying appellate rights for third parties. And a legislative scheme which accounts for appellate rights that are subsequently removed by judicially-imposed standing requirements may not promote a healthy patent system. As the discussion regarding “bad” patents above illumi-

⁶⁰ See *Phigenix, Inc. v. ImmunoGen, Inc.*, 845 F.3d 1168, 1173 (Fed. Cir. 2017).

⁶¹ *JTEKT Corp. v. GKN Auto. Ltd.*, 898 F.3d 1217, 1221 (Fed. Cir. 2018).

⁶² *Altaire Pharms., Inc. v. Paragon Biotech, Inc.*, 889 F.3d 1274, 1283–84 (Fed. Cir. 2018).

⁶³ *Phigenix*, 845 F.3d at 1173.

⁶⁴ See *RPX Corp. v. ChanBond LLC*, No. 17-2346, slip op. at 5–6 (Fed. Cir. Jan. 17, 2018).

⁶⁵ See, e.g., *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 477 (1940); see also *Canadian Lumber Trade Alliance v. United States*, 517 F.3d 1319, 1332–33 (Fed. Cir. 2008).

⁶⁶ *RPX*, slip op. at 5–6.

nates, Congress passed the AIA in response to the patent community's call for "improving patent quality and providing a more efficient system for challenging patents that should not have issued."⁶⁷ However, the PTO will be less likely to hear from broader, public-interest based considerations, and may even suffer a collective action problem, spurred by the notion that patent invalidation binds nonparties too.⁶⁸ The costs of bad patents are moreover exacerbated by patent assertion entities like "patent trolls" and increased settlement costs.⁶⁹ Normatively then, a more expansive view of standing by the courts in light of these consequences may be preferable.⁷⁰

The doctrines of champerty and maintenance may provide ethical guidance. These old English-law doctrines that relate to the role of third parties in traditional litigation sought to prohibit third parties from funding or otherwise interfering with another's lawsuit.⁷¹ They were designed to eliminate proxy wars, a concern that developed from the feudal lord system and efforts by wealthy barons to corrupt the legal process.⁷² The ABA Model Rules, with a similar distaste for proxy wars, adopted Rule 5.4 to limit third-party associations with attorneys.⁷³ The role of third parties in seeking to invalidate patents at the PTAB runs in a similar vein, particularly when these third parties are profit-seeking entities whose business models rely on their ability to participate. Burford, a large litigation funder, argues alternatively that these doctrines are no longer justified but for the extreme situation.⁷⁴ Whether the role

⁶⁷ See H.R. Rep. No. 112-98, pt. 1, at 39-40 (2011).

⁶⁸ See Rochelle Cooper Dreyfuss, Giving the Federal Circuit a Run for its Money: Challenging Patents in the PTAB, 91 Notre Dame L. Rev. 235, 297-98 (2015).

⁶⁹ See Burstein, *supra* note 52, at 539-40.

⁷⁰ See *id.* at 542; Dreyfuss, *supra* note 69, at 298.

⁷¹ See generally Lord Neuberger, President of the Supreme Court, Speech at the Harbour Litigation Funding First Annual Lecture (May 8, 2013), (transcript of speech available at <https://www.supremecourt.uk/docs/speech-130508.pdf>).

⁷² See *id.* at 7-10.

⁷³ See Model Rules of Prof'l Conduct r. 5.4 (Am. Bar Ass'n, 2018).

⁷⁴ See Burford Capital, *Litigation Finance is Not Champerty, Maintenance or Barratry*, BURFORD CAPITAL BLOG (July 30, 2013), <http://www.burfordcapital.com/blog/litigation-finance-not-champerty-maintenance-barratry/>. An extreme situation may be a true proxy war, like that of the most recent Peter Thiel/Gawker saga. Peter Thiel was open about his goals to kill Gawker Media after they published a piece that revealed he was gay. In his plot for revenge, he funded a lawsuit between Gawker and Hulk Hogan on completely unrelated claims, which ultimately led to the bankruptcy of Gawker. See, e.g., Rowland Manthorpe, *How Peter Thiel and Hulk Hogan Broke Gawker: UpVote 24*, WIRED

of third parties in the patent system truly meets this level of intervention is one which remains unanswered, and this Note does not purport to answer fully that question. Nevertheless, the unique dynamics of the patent system, such as the adjudication of public rights, may thus lead to the conclusion that public intervention and public discourse are indeed proper.

CONCLUSION

The current patent system has sought to create a means for ensuring the “Progress of Science and useful Arts”⁷⁵ through its system of post-grant second-look procedures. However, as this paper has argued, the current system is flawed. Congress may have granted third parties appellate rights from PTAB post-grant procedures in the AIA, but because of Article III standing principles, it lacked authority to do so.

Only time will show if the Federal Circuit’s continued stance on third-party standing will ultimately lead to a decline in third-party post-grant petitions. Third parties may be able to eventually provide stronger evidence of harm created through lost appellate rights. Additionally, whether the adjudication of patent rights, vis-à-vis IPRs, is rendered improper for an Article I tribunal when no Article III court can review the outcome remains an open question. While public rights adjudication generally lacks an Article III adjudicator, due process concerns may require otherwise.

Finally, third-party participation may be even more than just preferable, but instead a necessary element to the administration of a successful patent system. Third-party interference may be justified in this particular instance, especially given the public nature of the rights at stake. Therefore, although traditional standing doctrines dictate a limited reading that leads to the exclusion of third parties, administrative difficulty and the unique rights at issue may necessitate a broader interpretation of who may “stand” to challenge patent claims. ■

(Mar. 8, 2018), <https://www.wired.co.uk/article/ryan-holiday-conspiracy-peter-thiel-gawker-hulk-hogan>.

⁷⁵ U.S. CONST. art. I, § 8, cl. 8.