

Inter Partes Review (IPR) Has Been Successful In Allowing Companies To Challenge Bad Patents And Is Critical To Protecting U.S. Manufacturers

Bad Patents Are A Drag On Manufacturers And The U.S. Economy

Bad patents have large economic costs.

- *The direct litigation costs, alone, are substantial.*
 - The American Intellectual Property Law Association has found that the median cost for litigating a patent case with less than \$1 million at risk is \$600,000.¹
 - For cases with more than \$25 million at risk, the median cost of litigating through trial is \$5 million.²
- *Patent litigation also distracts companies from their work.*
 - Companies need to take engineers away from doing actual engineering work and force them to talk to lawyers, prepare for depositions, and testify at trial.
 - Perhaps most importantly, manufacturers are deterred from creating products when they fear that they may be hit with a patent lawsuit.

All of these costs to manufacturers raise prices for consumers, or prevent goods from reaching consumers' hands altogether.

If an asserted patent is valid—that is, the inventor truly created something novel and nonobvious—the costs to manufacturers may be worth it to incentivize innovation. But when the patents are bad—that is, they are based on abstract ideas, old ideas, or obvious ideas—they serve no positive purpose. Holders of bad patents inflict billions of dollars of costs on the U.S. economy in an effort to get rich quick. One study found that lawsuits by non-practicing entities—that is, patent holders who do not actually manufacture or implement their invention—were associated with half a trillion dollars of lost wealth to defendants from 1990 to 2010.³

Inter Partes Review Has Been Successful In Weeding Out Bad Patents

IPR has been highly successful at weeding out bad patents. As Carl Shapiro, an expert on competition policy at the University of California, Berkeley, put it, “we have made an impressive amount of progress over the last five to 10 years in getting the patent system more into balance.”⁴

¹ American Intellectual Property Law Association, Report of the Economic Survey 2007

² American Intellectual Property Law Association, Report of the Economic Survey 2011

³ Michael Meurer, et al., *The Private and Social Costs of Patent Trolls*, 34 Regulation 26, 26 (2012).

⁴ Eduardo Porter, *Patent 'Trolls' Recede as Threat to Innovation. Will Justices Change That*, NY Times (Nov. 21, 2017), available at <https://www.nytimes.com/2017/11/21/business/economy/patents-trolls-supreme-court.html>.

- In fiscal year 2018, the PTAB initiated 859 reviews of issued patents.⁵
- In more than 80% of IPRs that reached a final written decision, the PTAB cancelled some or all patent claims (that is, found them invalid) or the patent owner conceded that the claims were invalid.⁶
- IPR has thus proven to be a highly targeted and successful method of rooting out and canceling bad patent claims.

It has been estimated that in the first five years after IPR was created, IPR has helped patent owners and accused infringers avoid at least \$2.31 billion in deadweight losses by providing an efficient system for challenging patents.⁷ IPR has proven much less expensive than district-court litigation. The average cost of IPR through a PTAB hearing is \$275,000—far less than the \$600,000 to \$5 million cost of district-court litigation.⁸

These savings add up. They result in lower prices for American consumers and more jobs for employees of manufacturing companies.

⁵ PTAB, Trial Statistics 6 (Apr. 2019), available at https://www.uspto.gov/sites/default/files/documents/trial_statistics_apr_2019.pdf. These numbers include IPR and a small number of petitions for post-grant review and covered business method review—post-issuance review proceedings similar to IPR.

⁶ Elliot C. Cook, et al., *Claim and Case Disposition*, <https://www.finnegan.com/en/america-invents-act/claim-and-case-disposition.html>.

⁷ Josh Landau, *Inter Partes Review: Five Years, Over \$2 Billion Saved*, Patent Progress (Sept. 14, 2017), <https://www.patentprogress.org/2017/09/14/inter-partes-review-saves-over-2-billion/>.

⁸ American Intellectual Property Law Association, Report of the Economic Survey 2015