



June 23, 2022

Dear Members of the Subcommittee on Courts, Intellectual Property, and the Internet of the House Committee on the Judiciary,

Ensuring meaningful access to Patent Trial and Appeal Board (PTAB) proceedings promotes patent quality and benefits the nation's startups and small business innovators. As you reflect on the past ten years of experience with the PTAB, we urge you to remember the important role the Board plays in curbing abuse of the patent system and mitigating the harm of low-quality patents. Today's hearing on *The Patent Trial and Appeal Board After 10 Years: Impact on Innovation and Small Businesses* can make a valuable contribution towards building a more balanced patent system centered around quality.

We are non-profits and trade associations that support and advocate for the nation's tech startups and small business innovators. Engine is a non-profit that works with government and a community of thousands of high-tech, growth-oriented startups across the nation to support technology entrepreneurship through research, policy analysis, and advocacy. ACT | The App Association is an international advocacy and education non-profit organization representing more than 5,000 small business technology firms that develop the software applications and connected devices powering the Internet of Things. The Consumer Technology Association represents the \$505 billion U.S. consumer technology industry, and its membership ranges from dynamic startups to the world's largest patent holders. The Developers Alliance is the world's leading advocate for software developers and the companies invested in their success, with members including industry leaders in consumer, enterprise, industrial, and emerging software, and a global network of more than 70,000 developers.

Today's domestic innovators have to confront low-quality patents—including those claiming things that were already known—and *inter partes* review (IPR) is an important tool for improving patent quality. Studies estimate that more than 25 percent of issued patents would be found invalid if adjudicated, and in the software and business method space those estimates jump to 39 percent and 56 percent, respectively.¹ These invalid patents stand in the way of innovation and can force U.S. companies to avoid R&D in the areas those patents improperly cover. Invalid patents are also routinely weaponized against startups, innovators, and small businesses across the country, draining

¹ Shawn P. Miller, *Where's the Innovation: An Analysis of the Quantity and Qualities of Anticipated and Obvious Patents*, 18 Va. J. L. & Tech. 1, 6-7 (2013). See also, e.g., John R. Allison et al., *Our Divided Patent System*, 82 U. Chi. L. Rev. 1073, 1099 (2015) (43 percent of patents subject to final court judgment were found invalid).

valuable resources that could be spent on product development, salaries, customer acquisition, and more.²

Solving the patent quality problem requires a multifaceted approach, and we encourage policymakers to seriously consider how to improve the quality of issued patents,³ but we also need mechanisms like IPR to clear out invalid ones. The U.S. patent system expects innocent third parties to incur most of the cost of removing invalid patents from the system, and IPR reduces those costs by an order of magnitude.⁴ That, in turn, levels the playing field in abusive patent assertion and makes those harmful practices less profitable.

Indeed, IPR has contributed to a drop in the amount of abusive litigation, reduced the settlement value of low-quality patents, and led to lower litigation costs.⁵ And when the PTAB cancels an invalid claim, it can have outsized benefits for startups and small business innovators. We know that invalid patents and abusive assertion cause the greatest disruption for these smaller companies. And most startups cannot afford the high costs of lengthy district court litigation to defend frivolous accusations.⁶ While IPR is still quite expensive, it is much more affordable, putting a real defense within reach.⁷ And when one company or entity is willing to go through the process of challenging an invalid claim before the PTAB, it frees up space for all other innovators and can often resolve (threatened) litigation for numerous small businesses.⁸

² See, e.g., Christopher R. Leslie, *The Anticompetitive Effects of Unenforced Invalid Patents*, 91 Minn. L. Rev. 101 (2006); Colleen Chien, *Startups and Patent Trolls*, 17 Stan. Tech. L. Rev. 461 (2014); 153 Cong. Rec. H10270-10307 (Sept. 7, 2007), <https://www.congress.gov/congressional-record/2007/09/07/house-section/article/H10270-1> (statement of Rep. Lamar Smith, referring to precursor to AIA, and saying: “The bill will eliminate legal gamesmanship from the current system that rewards lawsuit abuses. It will enhance the quality of patents and increase public confidence in their legal integrity.”).

³ E.g., Letter from Engine to Senate Subcommittee on Intellectual Property 3 (June 22, 2021) (summarizing and citing to suggestions for improving patent quality); Abby Rives, *A Declining Focus on Patent Quality at the USPTO and What it Means for Startups*, Engine (Oct. 21, 2020), <https://www.engine.is/news/ip-recap-102120> (similar, and discussing reorganization at patent office to eliminate certain quality-focused positions).

⁴ Compare Am. Intellectual Prop. Law Ass’n, 2019 Report of the Economic Survey 50-51 (2019) *with id.* at 52 (reporting costs of patent litigation, including defending NPE suits, and costs of IPR).

⁵ E.g., *id.* at 50-51; Malathi Nayak, *Cost of Patent Infringement Litigation Falling Sharply*, Bloomberg BNA (Aug. 11, 2017), <https://biglawbusiness.com/cost-of-patent-infringement-litigation-falling-sharply>; Ryan Damon et al., *Five Years Later: Lessons Learned from the First Inter Partes Review*, ACC Docket (May 3, 2018), <https://www.accdocket.com/articles/supreme-court-decisions-inter-partes-review.cfm> (reporting data showing how “IPRs have reduced the cost to challenge questionable patents and also reduced their settlement value”); *Patent Review is Working for Startups*, Engine, <https://innovatewithoutfear.engine.is/wp-content/uploads/2020/01/IPR-is-working-one-pager.pdf> (showing less non-practicing entity litigation since IPR went into effect).

⁶ E.g., Chien, *supra* note 2, at 461-62 (in survey of startups, majority had received a demand and large percentage reported significant operational impact); *Startups Need Comprehensive Patent Reform Now*, Engine 7-14, <http://static1.squarespace.com/static/571681753c44d835a440c8b5/57323e0ad9fd5607a3d9fd5607a3d9faec/1462910484459/Startup-Patent-Troll-Stories1.d.pdf?format=original> (recounting startup stories).

⁷ *Supra* note 4. For example, while it costs approximately \$325,000 to challenge an electrical or computer-focused patent in IPR, the average seed-stage startup raises \$1.2 million to cover all its expenses for 22 months, and most startups have far less money than that. *The State of the Startup Ecosystem*, Engine 17 (2021), <https://engineis.squarespace.com/s/The-State-of-the-Startup-Ecosystem.pdf>.

⁸ See, e.g., *HP Inc. v. MPHJ Tech. Invs., LLC*, 817 F.3d 1339, 1342 (Fed. Cir. 2016) (after letters were “sent . . . to numerous small businesses, alleging that those businesses likely infringed the '381 patent,” and “[b]ecause the letters were sent to users of HP’s multi-function printers, HP petitioned for IPR of the '381 patent”); *Distinctive Developments, Ltd. v. Uniloc USA, Inc.*, IPR2013-00391, Paper 38 (PTAB Dec. 3, 2014) (IPR challenged patent that was already asserted in ten

The innovation ecosystem needs affordable, efficient, and accessible means to challenge low-quality patents. But a functioning PTAB system relies on the Board considering meritorious petitions. In recent years, we have seen PTAB practices that allow meritorious petitions to be ignored.⁹ So even when the PTAB knows there is a reasonable likelihood claims are invalid, it can leave them in force, to be asserted in demand letters and lawsuits against startups and small business innovators. Unsurprisingly, these restrictions in access to IPR have correlated to a marked increase in abusive patent litigation, especially in certain pockets of the country.¹⁰ All of this conflicts with the letter and the spirit of the America Invents Act and has created new uncertainties and costs in PTAB practice and the patent system more broadly.¹¹

We commend you for convening today's hearing, and we hope you will explore how to restore and improve the PTAB system to ensure it can deliver on the promise of better quality and protecting small innovators across the U.S. from invalid patents and abuse of the system.

Thank you for your consideration, and we remain committed to engaging with the Subcommittee on these and other important issues.

Sincerely,

Engine

ACT | The App Association

Consumer Technology Association

Developers Alliance

lawsuits against multiple defendants); Daniel Nazer, *EFF Wins Final Victory over Podcasting Patent*, Elec. Frontier Found. (May 14, 2018), <https://www.eff.org/deeplinks/2018/05/eff-wins-final-victory-over-podcasting-patent>; Aaron L. Parker et al., *How Sports Tech Companies Can Fight Back Against Patent Trolls*, Finnegan (July 27, 2018), <https://www.finnegan.com/en/insights/articles/how-sports-tech-companies-can-fight-back-against-patent-trolls.html>.

⁹ E.g., Robert Colletti et al., *The Recent Rise of Discretionary Denials at the Patent Trial and Appeal Board*, JD Supra (Nov. 19, 2020), <https://www.jdsupra.com/legalnews/the-recent-rise-of-discretionary-97285/> (“[u]nder NHK/Fintiv, the Board can decide not to institute a timely, meritorious petition that fully complies with all statutes and regulations”).

¹⁰ See, e.g., Startups & the U.S. Patent System: Prioritizing Quality and Balance to Promote Innovation, Engine 16 (July 2021), <https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/60f8579bae6a2d324b7440a2/1626888093336/Engine+Patent+Quality+Booklet+2021+7.21.pdf>; *Forum Shopping: A Familiar Tactic in Abusive Patent Litigation, Back on the Rise*, Engine (Nov. 9, 2020), <https://www.engine.is/s/WD-TeX-Diagram-Updated-with-text.pdf>.

¹¹ See, e.g., Joel D. Sayres & Reid E. Dodge, *Unfettered Discretion: A Closer Look at the Board's Discretion to Deny Institution*, 19 Chi.-Kent. J. Intell. Prop. 536, 543-47 (2020) (analyzing statute, legislative history, and practical consequences of discretionary denial practices, and concluding that they do not appear to be supported by statute).