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The Balancing Incentives Act

The America Invents Act of 2011 (AIA) created the Patent Trial and Appeal Board (PTAB)¹ in the U.S. Patent and Trademark Office (USPTO). The PTAB was intended to be an *alternative* forum to challenge the validity of patents that is *faster and cheaper* than federal court.

However, a perverse incentive structure acting on the PTAB caused it did the opposite: the PTAB invalidates 84% of the patents it fully adjudicates, and it adds years to federal court litigation, and increases litigation costs by millions of dollars.

The result of perverse PTAB incentives is that investment in early-stage startups decreased in the U.S. and increased to China. In the ten years since the creation of the PTAB, China overtook the U.S. in 37 of 44 technologies critical to our national security, and Big Tech monopolized.

Perverse Incentives Drive PTAB Patent Invalidation Rates

Only those seeking to invalidate patents are permitted to petition the PTAB to invalidate a patent; Patent owners are barred from challenging their own patents. That means the sole PTAB customer is an infringer or its agents.

The PTAB's only function is to invalidate patents, so the only *customer value proposition* the PTAB can offer is its invalidation rate. In other words, to attract petitions, it must invalidate patents at a rate significantly higher than the federal courts. The PTAB is funded solely by fees paid for petitions, so it cannot sustain operations without a supply of petitions.

These perverse incentives bias the PTAB to invalidate patents at a rate significantly higher than federal courts.

The USPTO Acts on the PTAB's Perverse Incentives

The USPTO has taken actions to increase PTAB invalidation rates. For example, petition fees fall short of the PTAB's cost of conducting petition procedures by as much as 50%. The USPTO has not raised fees to close the gap because it would reduce the number of petitions filed. The USPTO incentivizes filing petitions by refunding petition fees if the PTAB does not institute the petition. Administrative patent judges ("APJ") have no code of conduct so conflicts of interest are common and accepted. For example, APJ's handle cases where their former employer is a petitioner. These conflicts increase the likelihood of invalidating the patent. Any USPTO Director since 2011 could have established a code of conduct, yet none did. When an original panel of APJs refused to invalidate a patent, USPTO management stacked the panel with new APJs so it would invalidate the patent. The USPTO then retaliated against the whistleblower who brought this to light. And, incredibly, APJs actually receive higher bonuses to invalidate patents than they do to hold them valid.

Clearly, the USPTO acts under these perverse incentives to increase the PTAB's invalidation rate. It will continue to do so because the PTAB cannot stay in business unless its invalidation rate is significantly higher than federal courts. These perverse incentives that drive the PTAB must be rebalanced.

The Balancing Incentive Act

The invalidity rate must be removed from the PTAB's *customer value proposition*. This is accomplished by requiring a patent owner's consent to file a petition. If the PTAB's invalidation rate is significantly higher than the courts, the patent owner will not consent. If it is too low, nobody will petition the PTAB. However, if the PTAB invalidation rate is reasonably in line with the federal courts, both parties will benefit because the PTAB was set up by Congress to be *faster and cheaper* than federal court.

The Balancing Incentives Act is only 20-lines long. It adds 12 words requiring patent owner consent to a petition before the PTAB can instituted it. This balances the incentives ensuring the PTAB is an unbiased tribunal. The Balancing Incentives Act enables a patent to be used as collateral to attract early-stage investment in startups, thus positioning the U.S. to retake the global innovation lead from China and restoring competition in Big Tech markets.

¹ The PTAB serves two functions – it takes patent application appeals from examination, and it invalidates issued patents. The latter is discussed here and the Balancing Incentives Act only affects the latter.