

October 28, 2013

The Honorable William Goodlatte
Chairman
House Judiciary Committee
2138 Rayburn House Office Building
Washington, DC 20515

The Honorable John Conyers, Jr.
Ranking Member
House Judiciary Committee
B-351 Rayburn House Office Building
Washington, DC 20515

Chairman Goodlatte and Ranking Member Conyers,

The undersigned companies thank you for introducing the Innovation Act (H.R. 3309), an important piece of legislation responding to the need to improve the patent system. While we support the intent of the bill, we are concerned that the proposed extension of the transitional program for covered business method (CBM) patents will have a significant and negative impact on small technology companies.

Patent trolls are a serious issue in the tech community and we support measures to lessen their burden on our companies. For a company facing litigation based on overly-broad patents, the proposed reforms could help minimize the resources needed, and reduce costs and time spent. Requiring losers in patent cases to pay for the legal costs of the prevailing party through the bill's fee-shifting provision would also help.

We also support the transparency provisions included in the Innovation Act. Too often patent trolls take advantage of vague and indecipherable demand letters to extort money out of small businesses. Even when a lawsuit is filed, it is hard for small companies to determine the real party at interest and the claims leveled against them. These transparency provisions help demystify the process of patent litigation and allow developers to more easily defend themselves in these suits.

We are concerned, however, by the provision of the bill which extends indefinite post-grant review at the United States Patent and Trade Office (USPTO) for software patents. By expanding the reach of the program to include software patents and eliminating the September 16, 2020, sunset provision, the proposed legislation would place an even greater burden on small businesses.

We understand the legislation is aimed at eliminating overly-broad patents, but the extension of post-grant review and the significant changes that would result do not justify this broad change. However, extension of post-grant review still requires businesses to retain an attorney

who can not only address the claims in court but also stay the case and file a review with the USPTO, which does not have the desired outcome of reducing costs on small businesses being sued by patent trolls. While the post-grant review itself costs less, the potential for increased litigation is a steep cost for a small business with limited capital and experience with law.

When choosing to pay the patent troll a few thousand dollars versus paying a lawyer to take them to court, most small companies will still choose to quickly end the headache. Small businesses rely on certainty in the system in order to make decisions about the future. The extension of the post-grant review process does not provide certainty and still retains the costs associated with litigation.

The post grant review process additionally hurts small businesses software patent holders, as it would significantly increase the costs associated with protecting their patent rights. According to a 2011 survey by the American Intellectual Property Law Association, for a claim that could be worth less than \$1 million, the median legal costs for a patent owner to litigate a claim against a patent infringer is \$650,000.¹ The cost to a patent owner to additionally defend their patent in a post-grant review at the USPTO is \$227,200.² It could cost \$877,200 to defend a claim worth less than \$1 million if a patent owner is forced to go through a post-grant review at the USPTO as well as an infringement lawsuit. When the damages won against a patent infringer are less than legal expenses, companies are disincentivized from enforcing their own patents.

Instead of prolonging the post-grant process, we believe the next stage of patent improvement should come from a more robust pre-grant examination process. That is where the uncertainty about overly-broad patents can be more easily addressed and the tech community can be protected from bad patents without affecting the owners of patents that were properly granted.

Patent reform is needed to address the threat patent trolls hold over the entire tech community and we commend your efforts to address those threats. However, we respectfully urge you to reconsider this section of the bill to ensure that the good intentions of this legislation do not result in additional uncertainty and costs for innovative small companies.

Respectfully,

David Bain
CEO
TM Technologies
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<http://www.aipla.org/advocacy/executive/Documents/AIPLA%20Comments%20to%20IPEC%20on%20Joint%20Strategic%20Plan%20on%20IP%20Enforcement%20-%2008.10.12.pdf>

² <http://www.gpo.gov/fdsys/pkg/FR-2012-02-10/pdf/2012-2534.pdf>

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