

Inter Partes Review: A Critical Program That Must Be Protected

Who We Are

United for Patent Reform (UFPR) is a broad coalition of diverse American businesses advocating for a patent system that enhances patent quality, advances meaningful innovation, and protects legitimate American businesses from abusive patent litigation. Our members are small and large — they range from Main Street retail shops, REALTORS®, hotels, grocers, convenience stores, and restaurants to national construction companies, automobile manufacturers, and technology businesses. Collectively, our members represent over 80 million U.S. employees, a figure that accounts for nearly two-thirds of private sector jobs in the U.S.

Low-quality patents can be a serious drag on innovation and job creation, and can erode public confidence in the patent system. Congress created a program to help fix that problem when it passed the America Invents Act in 2011: **Inter Partes Review** (IPR). IPR gives businesses the opportunity to ask the U.S. Patent and Trademark Office (PTO) to review its initial granting of a patent.

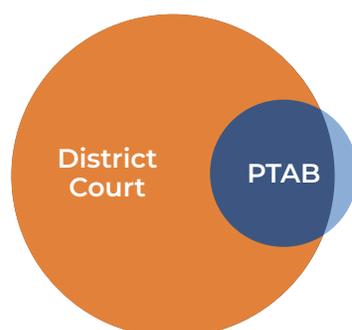
For the more than **300,000 patents issued each year**, busy examiners have just **19 hours on average** to complete a review and mistakes happen. IPR is an important procedure to correct any errors and ensure only valid patents are granted. In doing so, it only impacts a tiny fraction of patents: **99.8% of active patents have never faced an IPR**. Even though IPR has been critically important for American businesses to efficiently fight frivolous claims of patent infringement, **saving litigants \$2 billion in legal fees**, baseless complaints of unfairness in IPR have led PTO to weaken the program, leading to a **20% uptick in patent litigation by NPEs**. Congress should defend IPR and stop this trend.

IPR is a Necessary Tool to Combat Invalid Patents

The concept of IPR is simple. Any member of the public (often a defendant in patent litigation) can ask the PTO to evaluate whether a patent should have been granted in the first place. The requester submits a petition along with “prior art” to show that someone else invented it first.

A panel of expert administrative patent judges on the PTO’s Patent Trial and Appeal Board (PTAB) then compares the patent and the prior art to decide whether the IPR should move forward, applying a high standard so that only strong petitions are instituted. If instituted, the patent holder and the challenger will make their cases through written briefing and an oral argument. The IPR ends within one year when the panel of judges issues a final decision.

Jurisdiction of Patent Challenge



• More than 80% of litigations do not involve an IPR challenge.



• 85% of patents in IPR are in litigation.

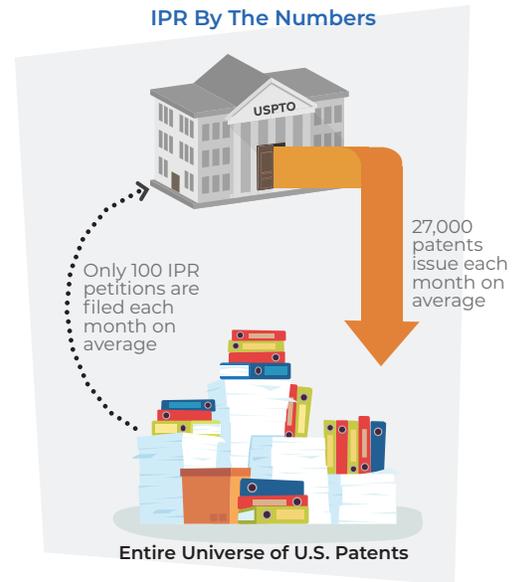
99.8% of active patents never face an IPR¹

¹ Unified Patents: <https://www.unifiedpatents.com/insights/2020/2/5/patent-quality-initiative-statistics-dispelling-ptab-myths>

The realities of the patent examination process and the high number of invalid patents issued make a strong IPR process necessary for American businesses. The PTO must grant a patent unless a patent examiner can prove it is invalid. But examiners have on average only 19 hours to look for prior art, understand the claimed invention, make a detailed comparison to decide what should be patentable, and engage in a back-and-forth with the applicant. This is not enough time, which causes examiners to miss the best prior art or fail to evaluate it correctly, thus issuing an invalid patent. With record-setting numbers of patent applications being submitted, and more than 300,000 patents being issued each year, IPR is more important than ever.

IPR Has Been Critically Important to the Country's Small and Main Street Businesses

Because IPR is faster and cheaper than litigation, the impact it has had on the ability of small businesses and Main Street companies to fight frivolous claims of patent infringement has been significant. This has helped American businesses fight crushing legal costs, and more often than not is used to challenge patents held by foreign companies.



Small and independent businesses have used IPR to invalidate claims from NPEs that sued:



realtors over the simple concept of mapping houses for sale



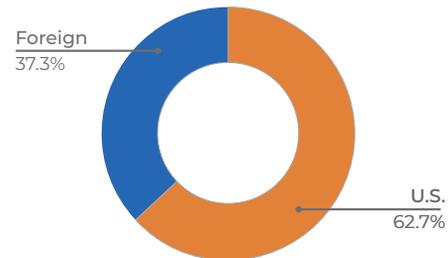
independent podcasters over the idea of podcasting



16,000 small businesses nationwide over the concept of scanning a document to email

PTAB Petitioner Status: 2012-2019

IPR benefits U.S. companies and more often than not challenges patents held by non-US entities.²



IPR Has Been Weakened and Abusive Litigation Is Making a Comeback

IPR is integrated into the patent system by statute, and the data shows it has been fair and balanced. IPR's high standard prevents 37% of petitions from moving forward. The opportunities for patent owners to present arguments and evidence supporting validity allows many challenged patents to remain intact. Eighty-seven percent of patents challenged in IPR face only 1 or 2 petitions, debunking claims that "multiple petitions" are a problem.

But the PTO has responded to baseless complaints of unfairness in IPR by weakening the program. Through new regulations, precedential decisions, and guidance to its judges, the PTO has made it harder to invalidate patents that never should have been granted. Through regular use of its discretion to deny IPRs, the PTO has turned away challenges to invalid patents for procedural reasons, forcing businesses to engage in litigation.

NPEs have noticed. The frequency of patent litigation brought by NPEs is increasing once again, rising by 20% from 2018 to 2019. These NPEs are threatening small and Main Street businesses with drawn out and costly litigation to spur quick settlements. Congress should defend IPR and stop this trend.

In FY2019 the PTAB denied institution to 37% of petitions.³

² Unified Patents: <https://www.unifiedpatents.com/insights/2019/12/11/new-study-suggests-that-us-companies-have-received-the-greatest-benefit-from-post-aja-proceedings>
³ USPTO: <https://www.uspto.gov/patents-application-process/patent-trial-and-appeal-board/statistics>