In answering the questions brought up by Itka Shira Safir on Patent Law and the Inter Partes Review

Patents and Problems:

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Ms Safir, who is studying law at the University of Chicago, enters the fray of an area of law which she has deep understanding in. She is well versed in the principles and legal consequences of patent and copyright law, and her analysis with regards to he merits of the “Inter Partes Review process” rightfully looks at whether the implementation of the Leahy–Smith America Invents Act of 2011 reaches the goals set forth by the supporters of the legislation. Her assessment is that we need to review if the Inter Partes Review stops patent trolls, and she evaluates the side effects of the law.

I think we need to question what was the cause of patent trolls and what was the effect. Patent trolling was the natural result of bad patent policy in legislation and implementation. Trying to solve the problems of patent trolls was initiated not just from the Free Software and Open Source movements, but supported by, and pushed by, the large companies who felt they were being cut by a million paper cuts, with frivolous lawsuits. They were perfectly happy when they were the ones in control of the situation, and perpetrated protracted lawsuits against individual inventors in order to steal there ideas and patents. The most famous case of this, of course, was when RCA strong armed Edwin Armstrong into submission, which contributed to his ultimate suicide. And if that wasn’t good enough, RCA’s legal vultures also attacked Philo Farnsworth, in his initiation of employment with Philco. RCA brought frivolous lawsuits claiming interference against Farnsworth, arguing that another patent had priority over Farnsworth's invention, despite the fact it no evidence of a competing instrument was ever produced within the time frame of the patent. To this day we are arguing with ventilator manufacturers whether outsiders can fix ventilators or obtain even standard designs and diagrams to support them, without the permission of patent holders.

Big companies have swallowed up small competition with quality inventions since the start of the industrial revolution. Patent trolling has been an effective means of suppressing competition since Andrew Carnegie and even before that. The question that we need to ask isn’t “does the Inter Partes Review process” serve the purpose of preventing patent trolls. Using the courts to push around inventors and artists is seemingly inherent to the legal process itself. The real question needs to be if the process contributes to producing better patents, and good law. The problem is not that the lawsuits brought by shell companies holding patents for legal purposes were in some way frivolous. It was all ok until someone got the bright idea to gather all these patents up together so that enough financial power could be brought to the system to defend small patents. This is not an excuse for trolling, but it an accurate description of the facts. The problem was, and still remains, that patents were frivolous to start with and system was, and probably still is, fundamentally broken.

The purpose of patent law is to benefit the public, and not make either inventors or large corporations wealthy. It says so right in the constitution in plain language that even a twelve grader can understand. [Congress has the right to] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." This is really the standard by which we need to measure how well any patent and copyright law measures up. Between 1999 to 2019 the number of patents approved by the US Patent Office has been steadily increasing.

From the Patent Office itself is reports:

Calendar Year	Utility Patent Applications (e) (inventions)	Design Patent Applications	Plant Patent Applications	Utility Patents (e) (inventions)	Design Patents	Plant Patents	Patent Grants to Foreign Residents (a)
2019	621,453	46,847	1,134	354,430	34,794	1,275	204,656
2018	597,141	45,083	1,079	307,759	30,497	1,208	177,915
2017	606,956	43,340	1,059	318,828	30,870	1,311	182,002
2016	605,571	42,571	1,177	303,049	28,873	1,235	172,818
2015	589,410	39,097	1,140	298,408	25,986	1,074	169,764
2014	578,802	35,378	1,063	300,677	23,657	1,072	166,999
2013	571,612	36,034	1,406	277,835	23,468	847	154,891
2012	542,815	32,799	1,149	253,155	21,951	860	142,180
2011	503,582	30,467	1,139	224,505	21,356	823	125,998
2010	490,226	29,059	992	219,614	22,799	981	122,694
2009	456,106	25,806	959	167,349	23,116	1,009	96,677
2008	456,321	27,782	1,209	157,772	25,565	1,240	92,929
2007	456,154	27,752	1,049	157,282	24,062	1,047	89,007
2006	425,967	25,515	1,151	173,772	20,965	1,149	93,942
2005	390,733	25,553	1,222	143,806	12,951	716	75,046
2004	356,943	23,975	1,221	164,290	15,695	1,016	87,051
2003	342,441	22,602	1,000	169,023	16,574	994	88,258
2002	334,445	20,904	1,144	167,331	15,451	1,133	87,101
2001	326,508	18,280	944	166,035	16,871	584	85,173
2000	295,926	18,292	797	157,494	17,413	548	78,871
1999	270,187	17,761	863	153,485	14,732	420	74,877

As one can see, since 1999 there has been a steady rise on the number of patent applications and patent grants. And while the number of applications rise, as well does the grants, the percentage of grants per application has remained starkly steadfast at rough between 30% and 40% of granted patents to

applications. According to the October 2019 report to the Congressional committee on the Judiciary, Commissioner for Patents Andrew Hirshfeld says that the agency has employed more than 8,300 patent examiners to cover all these applications.

Looking back over the data, it would seem that the 2011 Leahy-Smith Act has had negligible impact over all on the granting of patents. There has been an upturn in patent applications and patent grants, that largely follow each other since before the act, starting in 2010. There has been a steady increase since 2008 on the percentage of grants/application, when in 2007 it reached a minimum of about 28% and has steadily risen since them to about 37%. This trend was prior to the act and continues. The real question has to be, why is it that after a century of working on patents, that in review of the USPOs work, a full "81% of instituted proceedings that result in a decision have at least one claim invalidated". Why are we still producing junk patents? Why does this continue to be more of a business strategy and gimmick rather than a real stimulus for producing quality inventions for the public good? Can Americans really trust a patent system that rigs our healthcare market by distorting drug competition, that impedes hardware standardization because of patent fears among video card manufacturers, etc etc etc. If the law was designed to bring parties into negotiations rather than ratchet up wasteful litigation, then indeed, the rough treatment of bad patents in the Inter Partes Review is effectively bringing parties to the table faster and at less cost. Otherwise, it seemingly has no impact on the overall system. The patent office had been producing bad patents in the past, and to this day, it still does so.

The most important part of this act, happens to be the alteration of first invented to first filed. It would be interesting in another analysis to see how this has affected outcomes in the granting process and in judicial litigation.

Reference: https://www.chibus.com/perspectives/2020/5/25/patent-wars-the-trolls-and-the-leviathans-ygmh3

http://www.mrbrklyn.com/docs/itka_response_data.ods