



June 4, 2018

Chief Judge David P. Ruschke
US Patent and Trademark Office
Patent Trial and Appeal Board
Madison Building (East)
600 Dulany Street
Alexandria, Virginia 22313

VIA FED EX

Dear Judge Ruschke:

I write on behalf of the Electronic Frontier Foundation (EFF) to request that the Patent Trial and Appeal Board amend its docketing practices and the PTAB E2E system to ensure that complete dockets are available to the public. Under current practice, when a document is submitted to the PTAB under seal, the corresponding docket entry is not visible to the public. In other words, even the fact that these filings exist is kept secret. This violates the public's First Amendment right of access to trial proceedings.

On January 26, 2018, EFF submitted a Freedom of Information Act request to the USPTO requesting a list of docket entries from post-grant proceedings where the entry was hidden from the public.¹ In response, the USPTO produced a table with 16,773 entries. Many of the entries appear to correspond to documents that were improperly sealed. For example, some of the entries correspond to patents that were improperly submitted as sealed exhibits. We are concerned that the PTAB is allowing parties to seal documents that should be publicly filed.

For some entries, a public redacted version of the same document was filed and appears on the docket. But we have also found that many entries have no corresponding public docket entry.² In other words, not only was the entire document withheld from the

¹ More precisely, we requested: “[A]ny and all documents or databases relating to any post-grant proceedings (i.e. any post grant review, inter partes review, or covered business method review) that comprise a list of documents filed in a post-grant proceedings, where there is a related Visibility category or field, and where the value for that related Visibility category or field has a value of either Private or Board for at least one of the documents in that post-grant proceeding.”

² To provide just two examples from what appear to be many thousands, in IPR2016-01526, the parties filed a Join Motion to Terminate Proceeding (Paper 19) but no public version was filed and no entry appears in the public docket. In IPR2015-00013, the Mandatory Notice under 37 CFR 42.8 (Paper 8) appears to have been filed under seal (likely improperly) and no entry appears on the publicly available docket.

public, but its filing was kept secret. Even when the underlying document is properly sealed, the public should not be excluded from knowing that a document was filed at all. Otherwise the media and other members of the public will have no way to monitor proceedings and no way to challenge improper claims of secrecy.

“Courts and commentators have long recognized the centrality of the openness to adjudicatory proceedings[.]” *N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.* (“NYCLU”), 684 F.3d 286, 296 (2d Cir. 2011). When considering whether an administrative proceeding is subject to First Amendment right of access, courts look to “whether openness enhances the ability of the government proceeding to work properly and to fulfill its function.” *NYCLU*, 684 F.3d at 301-02 (internal quotation marks omitted); *see also Detroit Free Press v. Ashcroft*, 303 F.3d 681, 704 (6th Cir. 2002); *Barrett v. Volz*, No. 2:16-CV-209, 2016 WL 4082640 (D. Vt. Aug. 1, 2016). Courts also consider whether the tribunal operates “under procedures modeled on those of the courts, and impose[s] official and practical consequences on members of society.” *NYCLU*, 684 F.3d at 298-300.

Trial proceedings before the PTAB under the America Invents Act are precisely the kind of procedure that courts have found subject to First Amendment right of access. They are an adversarial, adjudicative process. *See Detroit Free Press*, 303 F.3d at 696. Moreover, as an invalid patent can improperly limit the entire public, the public has a strong interest in PTAB proceedings. *See NYCLU*, 684 F.3d at 301. For these reasons, the PTAB’s current docketing practices violate the public’s right of access. *Detroit Free Press*, 303 F.3d at 683 (“When government begins closing doors, it selectively controls information rightfully belonging to the people.”)

The USPTO must reform its system to ensure all docket entries are made public in the PTAB E2E portal. To be clear, we are not arguing that all *filings* must be made public. Some PTAB filings may contain genuinely confidential information. But the PTAB should not withhold the existence of filings. Instead, the PTAB should immediately reconsider and reverse its unnecessary and overbroad secret docketing practice.

Very truly yours,



Daniel K. Nazer
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