

# UNITED *for* PATENT REFORM

## **UFPR Statement to House Subcommittee on Courts, Intellectual Property, and the Internet on its Hearing ‘The Patent Trial and Appeal Board After 10 Years: Impact on Innovation and Small Businesses’**

*June 22, 2022*

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 United States.

UFPR appreciates the opportunity to provide testimony on the important work of the Patent Trial and Appeal Board, and in particular, its Inter Partes Review (IPR) program. IPR is our patent system’s efficient, cost-effective, and expert program for assessing patent validity, and it is imperative to ensure continued access to it. This access is important to all of UFPR’s members, including those members that do not hold patents themselves, but are impacted by abusive threat letters and patent litigation brought using invalid patents that should not have been granted in the first place.

Invalid patents can be a serious drag on innovation and job creation, and can erode public confidence in the patent system. Congress created the IPR program to help fix that problem when it passed the America Invents Act in 2011. 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 350,000 patents issued each year,<sup>1</sup> busy examiners have just nineteen hours on average to complete a review<sup>2</sup> and mistakes happen. IPR is an important and efficient procedure to correct any errors in the patent examination process.

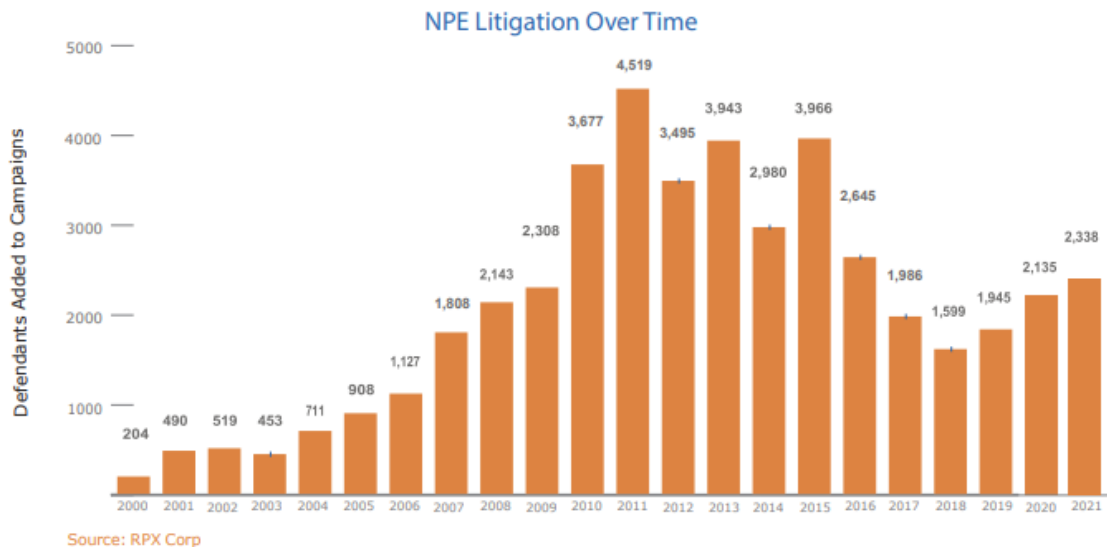
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<sup>1</sup> See United States Patent and Trademark Office Performance and Accountability Report, Fiscal Year 2021, Table 6.

<sup>2</sup> See Michael D. Frakes & Melissa Wasserman, Is the Time Allocated to Review Patent Applications Inducing Examiners to Grant Invalid Patents? Evidence from Micro-Level Application Data, *Review of Economics and Statistics* (2017).

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Even though IPR has been a critically important tool for American businesses to fight frivolous claims of patent infringement, saving litigants \$2 billion in legal fees,<sup>3</sup> baseless complaints of unfairness in IPR have led the PTO to weaken the program, leading to a 46% uptick in patent litigation by NPEs from 2018 to 2021.<sup>4</sup>



A recent opinion piece from Jonathan Johnson, CEO of UFPR member Overstock.com, explains how this rise in litigation has impacted businesses and, as a result, American consumers. Mr. Johnson identifies the weakening of the IPR program by the PTO as leading to NPEs “weaponizing invalid and questionable patents.”<sup>5</sup> As Mr. Johnson points out, left unabated, these lawsuits can mean “[b]usinesses get poor—or shuttered. People are laid off. Useful tech gets flushed down the drain or goes overseas. American consumers suffer unawares.”<sup>6</sup>

It does not have to be this way – and IPR is a straightforward and surgical approach to address these concerns, impacting only about 0.2 percent of all active patents.<sup>7</sup> But IPR knocks out those

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<sup>3</sup> See Patent Progress, Inter Partes Review: Five Years, Over \$2 Billion Saved, available at <https://www.patentprogress.org/2017/09/14/inter-partes-review-saves-over-2-billion/>.

<sup>4</sup> See RPX, Q4 in Review: NPEs Cap Off a Busy 2021 as SEP Policies Evolve in the US and UK, available at <https://www.rpxcorp.com/intelligence/blog/q4-in-review-npes-cap-off-a-busy-2021-as-sep-policies-evolve-in-the-us-and-uk/>.

<sup>5</sup> Jonathan Johnson, Patent trolls have resurfaced and are hurting businesses, *Utah Policy* (Mar. 8, 2022), available at <https://utahpolicy.com/politics/63002-guest-opinion-patent-trolls-have-resurfaced-and-are-hurting-businesses> (Johnson op-ed).

<sup>6</sup> Johnson op-ed.

<sup>7</sup> See Unified Patents, Patent Quality Initiative Statistics - Dispelling PTAB Myths, available at <https://www.unifiedpatents.com/insights/2020/2/5/patent-quality-initiative-statistics-dispelling-ptab-myths>.

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invalid patents that otherwise would be erroneously allowed to target even more American businesses. And often, it is businesses like Overstock.com and other UFPR members who are targeted by NPEs for their use of products and services provided by *another* business.

In many of these cases, the targeted end user of the technology does not initiate an IPR itself, but instead benefits from IPRs initiated by their suppliers and service providers. In fact, this benefit is felt not just by those Main Street businesses who have been sued or received threat letters, but also by those businesses who will never have to be on the receiving end of threatened litigation thanks to the IPR process. As Mr. Johnson puts it, the NPE will no longer be able to “siphon profits from hard-working business through bogus patent lawsuits.”<sup>8</sup>

The IPR review process benefits all businesses – those that bring the IPR itself to invalidate a patent that was granted in error, and those that are permitted to continue their use of a product or service unimpeded with its invalidation. Some examples highlighting these benefits are as follows:

- An NPE sued several businesses, including national grocery company Albertsons, and Missouri-headquartered outdoor gear retailer Bass Pro Shops, claiming they infringed on its patent related to the use of electronic gift cards. Fortunately, an Atlanta-based financial services company who was also sued by the NPE petitioned the PTO to review the patent through its IPR program – [and won](#). The patent was invalidated, and the Main Street businesses could once again allow their customers to give and use electronic gift cards.
- An NPE sued 74 businesses located in 23 states - including Alabama, Colorado, Kentucky, Michigan, and Texas - for using technology that allowed them to print over a network. Many of those targeted were small, family-owned commercial printing shops, like the fourth-generation business in Nashville, Tennessee that was targeted. Luckily, several commercial printer companies used the IPR process to have the PTO review the invalid patent in question and got the patent [overturned](#), helping to save many small businesses from having to pay a shakedown settlement or hefty litigation costs.
- Technology that allows businesses to scan documents directly to an email recipient saves countless hours. Thousands of businesses throughout the country rely on this technology daily, but all were threatened when a NPE attempted to use a bad patent to collect usage

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<sup>8</sup> Johnson op-ed.

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fees. The scanner manufacturers acted quickly to use the IPR process to [invalidate](#) the bad patent and restore their customers' access to their technology free of fear.<sup>9</sup>

The patent system exists not for the benefit of patent holders, but for the benefit of the public and to promote *true* innovation. By ensuring that invalid patents can be efficiently and cost-effectively addressed by expert patent judges, the public's confidence in our U.S. patent system will be strengthened, and American businesses and consumers will benefit. UFPR urges Congress to strengthen the IPR process so that these benefits can continue.

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<sup>9</sup> See UFPR #StandWithMainStreet, available at <https://unitedforpatentreform.com/stop-badpatents>.