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The PTAB's 70% All-Claims Invalidation Rate Continues to Be a Source of Concern



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"With the PTAB receiving thousands of petitions each year, one would expect that the All-Claims Invalidation Rate would be relatively constant year to year… But that hasn't happened. The All-Claims Invalidation Rate has increased from 55% to 70% since 2019 … reflecting a U.S. patent system that is out of balance."

The invalidation rate of patents in America Invents Act (AIA) proceedings, particularly inter partes reviews (IPRs), has been extremely high since the inception of the Patent Trial and Appeal Board (PTAB). Currently, a patent reaching a final written decision in an IPR will on average have 78% of its claims found invalid. Perhaps more surprising, when there is a final written decision, **70%** of the time ***all challenged claims*** in the patent are found invalid.

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PTAB adjudicates claims as "unpatentable.")

The U.S. Patent and Trademark Office (USPTO) presents its statistics in a manner that highlights aggregate invalidation rates are lower when the rate of institution (currently about 68%) is factored in. Still, most petitions result in institution, and many patents are subjected to multiple petitions over time so they eventually will be subjected to a full AIA proceeding. This article focuses on what happens when an IPR proceeding takes place and a final written decision is issued.

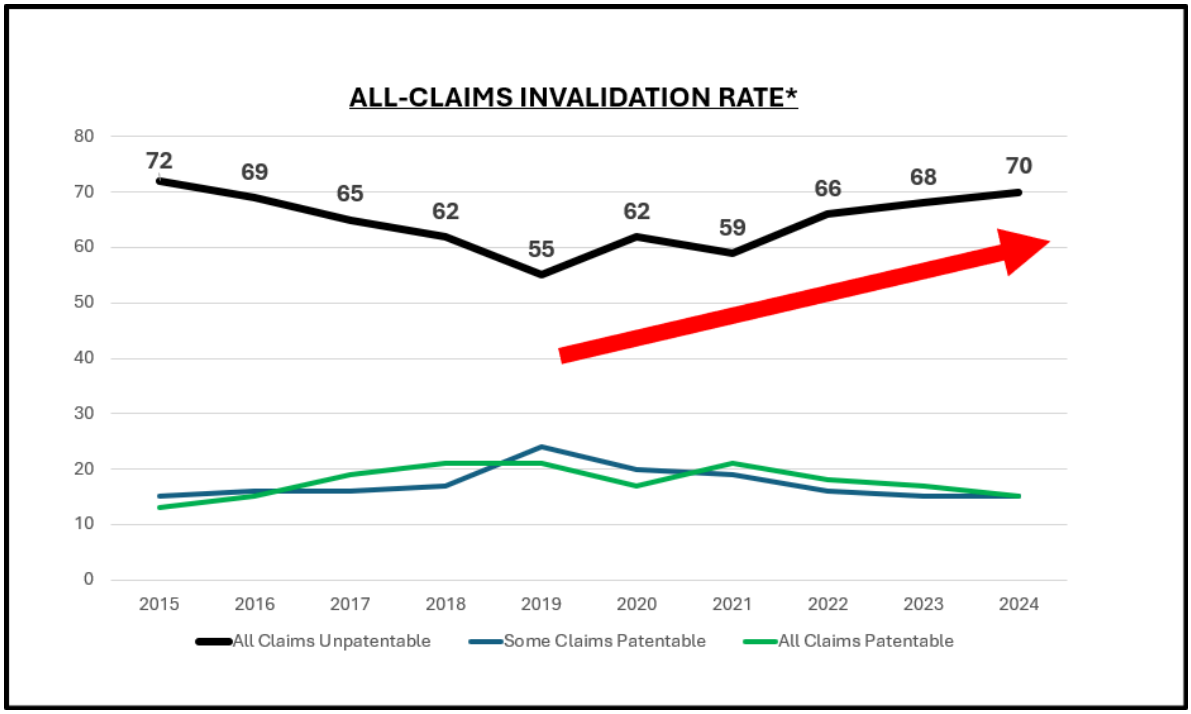


The PTAB's All-Claims Invalidation Rate Has Increased Significantly from 55% to 70% between 2019 and 2024

In the first several years of AIA proceedings, the PTAB found all challenged claims to be invalid at an extremely high rate. The conventional explanation for the high invalidation rate in this early period was that the PTAB was "weeding out" the most egregiously invalid patents that should never have been issued in the first place. Most expected that over time that the All-Claims Invalidation Rate would come down and approach some kind of equilibrium.

But that has not turned out to be the case. The All-Claims Invalidation Rate has remained very high, currently at 70%. Not only has it remained high, but over the last five years it has increased significantly from 55% to 70%, as illustrated below:

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Source: www.uspto.gov/patents/ptab/statistics (see Outcomes by Petition).

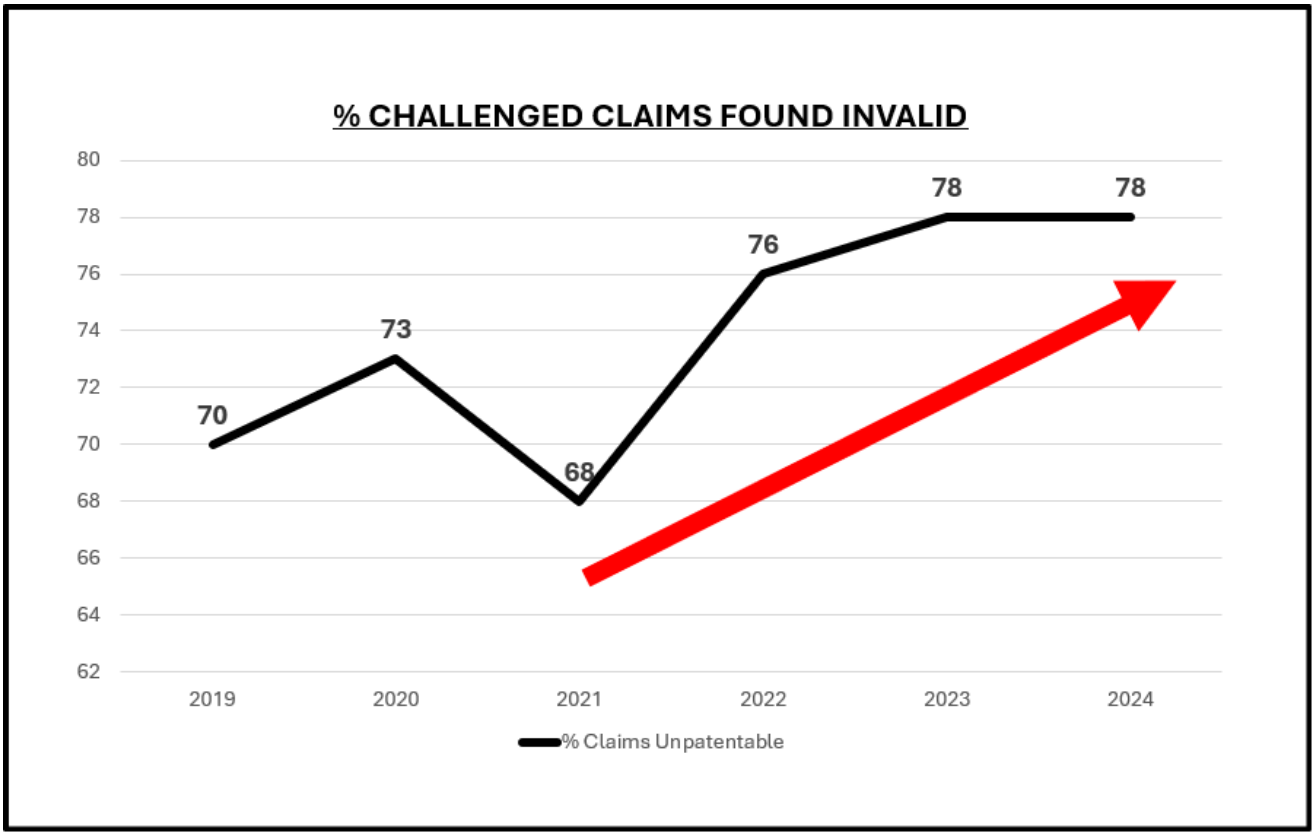
These figures are computed based on the outcome of final written decisions when there has been an institution. As previously mentioned, the "All-Claims Invalidation Rate" means the percent of final written decisions where all of the challenged claims are found invalid.

These figures present two issues of concern. The first is that all challenged claims are being found invalid at a 70% rate. That is an extremely high number. Even the lower bound of 55% back in 2019 is a very high cancellation rate. It means that more than one out of every two patents evaluated at the PTAB will have all of its claims found invalid. How can it be that the vast majority of patents selected for litigation are invalid?

The second concern is that the All-Claims Invalidation Rate has been increasing steadily over the last five years from 55% to 70%.

On a per-claim basis, the invalidation rate has increased from 70% to 78% from 2019 to 2024, as illustrated below:

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Source: www.uspto.gov/patents/ptab/statistics (see Outcomes by Claim Challenged).

Therefore, nearly 80% of challenged claims are found invalid when the PTAB issues a final written decision. If disclaimed claims are factored in, more than 80% of challenged claims were invalidated in 2024.

The Elevated All-Claims Invalidation Rate of 70% at the PTAB is Problematic

Why is the All-Claims Invalidation Rate so high? Most IPRs involve patents that are being litigated and that have been subjected to due diligence by the patent owner, the law firm, and/or a third party litigation funder before they are asserted. This due diligence typically includes an assessment of the case for infringement, and of most relevance here, an evaluation of the strength of the patent from a validity standpoint.

With that in mind, how can it be that the subset of patents selected for assertion will have all

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Most would agree that over the last 5-10 years the quality of examination of patent applications has improved. The *Alice* decision alone has greatly reduced the number of weak "business method" patents issued by the examining corps. Most would agree that during the 2017-2024 timeframe Director Andrei Iancu and Director Kathi Vidal put into place additional procedures and guidance to improve the quality of examination. The USPTO reports that patent examination quality has been high in recent years based on the Office of Patent Quality Assurance (OPQA) statistical sampling program. There is no evidence that the steady increase in the All-Claims Invalidation Rate from 55% to 70% at the PTAB is attributable to a decrease in the quality of examination by the USPTO.

With the PTAB receiving thousands of petitions each year, one would expect that the All-Claims Invalidation Rate would be relatively constant year to year with some statistical variance around a mean value. But that hasn't happened. The All-Claims Invalidation Rate has increased from 55% to 70% since 2019. This excessively high All-Claims Invalidation Rate is reflecting a U.S. patent system that is out of balance.

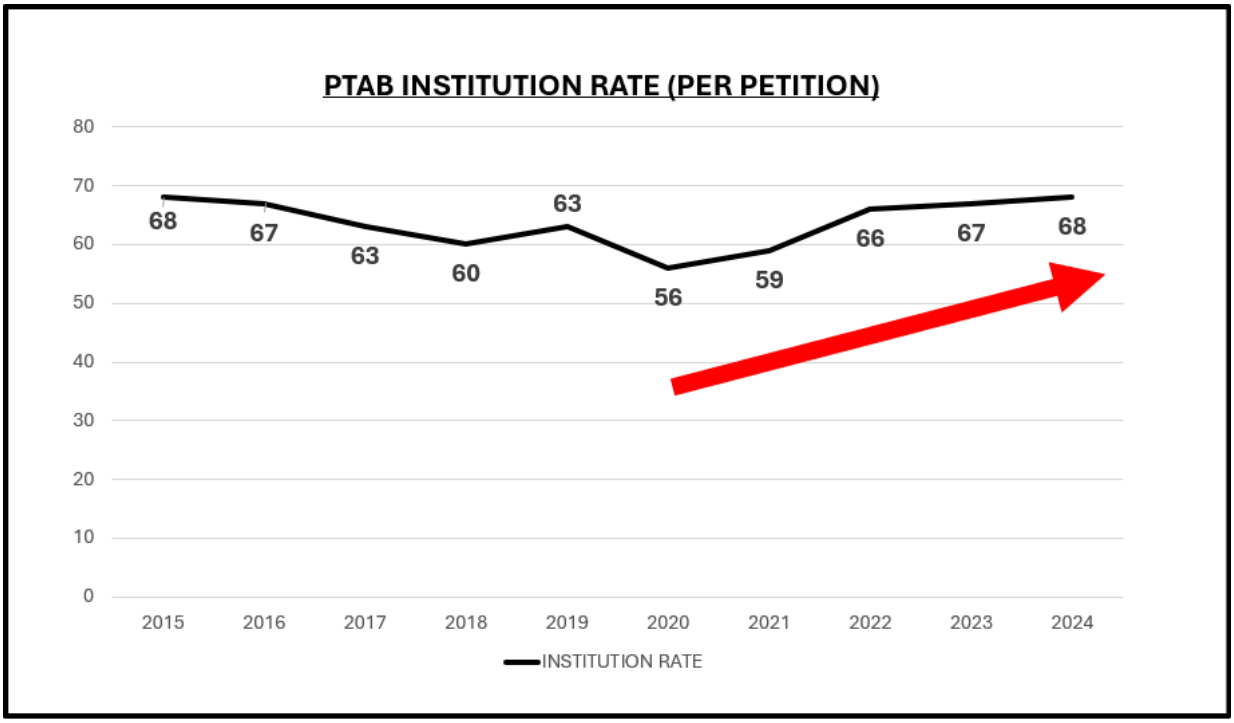
Ultimately, we are confronted with this fundamental fact: At one end of the pipeline, we have the USPTO examining corps examining applications and issuing patents. At the other end of the pipeline, another body in the USPTO is finding all challenged claims of patents invalid over 70% of the time when the patent is reviewed. Something seems awry from a systems perspective.

The Institution Rate Has Been Increasing

It is true that the All-Claims Invalidation Rate of 70% is mitigated by the fact that not all petitions result in institution. However, the institution rate, like the invalidation rate, has been steadily increasing.

In recent years, the institution rate has increased from 56% to 68%, as illustrated below.

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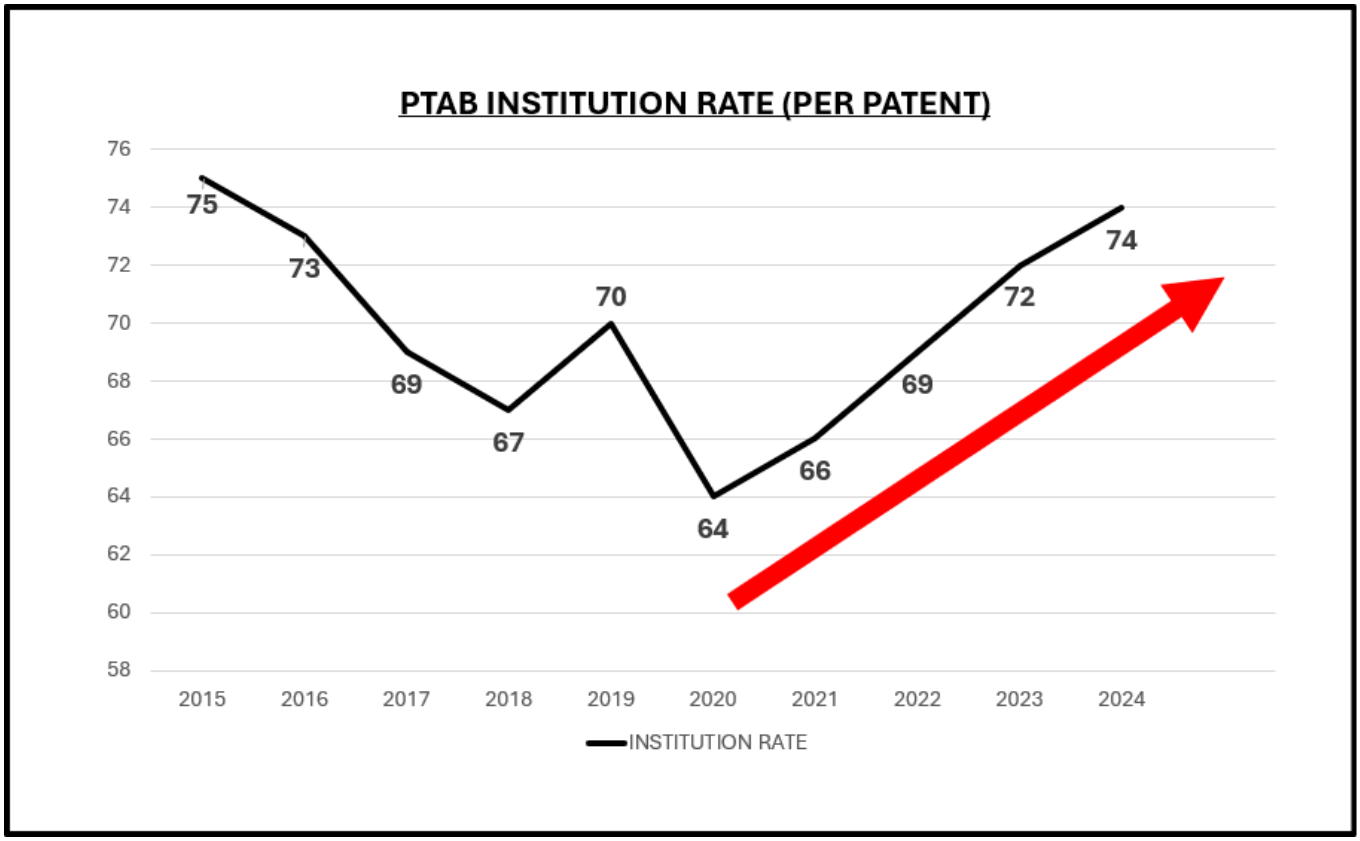


Source: www.uspto.gov/patents/ptab/statistics (see Institution Rates by Petition).

In 2024, PTAB proceedings were instituted 68% of the time on a per-petition basis.

On a per-patent basis, the institution rate increased from 64% in 2020 to 74% in 2024, as depicted below:

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Source: www.uspto.gov/patents/ptab/statistics (see Institution Rates by Patent).

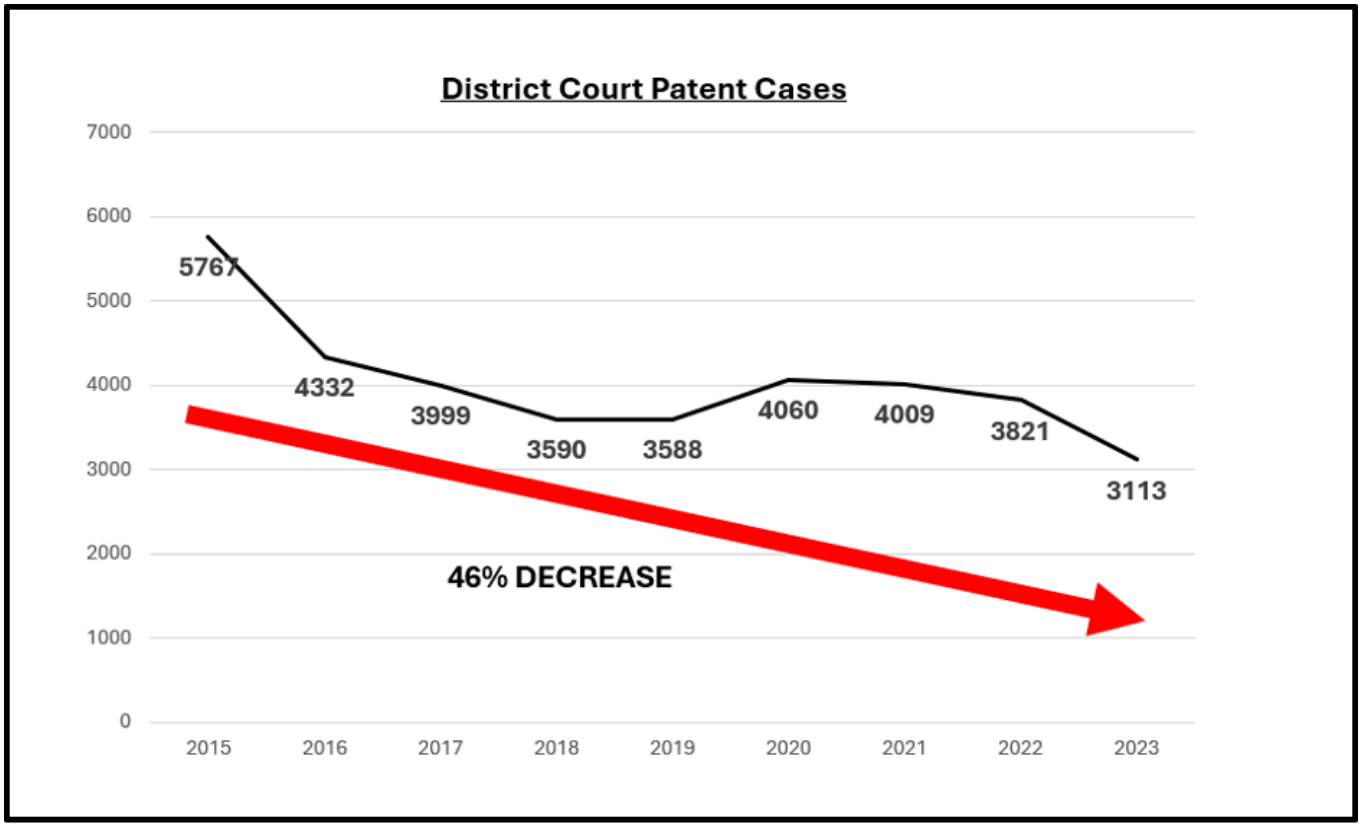
Like the All-Claims Invalidation Rate, the institution rate exhibits the trend of a steady increase in recent years.

The reality is that many asserted patents will be challenged with multiple petitions. If the institution rate per petition is 68%, then in most cases there will be an institution if a patent has been targeted by multiple petitions over the course of time. There truly is no "quiet title" for the patent owner in this situation. And it is extremely difficult for a patent owner to enforce its patents under these circumstances, even if there is flagrant infringement.

The Number of Patent Litigations and the Number of Petitions Have Been Falling

It has been widely reported that the number of patent suits has dropped nearly 50% since 2015. For example, Lex Machina data indicates that the number of district court patent cases dropped

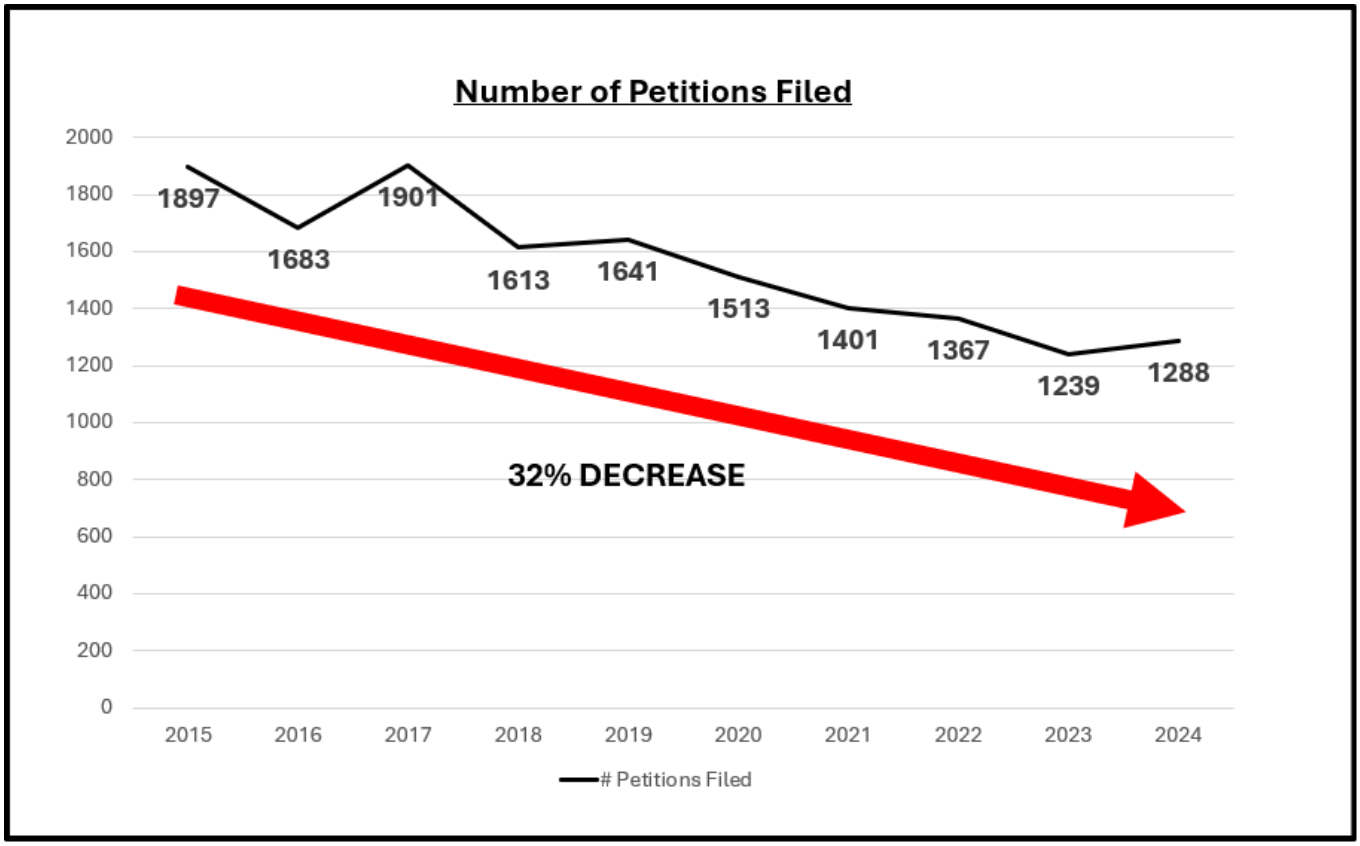
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Source: Lex Machina press releases.

During the same period, the number of PTAB petitions has been steadily falling:

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Source: www.uspto.gov/patents/ptab/statistics (see Petitions filed by Trial Type)

The relationship between the decreasing number of patent suits and the decreasing number of petitions invites a few chicken-and-egg questions.

First, why has the number of patent suits decreased by nearly 50% since 2015?

Certainly, the 2014 *Alice* decision on patent eligibility based on the "abstract ideas" doctrine has had a dampening effect on the number of patent cases.

But it is more likely that the decrease in the number of patent suits has been driven by the very high rate of invalidation at the PTAB. Patent owners are much less likely to assert their patents when they know there is an extremely high likelihood that the patent will be invalidated at the PTAB. Law firms and third party funding entities taking a contingent interest in patent cases are less likely to support those patent suits when the PTAB invalidation rate is so high.

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in the above figure, the number of petitions has declined as the number of patent cases has declined during the same period.

Another question is whether the PTAB's high rate of invalidation is even sustainable from a systems perspective. The high rate of invalidation at the PTAB drives down the number of patent cases, which in turn further reduces the number of petitions filed. If the PTAB's All-Claims Invalidation Rate remains at 70%, or gets even higher, then we can expect that the number of petitions will continue to drop. At some point, is it possible that the volume of petitions becomes so low that PTAB capacity exceeds demand? This is just one of many questions that arise when considering the potential effects of the PTAB's high All-Claims Invalidation Rate over the course of time.

Closing Thoughts

When the AIA was passed, few people foresaw that the PTAB would end up invalidating all challenged claims in patents 60-70% of the time.

The elevated invalidation rate at the PTAB is not healthy for the U.S. patent system, and it needs to be addressed, whether that comes in the form of internal USPTO policy adjustment, rulemaking, or legislative reform such as the PREVAIL Act currently under consideration by Congress.

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Paul Morgan
January 14, 2025 10:21 am

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