

## ***RAISING THE STAKES IN PATENT CASES***

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Defendants in patent infringement cases are permitted to defend on the grounds that the infringed upon patent is invalid. This defense, which we call a patent challenge, is intended to correct for the fact that the Patent and Trademark Office may grant patents that are invalid, and invalid patents impose significant economic costs without the offsetting benefit of spurring innovation. Patent challenges are intended to weed out these invalid patents. Unfortunately, patent challenges have flaws. Defendants sometimes succeed in convincing a court to invalidate a truly valid patent. In these cases, challenges reduce the returns to valid patents and discourage valuable innovation. Other times, a court upholds an invalid patent against a challenge. This imposes a tax on genuine innovation and shifts resources toward rent-seeking and away from productive activities. In this paper we ask whether it is possible to reduce the costs patent challenges impose on valid patents without hampering the utility of patent challenges in weeding out invalid patents. If patent trials are inaccurate, it would appear that the most sensible course of action would be to reduce the stakes of those trials. Counter-intuitively, we propose *raising* the stakes of patent litigation by providing enhanced rewards to victorious patent holders and imposing enhanced penalties on owners of patents that are invalidated at trial. Such measures would actually create greater separation between holders of valid and invalid patents, incentivizing innovation by the former while dissuading the latter from litigating or even asserting their socially worthless property rights.