



Via Electronic Transmission

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The Honorable Hank Johnson
Chairman,
House Judiciary Committee
Subcommittee on Courts, Intellectual
Property, and the Internet
2240 Rayburn House Office Building
U.S. House of Representatives
Washington, DC 20515

The Honorable Darrell Issa
Ranking Member,
House Judiciary Committee
Subcommittee on Courts, Intellectual
Property, and the Internet
2300 Rayburn House Office Building
U.S. House of Representatives
Washington, DC 20515

Dear Representatives Johnson and Issa,

CCIA writes regarding a study introduced into the record during the recent subcommittee hearing entitled “The Patent Trial and Appeal Board After 10 Years, Part II: Implications of Adjudicating in an Agency Setting.” This study, introduced by Rep. Massie and authored by Ron Katznelson, implies that PTAB judges are motivated by pecuniary interests to invalidate patent claims in order to obtain higher bonuses and purports to show that this is true via statistical analysis. PTAB judges are dedicated, hard-working individuals who seek to determine whether a patent should have issued, not the financially motivated actors the Katznelson study implies they are.

Nowhere is this clearer than if one looks at the actual statistical analysis performed by Katznelson. His model suffers from a number of flaws. CCIA’s Director of Research and Economics, Trevor Wagener, analyzed the Katznelson paper and identified these flaws. His preliminary summary of his findings is attached. Below, I summarize his basic findings.

I. Katznelson’s Model Makes Choices Regarding Data That Are Unsupported

Katznelson’s model treats a “mixed” final written decision (FWD) as equivalent to a final written decision which cancels all patent claims. In reality, especially during the time period Katznelson studied, a mixed final written decision might uphold the vast majority of challenged patent claims while invalidating only one or two.

Katznelson also gives all three judges on a given panel equal responsibility for the outcome. While all three PTAB judges do work on their panel’s cases, the default assignment of credit is solely to the judge authoring the final written decision. Katznelson’s model assigns equal production credit to all three judges on a panel and thus fails to reflect reality, in which production credit is assigned to the authoring judge by default.

As a result, Katznelson’s model fails to reflect reality. Because of these inaccuracies, his results also do not reflect reality.

II. Katznelson's Results Lack Statistical Significance

Katznelson's conclusions primarily rely on a regression analysis found in Appendix A on Table 7 of his paper. However, the (one-sided) p-values produced in this analysis are 0.41 and 0.204, far outside the standard 0.05 level for statistical significance. Thus, there is no basis to assume—even on Katznelson's model—that PTAB judges make decisions on the basis of pecuniary interest.

Even more troubling, Katznelson's paper presents only one-sided p-values for his independent variables of primary interest, not the standard two-sided p-value. This means that he tested only for whether the coefficients were positive; his test ignored the possibility that they were negative. This is an important consideration, as CCIA's replication of Katznelson's flawed model found a slightly negative coefficient for institution decisions, rather than the slightly positive coefficient Katznelson found. In other words, one of Katznelson's two core directional findings did not replicate in CCIA's replication analysis, and in both Katznelson's analysis and CCIA's replication, neither directional finding was statistically significant, even under a one-sided p-value.

When standard two-sided p-values are calculated for Katznelson's model and regression results, it demonstrates that his results are even more likely to be the product of random chance than his already high one-sided p-values suggests. His coefficient for institution decisions is more than 80% likely to be the result of random chance, and his coefficient for FWDs has a more than 40% likelihood of being the result of random chance. No objective analyst would draw a policy-relevant conclusion from coefficients to likely to be the product of random chance.

Given the serious statistical deficiencies in Katznelson's analysis, it would be difficult to trust its conclusions. This is all the more true given the results of CCIA's analysis using a corrected model.

III. A More Accurate Model Shows That APJ Bonuses Are Statistically Strongly Coordinated Only With Production

CCIA created a model that corrects the flaws in Dr. Katznelson's model. Specifically, examining the same set of decisions, CCIA modeled APJ bonuses on a pure production basis, first counting panel membership and then running the model again with production credits assigned to the authoring judge, as the USPTO's documents indicate they are assigned.

Running a pure production model based on panel membership, CCIA obtained results showing that, to a statistically significant degree, APJ bonuses correlate to the number of decisions a panel makes, regardless of the outcome of those decisions. A separate regression analysis evaluating authorship against panel membership in the same model showed that only authorship of a decision, not panel membership, has a statistically significant effect on APJ bonuses, as expected based on the PTO's stated bonus criteria.

Thus, a model with assumptions that better reflect reality and PTO documentation is also more statistically significant and just as predictive, if not more so, than the Katznelson analysis. The natural conclusion is that it is in fact a more accurate model and that APJs are not motivated to invalidate patents based on hope of a larger bonus.

IV. Conclusion

The ultimate conclusion reached by CCIA's analysis is simple: **APJs who write more decisions get bigger bonuses**. It doesn't matter, for bonus purposes, if the decision invalidates the patent or upholds it, only how many decisions an APJ can take credit for writing.

These results reflect a broader conclusion: the APJs who conduct the PTAB's work seek to reach the answer to a single question in each case they hear: "Should this patent have issued?" They spend significant time to understand the patents and the prior art. And then, applying their legal and technical expertise, they answer that question on the basis of the evidence before them. They are not motivated to uphold or invalidate a patent by anything other than a desire to reach the correct answer. PTAB judges conduct a complex and difficult process with efficiency and fairness, and criticism of their motivations based on statistically insignificant results from an inaccurate model is an unfair affront to their hard work.

We appreciate the committee's consideration of this letter and our analysis and would be happy to answer any questions you may have.

Sincerely,

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