

BIG TECH ABUSES THE PATENT TRIAL AND APPEAL BOARD

Congress created the Patent Trial and Appeal Board (“PTAB”) to consider and resolve patent disputes efficiently. Big Tech, however, has gamed the system by strategically flooding the PTAB with thousands of duplicative filings after cases have been brought in federal court. Big Tech companies dominate the list of top-twenty users of the PTAB.

Former Chief Judge of the Federal Circuit Paul Michel has stated that Big Tech companies use their “influence to chip away at patent rights” and “have long relied on a strategy of deliberate infringement because enforcement litigation is too expensive for younger smaller competitors.”

A key part of that strategy is forcing patent holders to defend their inventions in multiple costly legal settings, which unfairly burdens small businesses and independent inventors. Important reforms are needed, like clear statutory authority for the PTAB to stay or terminate their proceedings while district court cases finish—especially when those cases started first.

The PTAB Must Be Reformed to Support Innovation and Protect Smaller Inventors

- **The PTAB Invalidates Most Patent Claims.** Big Tech companies use the PTAB to attack smaller competitors because the PTAB has a lower burden of proof for invalidating patents than federal court (“preponderance of the evidence” vs. “clear and convincing evidence”). The PTAB invalidates approximately 60% of all patent claims after trial. From another view, approximately 87% of patents have at least one claim invalidated after a PTAB trial. Commentators have unsurprisingly called the PTAB a patent “death squad.”
- **Big Tech Games the System by Forcing Smaller Businesses to Defend Both PTAB and Federal Cases.** PTAB trials are costly, averaging \$450,000—far more than most smaller competitors can afford. Big Tech often tries to make smaller competitors litigate at both the PTAB and federal court. Right now, PTAB judges have the discretion to reject challenges to patents when alleged infringers file at the PTAB after patent holders have already brought infringement cases in federal court (the “*Fintiv* Doctrine”). Without this power, Big Tech could drag smaller competitors back to court if it loses at the PTAB, giving Big Tech two bites at the apple and depriving small businesses of access to justice by forcing them to litigate at least two cases at the same time.

EXAMPLE. Centripetal, a cybersecurity technology firm based in Virginia, invented an Internetbased security system. Cisco invited the company to demonstrate its network protection system so that Cisco could consider licensing the technology—after Cisco signed a non-disclosure agreement, Centripetal disclosed its technology to Cisco and engaged in a series of negotiations to license the technology. According to Centripetal, Cisco declined to license the technology but began incorporating it into Cisco products. Centripetal responded by suing Cisco in federal court for patent infringement. Cisco, in turn, filed numerous petitions at the PTAB seeking to invalidate Centripetal’s patents. The court found that Cisco willfully infringed four of Centripetal’s patents and ordered Cisco to pay \$1.9 billion in damages. At the PTAB, Cisco challenged 9 patents using 14 separate PTAB petitions. The PTAB invalidated all of the claims of 6 of the patents, and some of the claims of another patent—a much higher invalidity rate than would be expected in district court. By filing numerous attacks against a single patent, Cisco used the PTAB to strengthen its negotiating position against Centripetal.

- **Big Tech Will Continue Abusing the PTAB.** The PTAB fulfills its purpose when it serves as a streamlined, cheaper alternative to district court litigation. Currently, when a petition is filed with the PTAB, the PTAB has discretion to decline to review that petition when related litigation in which the patent holder is attempting to stop infringement of their patent will more quickly resolve the issues. Without that discretion, patent owners will be forced to defend against the same validity arguments in two separate, duplicative proceedings. This is not the way it should work. There should be more

statutory protections, like codifying *Fintiv*, to prevent Big Tech from continuing to bully smaller businesses and inventors by bringing PTAB and federal cases at the same time.

BIG TECH COMPANIES ARE BIGGEST USERS OF PTAB

China's ZTE and Huawei Also Among Top Users

Top 20 Petitioners Since PTAB Established – 2012-2022

		Number of petitions filed
1	Apple	904
2	Samsung	898
3	Google	502
4	Microsoft	293
5	LG	285
6	Unified Patents	277
7	Intel	270
8	Cisco	191
9	Facebook	175
10	Comcast	174
11	Dell	166
12	HP	149
13	ZTE	148
14	Sony	145
15	Ericsson	139
16	Amazon	137
17	Huawei	135
18	Mylan	135
19	HTC	126
20	Lenovo	107

Source: [DocketNavigator](#)

Source: <https://innovationalliance.net/from-the-alliance/infographic-big-tech-companies-are-biggest-users-of-ptab-2012-2022/>.