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The Catalyst

What They Are Saying: Close Patent Loopholes That Threaten Innovation for Patients

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"When we developed these proceedings, we never thought people would use them this way"

- Former general counsel of the PTO

New administrative proceedings at the Patent and Trademark Office (PTO) are posing significant threats to patent-holders. Previous patent legislation created a new process, called Patent Trial and Appeal Board (PTAB) proceedings, or post-grant proceedings, to make it easier for people to challenge patents at the PTO rather than in court. The pro-challenger bias exhibited through these proceedings have led to three times the number of filings the PTO originally expected and has come to be known as a "death squad" for legitimate patents and patent holders. In fact, some financial investors and hedge fund managers have begun shorting the stocks of biopharmaceutical companies and then using the PTAB process to challenge those companies' patents for the sole purpose of profiting off of the resulting change in price.



Any patent litigation reform legislation must stop these abusive practices. Failing to protect patent rights would make it increasingly difficult to sustain continued investment in research and development for the biopharmaceutical industry and other IP-intensive sectors, which would impact our ability to develop new medicines that treat some of the most devastating

Many stakeholders agree that reform is needed to ensure that medical innovation continues. Here's what they are saying:

"Taking advantage of new rules created by Congress three years ago, hedge funds have increasingly been filing challenges to pharmaceutical patents. Some may be angling for payouts to drop their claims, while others are shorting the stock, betting that the manufacturers' shares will plummet... The legislation had an unexpected consequence: Hedge funds, which didn't have the right to challenge patents in court, now had a venue to bring such cases." – Susan Decker and Caroline Chen of [Bloomberg](#), March 20, 2015.

"When we developed these proceedings, we never thought people would use them this way, in an effort to move stock or as an investment vehicle." - Bernard Knight, former general counsel for PTO in [Bloomberg](#), March 20, 2015.

"Despite the fact that the statute on its face seems to allow any petitioner to file an IPR, it still feels wrong to many in the industry that a wealthy businessman should be able to reap financial rewards for a situation he creates... Given the universal agreement that the purpose for creating new post grant challenges was to create a low-cost alternative to litigation to determine the validity of patent claims it is difficult to understand why the Bass challenge should be allowed to move forward." – Gene Quinn of [IPWatchDog](#), April 8, 2015.

"Bass doesn't talk about it (I got only an e-mailed copy of his company's statement on the subject) but stock analysts who follow the drug industry believe Hayman Capital attempts to drive the company's stock price down with the patent challenge and profit on that decline. Multiple news accounts report that Bass's strategy is to short a drug company's stock – betting it will lose value in the future – and then file a patent challenge for the world to see." – Steve Syre of [The Boston Globe](#), April 28, 2015

"In less than three months, Bass's Coalition for Affordable Drugs has filed petitions to invalidate patents on six different drugs, including two on Thursday, owned by Shire Plc and Celgene Corp. His tactics are largely made possible by a change in U.S. law that, beginning in 2012, created new procedures to challenge patents, including by third parties." – Susan Decker and Kelly Bit of [Bloomberg Business](#), April 23, 2015.

"Hedge fund managers aren't in the business of helping suffering Americans, unless there's good money in it." – Steve Syre of [The Boston Globe](#), April 28, 2015

"In a story that ran after Bass' challenge to a Jazz Pharmaceuticals' (\$JAZZ) Xyrem patent, the news service cited anonymous sources close to Bass' firm saying that Hayman Capital is betting for and against shares of companies involved in the patent challenges." – Tracy Staton of [FiercePharma](#), April 21, 2015.

"A well-known hedge-fund manager is taking a novel approach to making money: filing and publicizing patent challenges against pharmaceutical companies while also betting against their shares... Mr. Bass's strategy taps an administrative process known as Inter Partes Review, or IPR, that allows petitions to strike down patents to be heard by a patent office panel. The process was created by Congress in 2011 to help companies fight so-called patent trolls, nonoperating companies that extract cash settlements from companies they accuse of patent infringement. The panel is a cheaper and faster option than trials in federal courts." – Joseph Walker and Rob Copeland of [The Wall Street Journal](#), April 7, 2015.

"We are going to challenge and invalidate patents through the IPR process ... [and] we are not going to settle." – Kyle Bass of Hayman Capital Management in [Financial Times](#), January 7, 2015.

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