



Patent owners do not like IPRs despite what Bloomberg Law, AIPLA study says



By [Gene Quinn](#) & [Steve Brachmann](#)
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“Those pointing to the prospect of a gold plated patent might as well be pointing to a pot of gold left by a Leprechaun at the end of a rainbow; gold plated patents and Leprechauns seem equally real based on the real life experiences of actual patent owners with the PTAB.”



On Thursday, February 3rd, legal intelligence firm Bloomberg Law and legal professional association American Intellectual Property Law Association (AIPLA) released the results of a survey entitled [Patent Owners, Petitioners Not Far Apart on PTAB Value](#). According to Bloomberg and AIPLA, the survey suggests that complaints from patent owners and other stakeholders in the U.S. patent system surrounding high patent invalidation rates at the Patent Trial and Appeal Board (PTAB) “have largely subsided.” The report argues that patent owners find value in PTAB trials and that inter partes review (IPR) challenges are beneficial. Simply stated, the conclusions reached defy common sense, do not comport with the experience of *actual* patent owners, and the survey does not hold up to even cursory scrutiny.

The problems with the Bloomberg/AIPLA survey are numerous, and will undoubtedly be misused by those who want to push the false narrative that patent owners and innovators in general find challenges to their patents to be a good thing from which they derive real benefit. “Who could possibly find benefit in paying hundreds of thousands of dollars to defend a patent before making one dime? That’s neither intuitive or practical,” said [Warren Tuttle](#), President of the United Inventors Association. “A far more likely scenario is that large entities wish to efficiently infringe

upon patent rights with the prospect of getting new technology for free. This survey does not speak to the reality that I know independent inventors and entrepreneurs face.”

Tuttle is, of course, correct. It is impossible to believe that patent owners think it is beneficial to have their patents challenged after they spent 5 to 10 years to obtain them at a cost of many tens of thousands of dollars. It is absurd to believe that patent owners think it is beneficial to have their patents challenged when a typical challenge will run anywhere between \$500,000 to \$1 million in attorneys fees through conclusion. It seems doubtful that a poll of *actual* patent owners would ever find it to be beneficial to have to defend a patent that is supposed to be presumed valid in a proceeding where the patent will not be afforded any presumption of validity. Furthermore, many patent owners are subjected to multiple, repeat challenges that number in the dozens. Some patent owners have [6 or 8 IPRs filed on the same patent](#), sometimes more.

“Independent inventors and many startups have no assets so a patent must be able to attract the investment needed to build assets,” explained [Paul Morinville](#), an inventor, patent owner and Member of the Board of Directors of U.S. Inventor. “IPR’s have gutted the value of small patent portfolios and that has gutted investment in independent inventors and patent centric startups. This survey obviously did not ask the right set of people.”

“The article seems to gloss over the fact that the majority of patent owners do not favor the *existence* of the AIA procedures,” said [Bob Stoll](#), currently a partner with Drinker Biddle and former Commissioner for Patents with the United States Patent and Trademark Office. “If anything, the study can be used to support the premise that further reforms are needed.”

Morinville and Stoll are, of course, correct. It shouldn’t be all that surprising that the survey flies in the face of everything we know and comes to the wrong conclusions. The truth is patent owners and innovators loathe IPRs, but no patent owners or innovators who were at all likely to hold negative views of IPRs were included in the survey, which has to make one wonder. Was the survey merely statistically invalid? Perhaps,

but given how the conclusions are so contrary to conventional wisdom and the survey sample so ridiculously small and did not include those constituencies known to be suffering at the hands of IPR, one has to wonder.

“Regardless of one’s position on IPR’s, as our recent presidential election has shown, all surveys, especially ones involving a small, non-representative sample, should be interpreted with skepticism,” said [Robert Rauker](#), medical device company CEO, patent owner and inventor.

Not only was the sample size ridiculously small and non-representative, but it is also quite misleading to suggest, as the survey does, that it actually reflects the opinion of patent owners. The survey included no actual patent owners as respondents. Instead, the study itself notes that the survey, which was available online last year from mid-November to mid-December, was completed by a total of 167 *patent attorneys*. So anytime the study says that it’s portraying the opinion of a patent owner (which it does, numerous times), it’s actually only portraying the opinion of a patent attorney that has represented a patent owner. That may seem a small, inconsequential point, but if you dig deeper it becomes quite indicative of a biased sample.

“How many responses were filed by the same high tech companies that pushed for the passage of the AIA and were pushing for additional patent reform,” asked John Calvert, current Executive Director of the United Inventors Association and a former Associate Commissioner for Patents at the USPTO. “Until the results can be broken down into finer statistics, we cannot truly understand what the inventor community really thinks of the way AIA affects the strength of patents since it’s passage. All we have in this report are general facts from the 167 respondents, 62 of who are in-house attorneys.”

Calvert raises an excellent question. How many of those patent attorneys surveyed and characterized as *patent owners* are from companies that engage in a never ending quest for more patent reform, like Google? We know that 70% of the corporate respondents came from Fortune 1000 companies; which means they come from the largest companies in the world and have at least \$1 billion in annual revenue. That factor alone suggests a substantial skewing of what was already an extremely small sample size. We know that large entities are the ones who have been engaging in efficient infringement schemes and filing large numbers of IPRs so they do not have to pay for the patent rights they trample. Google, for example, is one of the largest patent acquiring companies in the world, which absolutely makes them a patent owner. Still, they are famously (or perhaps infamously) known as the company behind the push to weaken the U.S. patent system. Microsoft is another company that is a massive patent owner, but files numerous IPRs, sometimes multiple IPRs against the same patent on the same day. Only asking attorneys and having 70% of the corporate respondents, who presumably represent the “patent owners” in this survey is problematic. How can you actually assume these large corporate entities that engage in near collusive efforts to ignore patent rights and efficiently infringe *really* represent the broad category of patent owners? Based on the survey details there is real reason to suspect that the so-called “patent owners” were more wolves in sheep’s clothing than anything else.

But let’s step back for a minute and try and apply a scintilla of logic. How could any patent owner be in favor of IPRs and really believe they create a “gold plated” patent anyway? Sure, in theory that make sense, but in practice that isn’t what is happening.

While winning at the conclusion of the IPR would to some extent “gold plate” the patent with respect to novelty ([35 U.S.C. 102](#)) and obviousness ([35 U.S.C. 103](#)), the patent is still susceptible to challenges in court for lacking patent eligible subject matter ([35 U.S.C. 101](#)) and for an inadequate description ([35 U.S.C. 112](#)). And if you’ve been paying attention over the last several years you realize the most difficult challenges to most patents come thanks to the so-called *Alice/Mayo* framework, which is the Supreme Court mandated application of 101. Moreover, if the patent owner prevail in a post grant challenge at any time before a final written decision there is absolutely no estoppel effect whatsoever. Further still, the [PTAB doesn’t even have to issue a decision that addresses all of the claims challenged](#). So there is likewise no estoppel effect with respect to challenged claims not subject to a final written decision. And just because you win one IPR challenge doesn’t mean that another entity can’t bring another IPR challenge, and just because you prevail in an institution decision doesn’t mean further challenges cannot be brought and instituted. And then, of course, there is the fundamental lack of due process afforded patent owners at the PTAB (see [here](#) and [here](#)), the inability to amend claims despite the statute giving patent owners the right to amend (see [here](#), [here](#) and [here](#)) and the PTAB being able to [ignore even timely submissions](#) made as a matter of right. Thus, those pointing to the prospect of a gold plated patent might as well be pointing to a pot of gold left by a Leprechaun at the end of a rainbow; gold plated patents and Leprechauns seem equally real based on the real life experiences of actual patent owners with the PTAB. Indeed, the PTAB is simply not a hospitable forum for patent owners, period.

“It is not surprising that there would be many patent owners who believe that IPRs could, on some level, be beneficial to them – after all, that’s what they were promised in the AIA. But I really wonder whether all respondents operate under the correct assumptions, or have been following the case law closely,” said [Hans Sauer](#), Deputy General Counsel for IP at the Biotechnology Innovation Organization (BIO). “For example, patent owners who believe that their adversaries will be subject to robust estoppel if they lose in an IPR must not have read *Shaw Industries*. Any patent owner who has defeated an IPR petition, only to see renewed petitions using the prior non-institution decision as a how-to guide, is likely to take a dim view of the proceeding. Patent owners who believe the PTAB will diligently resolve issues for district court litigation must never have run into the Board’s “redundant grounds” practice, under which presented grounds are neither instituted nor denied on the merits, only to hang out there for re-assertion later. Patent owners who believe that the 1-year litigation time bar will protect them from having to re-litigate their patent in the PTAB must never have experienced “proxy” IPR petitions by dubious third party petitioners.

Variations of the “multiple bites at the apple” theme simply abound in IPR. This is good for IPR petitioners, but it’s unambiguously bad for patentees.”

All excellent points raised by Sauer. IPR is unambiguously bad for patent owners and it is impossible to believe any independent inventor, start-up, university, biotechnology, manufacturing or pharmaceutical company would ever say or even suggest IPRs are beneficial. In fact, biotech and pharma companies have been complaining for years about IPRs and seeking some kind of legislative solution that would remove their patents from being able to be challenged in IPR. That doesn’t sound like a position that two major industries would take if they felt IPRs were beneficial, does it?

And this underscores a huge problem with this survey. Everyone familiar with how biotech and pharma companies think know that they don’t believe what is reported by Bloomberg and AIPLA. It is well known that they are lobbying very hard for a legislative fix, and yet there is no pause or question raised? The results make no sense, they fly in the face of logic and real world practice, and that alone should have raised significant questions about the credibility and reliability. “There are no results from actual patent owners, independent inventors, entrepreneurs or small businesses,” Calvert said. “More information from a wider range of respondents is needed to give a true picture of the effect of IPRs and other aspects of the AIA.”

Something is seriously askew and Bloomberg and AIPLA should have known it rather than release a report like this that will be fundamentally misused. That is particularly true given that the AIPLA has been on record supporting significant reforms to post grant challenges, specifically being supportive of the STRONG Patents Act submitted in the 114th Congress by Senator Chris Coons (D-DE). Does this survey suggest a shift in AIPLA’s belief that something needs to be done about the post grant procedures at the USPTO? That would be highly unusual given that they just submitted comments to the USPTO again raising significant concerns about certain aspects of post grant practice. Did they even stop to think about how this flawed, inaccurate, non-representative survey would undercut the positions they are taking?

Even if the study truly did reflected the opinions of *actual* patent owners, which it does not, the study itself calls into question its findings by pointing out that one major segment of the patent owning community was barely represented. For example, only three respondents identified themselves as representing patent aggregators or licensing entities. The study’s authors even acknowledge that these entities perceive that both license and patent value are lower than they were before *inter partes* review (IPR) proceedings existed. Of course, having only three respondents representing with that point of view allowed the report to marginalize these view as outlier opinions. But these are are not outlier opinions! For crying out loud the view that patent values are lower isn’t even an opinion, it is fact.

Then again, having the right disclaimer absolves all misleading suggestions apparently, or so it would appear that is the sentiment. The closing comments section of the PTAB study starts with:

“The explanations in the previous section and other conjecture in this paper are intriguing and call for more study of the phenomena recorded in the results. And a real-data statistical analysis of the link between outcomes in the PTAB and district court final dispositions is still wanting.”

No kidding. A real-data statistical analysis is what you would expect when you hear from an organization representing an entire sector of the legal world along with one of the most trusted names in business news and analysis. But it appears that we didn’t get one in this case, although they did go with results that are unreliable and absurd on their face, which is truly unfortunate.

“I am concerned with the reporting of this survey as there is nothing to suggest that independent inventors, entrepreneurs or the start-ups they create were actually involved in its polling,” Tuttle said. “In fact, most of the thousands of inventors and entrepreneurs that I know do not view the AIA favorably, are not in favor of the current post grant processes, and are upset when costly issued patents they presumed were 100% valid may no longer be. It’s more like having a rug ripped out from under them.”

Tags: [aipla](#), [american intellectual property law association](#), [Bloomberg Law](#), [Bob Stoll](#), [Google](#), [hans sauer](#), [inter partes review](#), [IPR](#), [patent](#), [patent owners](#), [Patent Trial and Appeal Board](#), [patents](#), [Paul Morinville](#), [PTAB](#), [Robert Rauker](#), [survey](#), [warren tuttle](#)

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Inventor Woes February 6, 2017 12:26 pm

Impossible to believe doesn’t necessarily mean something is factually incorrect. That’s what they tried to crucify Galileo and Darwin for, let us remember.

Invention Rights February 6, 2017 1:34 pm

They surveyed mostly outside counsel. Of course 48% of those representing patent owners thought that IPR's were beneficial – to their wallets! It appears that AIPLA represents the crony division of the Patent Bar. Their efforts are to promote patent disputes and make them super expensive to resolve. How long will their clients continue to take the bait?

angry dude February 6, 2017 4:38 pm

those morons do not represent small patent holders
nobody represents us at present
taxation without representation – that's all it is

Andrew Schulman February 6, 2017 4:47 pm

Sorry, but while the headline is catchy, it isn't supported by the article itself. The article shows that at least SOME patent owners are okay with IPRs and SOME of course are not. Is that any different from what the survey purported to show? No doubt the survey was skewed towards larger companies, but those companies are also patent owners. Many patent owners have somewhat contradictory interests, because they are also patent defendants. I don't understand why IPWatchdog would want to over-simplify the competing interests, and the tensions in patent law. This is one of several IPWatchdog articles that recently have presented an unnecessarily one-sided view that at times seems to suggest that almost any post-grant invalidation of a patent is an attack on American inventors as a whole.

angry dude February 6, 2017 4:59 pm

Andrew Schulman @4

Another skill for big infringer's lobby ?

Patents must be issued properly in the first place and presumed valid after that.

Period.

Gene Quinn February 6, 2017 5:08 pm

Andrew Schulman-

If you don't think the article supports the headline you obviously need to reread the article.

Clearly, the Bloomberg/AIPLA report is at a minimum misleading. They repeatedly use the term "patent owners" when only attorneys were surveyed. It is also wrong when it says that the criticisms of the PTAB have subsided, which they have not.

You say that we provide a one-sided view, which is as interesting as it is ignorant. The post grant proceedings, as explained in this and many other articles, are completely one-sided in favor of the challenger despite the fact that the statute says a patent is presumed valid. I realize that you don't like the truth, but that doesn't make it any less true. Pretending that the PTAB is a fair and even jurisdiction is asinine.

-Gene

Inventor Woes February 6, 2017 5:28 pm

"This is one of several IPWatchdog articles that recently have presented an unnecessarily one-sided view that at times seems to suggest that almost any post-grant invalidation of a patent is an attack on American inventors as a whole."

Couldn't have said it any better myself. It's like how the liberals won't stop complaining even though the opposition won fair and square.

Gene Quinn February 6, 2017 5:37 pm

Inventor Woes-

