

Newsflash, Politico: 'Patent Death Squad' Alive and Well

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Politico, the popular political journalism publication, recently ran the story **[“Patent Reform Advocates: PTO Process Not Patent ‘Death Squad.’](#)**” The story was based on a blog post by patent reform advocate Unified Patents. Politico reported Unified Patents’ proclamation that the Patent Trial and Appeals Board (“PTAB” or “Board”) has ruled valid 62% of challenged claims. But this figure is misleading at best and even conflicts with [data published by the USPTO](#).

Unified Patents is no mere patent reform advocate. Rather, the company exists to capitalize on the review processes put into play by certain provisions of the Leahy-Smith America Invents Act (“AIA”). Founded in 2012 – the same year that those provisions of the AIA went into effect – Unified Patents’ business model is to target non-practicing entities (“NPEs”) with *inter partes* review (“IPR”) proceedings. A stated goal of the company is to “zealously fight invalid patents” (see [Unified Patents’ website](#)). With respect to IPRs, patent reform advocates have remarked “how valuable it is to have [the AIA review] processes in place” (attributed to Beth Provenzano of United for Patent Reform).

In fact, Unified Patents has done more than simply remark on patent reform; it was a petitioner in 21 IPR proceedings, according to the USPTO’s publicly-available PTAB trial data. Of those 21 petitions, Unified Patents failed to have IPRs instituted on ten petitions and institution has not yet been determined for nine additional petitions. Of the two instituted decisions, only one has reached decision. Not surprisingly, the Board found all claims unpatentable.

Using some inventive math, Unified Patents reports that “[t]he PTAB has ruled valid 62% of challenged claims.” To arrive at this figure, Unified Patents attributes claims the PTAB has refused to review as claims the PTAB has “ruled valid.” Looking at their process in detail, Unified Patents assigns the outcome of each challenged claim to one of four categories. The first category is “not instituted,” and includes claims for which review was requested but denied. The remaining three categories include reviewed claims that were “cancelled,” found “patentable,” or found “unpatentable.” According to Unified Patents, the outcomes for challenged claims are: 54.2% (6,253 claims) were not instituted, 6% (687 claims) were cancelled, 8% (928 claims) were found patentable, and 31.8% (3,665 claims) were found unpatentable. Unified Patent’s 62% validity figure is “based on termination in a Denial of Institution” or a finding of patentable “in a Final Written Decision.” In other words, of the 62% of claims Unified Patents counts as valid, only 8% of claims were actually reviewed and found patentable on the merits, and the vast majority, 54.2% of claims, were not reviewed. Re-interpreting Unified Patents’ data in the same way that the USPTO presents its statistics reveals Unified Patents’ failure. Their data does not match the USPTO’s data and no source is provided.

As we’ve commented before, the PTAB’s IPR data has been reported using various metrics and organizational schemes. Depending upon which metric is used, the story can appear to be very different. For example, results that use a metric of IPR petitions (a metric that focuses on the validity of a single patent) show that the vast majority of patents do not survive the Board’s final written decision unscathed. As we previously presented for the first two years’ worth of Board-issued final written decisions on a per petition basis, all claims were deemed patentable in 9% of petitions, at least one claim was deemed unpatentable in 15% of petitions, and all claims were deemed unpatentable in 76% of petitions. More recent data shows that more patents are surviving the IPR process but that the vast majority of patents still do not survive the Board’s final written decision unscathed. For the USPTO’s 2015 fiscal year, all claims were deemed patentable in 13% of petitions, at least one claim was deemed unpatentable in 13% of petitions, and all claims were deemed unpatentable in 74% of petitions.

Many interested parties are concerned by the high rate at which the Board is killing patents. The rate at which patent rights are being killed is alarming because of the impact it will likely have on investment in technology and our economy as whole. Senator Chris Coons (D-Del.) is among those concerned. “It seems hard to imagine that we would expect anyone but the wildest optimist to invest when a patent only has a 16 percent chance of being held valid post-grant review proceedings,” [Senator Coons said](#),

referring to claim-based statistics reported by the USPTO. "So my fear is that many investors, if this kill rate continues going forward, will lose trust in the strength of American patents."

Authors



Michael J. McNamara, Member

Michael J. McNamara is a Mintz attorney whose practice focuses on patent litigation in technology and communication networks. He has experience in transactional matters, including patent drafting and prosecution, managing and analyzing patent portfolios, and license negotiation.