

The Balancing Incentives Act

This legislation balances the perverse incentives causing the Patent Trial and Appeal Board (PTAB) to invalidate patents the astronomical rate of 84% by taking its invalidation rate off the table of incentives.

OVERVIEW OF THE AMERICA INVENTS ACT AND THE PTAB:

The America Invents Act of 2011 created the PTAB inside the U.S. Patent and Trademark Office (USPTO) to provide a *faster, cheaper alternative* to federal courts for challenging patent validity. However, the perverse incentives driving the PTAB produced opposite results.

ISSUES WITH PTAB:

- PTAB invalidates claims in 84% of the patents it fully reviews.
- Adds years to litigation and millions of dollars in costs.
- Investment in U.S. startups decreased destroying small businesses and U.S. jobs. Investment increased in China thereby exporting those lost U.S jobs to China.
- As a result, in just 12 years China overtook the U.S. in 37 of 44 technologies critical to our national security and economic growth, and Big Tech monopolized.

PERVERSE INCENTIVES AT PTAB:

- Only those seeking to invalidate a patent can petition the PTAB, thus infringers and their agents are the sole PTAB customer.
- PTAB is solely funded by fees paid for petitions, so to stay in business it must attract petitions.
- PTAB's only function is to invalidate patents, thus its invalidation rate is all it has to attract petitions.
- To attract petitions, PTAB's invalidation rate must be significantly higher than federal court.
- These perverse incentives bias the PTAB to invalidate patents at the astronomical rate of 84%.

USPTO'S RESPONSE TO PERVERSE INCENTIVES:

- Fees paid to file petitions are half the PTAB's costs. Petition fees have not been raised to close the gap, thereby encouraging more petitions.
- Fees are refunded if the petition is not instituted, thereby encouraging more petitions.
- Administrative patent judges (APJs), without a code of conduct, take cases where their former employer is a party. Conflicts of interest are common and tolerated, thereby encouraging invalidation.
- USPTO management manipulates APJ panels to change decisions upholding a patent to invalidating it.

WHAT THE BALANCING INCENTIVES ACT DOES:

- Removes the PTAB's high invalidation rate from its *customer value proposition*.
- Requires patent owner's consent for the PTAB to review a petition thereby aligning PTAB's invalidation rate with federal courts, making it a fair and efficient alternative:
 - If invalidation rate significantly higher than federal court, patent owner will not consent.
 - If invalidation rate significantly lower than federal court, infringer will not file petition.
 - But, if invalidation rate is in line with federal courts, both parties will benefit because PTAB was set up by Congress to be *faster* and *cheaper* than federal court.

THE EFFECTS OF THE BALANCING INCENTIVES ACT:

- Restores reliable patent protection to inventors and startups.
- Reenables U.S. innovation to compete with China.
- Creates free and fair competition in markets dominated by Big Tech monopolies.