

IN THE  
**Supreme Court of the United States**

MILO SHAMMAS,

*Petitioner,*

*v.*

DREW HIRSHFELD, COMMISSIONER OF PATENTS,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

**BRIEF OF THE INTELLECTUAL PROPERTY LAW  
ASSOCIATION OF CHICAGO AS *AMICUS CURIAE*  
IN SUPPORT OF PETITIONER**

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## I. INTEREST OF *AMICUS CURIAE*

The Intellectual Property Law Association of Chicago (“IPLAC”) submits this brief as *amicus curiae* in support of Petitioner on the first question presented in the case.<sup>1,2,3</sup> Founded in 1884, the Intellectual Property Law Association of Chicago is a voluntary bar association of over 1,000 members who practice in the areas of patents, trademarks, copyrights, trade secrets and the legal issues they

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<sup>1</sup> Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in any part or made a monetary contribution intended to fund preparation or submission of the brief, and no person other than the *amicus curiae*, its members, or its counsel, made such a monetary contribution.

<sup>2</sup> In addition to the required statement of footnote 1, IPLAC adds that after reasonable investigation, IPLAC believes that (a) no member of its Board or Amicus Committee who voted to prepare this brief, or any attorney in the law firm or corporation of such a member, represents a party to this litigation in this matter, (b) no representative of any party to this litigation participated in the authorship of this brief, and (c) no one other than IPLAC, or its members who authored this brief and their law firms or employers, made a monetary contribution to the preparation or submission of this brief.

<sup>3</sup> Pursuant to Supreme Court Rule 37.2 timely notice was given of the intent to file this brief and consent was granted.

present. Located in Chicago, a principal forum for U.S. patent litigation, IPLAC is the country's oldest bar association devoted exclusively to intellectual property matters. Its members include attorneys in private and corporate practices before federal bars throughout the United States, as well as the U.S. Patent and Trademark Office and the U.S. Copyright Office. IPLAC represents all of trademark holders, patent holders and other innovators in roughly equal measure. These clients range from individuals to start-ups to large corporations. In litigation, IPLAC's members are split roughly equally between plaintiffs and defendants. As part of its central objectives, IPLAC is dedicated to aiding in the development of intellectual property law, especially in the federal courts.<sup>4</sup>

## II. SUMMARY OF ARGUMENT

The trademark and patent laws of the United States establish the routes through which an applicant to the United States Patent and Trademark Office ("USPTO") may seek redress for the improper denial of a mark or patent by the Office. 15 U.S.C. § 1071 provides that an adverse decision in a trademark application process may be appealed to the United States Court of Appeals for the Federal Circuit or an action may be taken in United States District Court. Similarly, 35 U.S.C. §

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<sup>4</sup> Although over 30 federal judges are honorary members of IPLAC, none of them were consulted or participated in any way regarding this brief.

145 provides that upon a final adverse decision on a patent application by the Office, the applicant may seek review via an appeal to the Federal Circuit or an action may be taken in United States District Court. (Somewhat similarly, a copyright applicant who is denied copyright registration by the United States Copyright Office may seek redress through the Administrative Procedure Act via district court. 5 U.S.C. § 702 (2015).)

In both trademark and patent application matters, the statutes require the applicant to pay all “expenses” of the action in district court without regard to whether the applicant is successful in the district court. In this case, the district court below improperly awarded the Government, as “expenses,” the salaries paid to the government’s attorneys and paralegals who worked on the case.

Such an award of attorney fees ultimately eliminates the option of district court review for applicants because, even if successful, the applicant could be subject to fees that make the action economically unfeasible. Permitting the USPTO to abrogate a route permitted by statute via unprecedented salary recovery would be allowing the USPTO to rewrite the statute and remove the district court option.

In addition, the statutes governing the setting of fees by the USPTO, the fee setting process engaged in by the USPTO, and the actual fees charged to applicants by the USPTO already take into account the costs of running the office including the salaries of government employees involved in any appeals or actions raised in district court. The USPTO’s budgeting and fee setting process is or



should be also taking into account outside counsel engaged by the Office to represent the Government in any appeals or district court actions. Permitting the recovery of employee salaries amounts to a double recovery by the USPTO.

Finally, when Congress permits the recovery of attorney fees in actions involving the Government, Congress provides for such recovery, setting out that provision explicitly. In most such cases, these attorney fee provisions protect the rights of a private citizen to be made whole by an award of attorney fees, not the government.

IPLAC's members and the clients those members represent believe that the statutory process for contesting an adverse decision by the USPTO cannot be abrogated by the Office rendering the process financially unfeasible. IPLAC's members and their clients should not be exposed to payment of government attorney fees based on a slim reference to "expenses" where there is no indication in the statutory provisions that such expenses would include attorney fees — especially where the applicant is successful.

### III. ARGUMENT

#### **A. The AIA Sets the Process By Which the USPTO Funds the Operations of the Office**

The Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011), (the "AIA") seeks to improve the climate for investment and industrial activity by improving the quality of trademarks and patents. *See* H. R. Rep. No. 112-98, pt. 1, at 39-40;

*see In re Cuozzo Speed Technologies, LLC*, 793 F.3d 1268, 1285 (Fed. Cir. 2015) (Newman, J., dissenting); Changes to Implement Transitional Program for Covered Business Method Patents, 77 Fed. Reg. 7080, 7081 (Feb. 10, 2012).

One way by which Congress intended to improve the quality of trademarks and patents was by ending the long standing diversion of fees collected by the USPTO to fund other unrelated government operations. Section 10 of the AIA authorizes the Director of the USPTO to set or adjust fees charged to applicants for trademarks and patents. 35 U.S.C. §§ 41-42. These fees must be set such that in the aggregate, they fund the operations of the USPTO including the administrative costs of the Patent Office and the Trademark Office. *Id.* The AIA even outlines the process by which the USPTO sets or adjusts fees. In setting the fees charged to applicants, the entire cost of operating the USPTO is intended to be, and has been, taken into account.

However, the AIA does not provide for the Office to seek recovery of attorney and paralegal salaries in a district court action as a part of this fee setting process. Having already charged the applicant a fee calculated to cover the Office's operation when the trademark or patent application was filed, the Office has already appropriately charged the applicant for its staff attorneys, paralegals, and even outside counsel that the Office expects to engage during the entire examination process. While no one application fee may cover these costs, when taken in total, the application fees were calculated at a rate sufficient to cover these salaries.

Further, to the extent that the recovery of attorney and paralegal salaries amounts to a fee increase to a trademark applicant, the USPTO has not followed the fee setting provisions provided for by the AIA. 35 U.S.C. § 3(a)(2)(B) requires that the Director of the United States Patent and Trademark Office consult with the Trademark Public Advisory Committee before changing [increasing] patent or trademark user fees. There is no record regarding such consultation reflected in the minutes of the Trademark Public Advisory Committee minutes found on the USPTO website at <http://www.uspto.gov/about-us/organizational-offices/public-advisory-committees/trademark-public-advisory-committee-2>.

**B. Government Attorney and Paralegal Salaries Are Not “Expenses” Contemplated by 15 U.S.C. § 1071(b) to be Recovered by the Government When the Trademark Applicant Elects the District Court Route**

Section 21(b) of the *Lanham Act* codified at 15 U.S.C. § 1071(b) provides a trademark applicant the right to seek independent review of the USPTO’s refusal to register a trademark in an *ex parte* administrative proceeding before the Trademark Trial and Appeal Board (“TTAB”). 15 U.S.C. § 1071(b). Congress did not grant this right and simultaneously take this right away by a grant of “expenses.” Far too many applicants cannot afford to pay “expenses” as defined by the district court whether they win or lose in a district court proceeding.

The district court in *Shammas v. Focarino* defined “expenses” under Section 21(b)(3) as “all the resources expended by the PTO during the litigation, including attorney’s fees.” *Shammas v. Focarino*, 990 F. Supp. 2d 587, 591 (E.D. Va. 2014) *aff’d*, 784 F.3d 219 (4th Cir. 2015). When affirming the lower court’s broad definition of “expenses,” the Fourth Circuit explained that Section 21(b)(3) “imposes a unilateral, compensatory fee, including attorneys fees, on every *ex parte* applicant who elects to engage the resources of the PTO when pursuing a *de novo* action in the district court....” *Shammas v. Focarino*, 784 F.3d 219, 225 (4th Cir. 2015). According to the Fourth Circuit, an applicant must pay this “compensatory fee” even if the USPTO improperly prevented the registration of the applicant’s trademark. This unsettling, overly broad construction means that IPLAC’s members and their clients must pay twice for the salaries of government employees, to essentially do their job, once via an application fee and then, via attorney and paralegal fees.

In a “Section 21(b) action,” the district court may affirm, reverse, or modify a decision of the TTAB. That action may include issuing a decision that entitles an applicant to registration despite the USPTO’s position, so long as the applicant meets the other requirements for registration. *See* 15 U.S.C. § 1071(b)(1) (“The court may adjudge that an applicant is entitled to a registration upon the application involved.... Such adjudication shall authorize the Director to take any necessary action, upon compliance with the requirements of law.”). If a party seeks independent review before a district court, the plain language of Section 21(b)(3) provides

that “unless the court finds the expenses to be unreasonable, all the expenses of the proceeding shall be paid by the party bringing the case, whether the final decision is in favor of such party or not.” 15 U.S.C. § 1071(b)(3). The text of the statute and common sense indicates that Congress did not intend for the courts to construe “expenses” so broadly as to include USPTO attorney and paralegal salaries, and effectively foreclose the opportunity of independent review before the district court.

The right to appeal to a federal district court in a Section 21(b) action has significant advantages for an applicant. But more, the loss of that right has significant detriments for both the applicant and the USPTO.

For instance, a USPTO attorney may raise unexpected issues in refusing a registration. After registration is refused, the applicant may file an *ex parte* appeal with the TTAB, but no additional evidence can be submitted and the TTAB proceeds based on the record created during the examination process. Trademark Trial and Appeal Board Manual of Procedure § 1207.01 (2012-2015). The *ex parte* appeal before the TTAB is a “simpler and shorter procedure, involving only the filing of briefs by the applicant and examining attorney, and, if requested by the applicant, an oral hearing.” TBMP § 102.03 (2012-2015).

The TTAB can also yield unexpected results. If an applicant loses at the TTAB, Section 21(b) provides the applicant two choices: (1) an appeal to the Federal Circuit in which the case proceeds on a closed record or (2) a civil action in a federal district court in which the applicant can submit new

evidence. 15 U.S.C. § 1071(a) and (b). Should the TTAB affirm rejection of a trademark application on the basis of likelihood of confusion, the applicant later in district court can (1) introduce survey evidence refuting any alleged likelihood of confusion, (2) submit evidence of the sophistication of the buyers, and/or (3) submit evidence of differing channels of trade. Such evidence often is not now adduced in the USPTO and thus would not be available during a direct appeal to the Federal Circuit. Requiring applicants to pay government attorney fees in district court, on the other hand, requires future trademark applicants in fear of paying such fees to spend countless sums generating and submitting surveys and other such evidence to examining attorneys. This requires USPTO review of such evidence – where such matters might otherwise not even come up in the examination process.

Also, the district court provides the advantage of *de novo* review, an entirely independent review of the record and newly submitted evidence. *See, Swatch AG v. Beehive Wholesale, LLC*, 739 F.3d 150, 155 (4th Cir. 2014). In contrast, the Federal Circuit applies the “substantial evidence” standard of review, which is deferential to the TTAB. *See, In re Bayer Aktiengesellschaft*, 488 F.3d 960, 964 and 966 (Fed. Cir. 2007) (“Where the evidence of record is conflicting and supports both registration and refusal of registration, the substantial evidence standard of review dictates that we affirm the Board.”). The applicant thus can succeed in district court by creating a more thorough record for district court review. A Federal Circuit appeal on a closed record and an affirmed rejection subject to review

only for the presence or absence of substantial evidence is far less desirable.

Requiring an applicant who chooses a routine record in the USPTO, followed by taking on the advantages of district court, to be responsible for government attorney and paralegal salaries penalizes the applicant regardless of the merit of the case. The result is the denial of a deserving registration subject to evidentiary needs beyond the record made with the USPTO, unless the applicants can afford to pay for USPTO salaries at the district court. Only applicants with deep pockets would be able to afford the luxury of more evidence and independent review.

Congress did not grant trademark applicants the right to seek independent review before a district court in exchange for such unpredictable and excessive costs – whether they are the extraordinary expenses of generating the evidence for an enhanced initial record, or USPTO attorneys fees. Requiring payment of the government’s legal fees precludes applicants from pursuing routine examination and only if necessary, district court trial.

**C. Government Attorney and Paralegal Salaries Are Also Not “Expenses” Contemplated by 35 U.S.C. § 145 to be Recovered by the Government When the Patent Applicant Elects the District Court Route**

Just as Congress provides trademark applicants with two paths as to a TTAB decision, Congress provides patent applicants with two paths when appealing a Patent Trial and Appeal Board

(“PTAB”) decision. An applicant may either appeal to the Federal Circuit, under 35 U.S.C. § 141, or it may appeal to the United States District Court for the Eastern District of Virginia, under 35 U.S.C. § 145. The latter statute states that “all the expenses of the proceedings shall be paid by the applicant.” If the USPTO is successful in seeking attorney fees in a trademark district court action, it will inevitably seek such fees in a patent action. The Fourth Circuit’s decision will negatively affect IPLAC members and their patent clients.

The Fourth Circuit’s trademark decision undermines Congress’ intent of providing two patent appeal options also. Specifically, requiring patent applicants to pay for attorney and paralegal fees, in addition to the statutorily designated proceeding expenses, win or lose, deters patent applicants from pursuing their district court rights. Only well funded corporations can afford such a luxury. For small entities, for which the patent law provides lower application fees in acknowledgement of their value and yet lack of resources, applicants will have no other financial choice but to remain within the administrative process by appealing to the Federal Circuit. However, within the Federal Circuit, applicants are not provided the benefit of *de novo* review, and are instead limited to the record created in a PTAB proceeding. This was not Congress’ intent.

Further, as discussed above, patent prosecution fees are set to cover USPTO salaries of professionals working on these foreseen appeals. Therefore, Congress has explicitly stated the extent to which a patent applicant is responsible for paying



any monies to the government in these civil proceedings. Additionally, there is no evidence that Congress intended for a successful applicant in district court to be burdened with the cost of Government employee salaries.

This country was built on the belief that incentivizing science and inventions is important to society. However, given the Fourth Circuit's broad interpretation of "expenses," fewer valuable patents may issue and that will be a loss of potential jobs in the United States. Patent applicants, especially small entities, should not be burdened with paying the salaries of government paralegals and attorneys who may very well have improperly rejected the applicants' patent applications during examination at the USPTO.

#### **D. Congress Is Clear When Providing for the Recovery of Attorney Fees**

Congress has repeatedly permitted the recovery of attorney fees from the government by citizens in actions involving the government. Likewise, Congress has specifically provided for the recovery of attorney fees by litigants in private litigation and has occasionally explicitly permitted such recovery by the government. As reported by the Congressional Research Service Report for Congress titled Awards of Attorneys' Fees by Federal Courts and Federal Agencies as updated June 20, 2008, (the "CSR Report") hundreds of individual statutory provisions provide specifically for the recovery of attorney fees. HENRY COHEN, CONG. RESEARCH SERV., 94-970, AWARDS OF ATTORNEY'S FEES BY FEDERAL COURTS AND FEDERAL AGENCIES. Even in the *Lanham*

*(Trademark) Act*, Congress directly provided for the recovery of attorney fees in certain situations, such as when someone is damaged by a wrongful seizure order, or in exceptional cases. 15 U.S.C. §§ 1116(d)(11), 1117(a), and 1122. Likewise, the statutes governing patent applications provide directly for the potential recovery of attorney fees in specific situations. 35 U.S.C. §§ 271(e)(4), 285 and 296(b).

Across a wide range of diverse Acts, the recovery of attorney fees is specifically addressed. Among the hundreds of provisions identified in the CSR Report in 2008 are the *Ethics in Government Act of 1978*, 2 U.S.C. § 288(d); the *Freedom of Information Act*, 5 U.S.C. § 552(a)(4)(E)(i); the *Civil Service Reform Act of 1978*, 5 U.S.C. § 5596(b)(1); the *Gonzalez Act*, 10 U.S.C. § 1089(f)(2); the *Housing Act of 1959*, 12 U.S.C. § 1701q-1(f) (specifically provided for an attorney fee award to the United States); the *Financial Institutions Anti-Fraud Enforcement Act of 1990*, 12 U.S.C. § 4246 (also providing for the award of attorney fees to the United States); the *Consumer Product Safety Act*, 15 U.S.C. § 2060(c) (providing for attorney fee award even against the United States); the *Copyright Act* (provisions including 17 U.S.C. § 505, 511(b), 512(k) and 1325); the *Gun Control Act of 1968*, 18 U.S.C. § 924(d)(2)(B); the *Navajo and Hopi Indian Relocation Amendments Act of 1980*, 25 U.S.C. § 640d-27(a); the *False Claims Act*, 31 U.S.C. § 3730(d)(1); the *Oil Pollution Act of 1990*, 33 U.S.C. § 2715(c); the *Safe Drinking Water Act*, 42 U.S.C. § 300h-2(c)(7); the *Social Security Act*, 42 U.S.C. § 669a(c) and other sections; and the *Civil Rights Attorney's Fees Awards Act of 1976*, 42 U.S.C. § 1988(b). When

Congress desires to make attorney fees available, it does so explicitly.

IPLAC's members and their clients need to be able to rely on the plain language of statutes in determining the course of action to take when their applications are rejected by the USPTO. Having unknown amounts of attorney and paralegal salaries to pay would impede their ability to pursue all of the remedies provided to them by statute. Where a statute such as the one at issue here does not specifically provide for the recovery of attorney fees, none should be recoverable.

#### IV. CONCLUSION

For the reasons above, the Court should grant *certiorari* to clarify the proper meaning of the term “expenses” as used in 15 U.S.C. § 1071 and should reject any definition that includes government attorney and paralegal salaries and other attorney fees.

Respectfully submitted,

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