

The America Invents Act of 2011 Created A Decade of Stolen Dreams

The unintended consequence of the America Invents Act of 2011 (AIA) was the devastation introduced to our unique American patent system.

Unlike real courts, the Patent Trial and Appeal Board (PTAB), created by the AIA, does not presume a patent is valid. To the PTAB, it does not matter how long the patent has been in effect, how successful the invention has been, how many companies have licensed the patent, or how many times the patent has been validated in actual courts. Most patents challenged at the PTAB are inevitably declared unpatentable - almost by default.

Inter Parts Review (IPR) and Post Grant Review (PGR) proceedings at the PTAB result in 84% of instituted patents with a PTAB Final Written Decision invalidated in whole or in part.

Administrative Patent Judges (APJs), who are not real judges, form an administrative tribunal with little to no technical experience in the special fields they are "judging." APJs are invalidating patents that have been previously validated by the much more experienced USPTO Patent Examiners who issued them. Additionally, the PTAB "court" does not include a trial by jury, and there is very little due process afforded an inventor whose patent claims have been challenged by an infringer. Even more alarming, according to Katznelson, APJs earn bonuses for invalidating patents of \$314 per decision, compared to an average of \$2 for decisions upholding all patent claims.

Due to the expense of a PTAB hearing, and the fact that one patent may face numerous hearings - each one costing hundreds of thousands of dollars - many cases have resulted in settlements without any inventor compensation or even complete abandonment of the patent.

One reason given for the PTAB being necessary has been for small businesses to be able to fend off Non-Practicing Entities (NPEs) or alleged "patent trolls." That has not been the case. Of the more than 12,000 PTAB petitions that have been filed, less than 2% comprise small and medium size entities filing against NPEs. Instead, for some of the reasons above, deep pocketed multinational conglomerates and Big Tech have used the PTAB to, basically, steal inventions from independent inventors and eliminate disruptive startups.

The AIA created the ultimate dichotomy. From the beginning, it has been the duty of the USPTO to issue patents that provide exclusive rights to inventors. However, since the establishment of the PTAB, it is now also the duty of the USPTO to destroy those property rights.