



10 June 2015

The Honorable Bob Goodlatte, Chairman
House Judiciary Committee
US House of Representatives
Washington, DC 20515

The Honorable John Conyers, Ranking Member
House Judiciary Committee
US House of Representatives
Washington, DC 20515

Dear Chairman Goodlatte and Ranking Member Conyers,

IEEE-USA, as an advocate for the engineers and scientists who built America's economy, the strongest in the world, we continue to have reservations about current legislative proposals to reform US patent law. While we support the stated goal of H.R.9, the *innovation Act*, curbing abusive litigation, H.R.9 as introduced will have a significant negative impact on Americans' ability to continue unsurpassed innovation. IEEE's U.S. membership exceeds 200,000 U.S. engineers and entrepreneurs in all 50 states, all of whom depend on a patent system that encourages investment and enables legitimate actors to assert their patent rights.

Both H.R.9 and the Senate's patent bill, S.1137 (the *PATENT Act*), weaken American patents and the ability of *all* innovators to secure constitutionally guaranteed rights to their inventions. Sponsors and proponents of these bills claim they are designed to curb abusive tactics in patent litigation. However, neither bill limits its effects to only bad actors. Instead, both bills are overly broad, and burdensome to all litigants—notably independent inventors, startups, entrepreneurs, and small businesses which seek to assert their patent rights.

Patents protect the most-constricted point in the innovation pipeline—investment in early-stage ideas. Usually, initial concepts are cheap. However, turning concepts into useful products, pharmaceuticals, and other practical benefits, is very expensive. Innovators and businesses invest in proof-of-concept testing, identifying the best chemical compound or technique out of a large number of possibilities, prototype-to-product engineering, debugging, ruggedizing and reliability engineering, testing, regulatory approval, building a production facility, building distribution and sales channels, and/or marketing to develop demand. All of these activities need to be funded before the first sale occurs.

Investors—whether venture capital investment, or senior corporate management—will invest only where there is a convincing showing of sustainable competitive advantage. Especially for the most disruptive ideas, where profitability is years in the future, investors need assurance that the risks carry a reward, and that investment will generate a return. Nobody wants to invest in “the next big thing” if someone else will run off with the profits. For many inventions, in all fields of technology, patents are crucial to reassure investors that the business—if successful—will be profitable, that the original innovator will be able to maintain those profits, and grow the initial idea and investment into jobs. Without that reassurance, the initial investment never comes, and ideas die.

IEEE-USA is concerned that the collateral damage inflicted by S.1137 and H.R.9 on all patents will harm American productivity, job creation, and economic growth, far more than they limit the actions of bad actors. Specifically, IEEE-USA:

- Opposes “heightened pleading requirements.” In no other area of civil litigation must a party plead with this kind of particularity. For example, in an employment discrimination case, the initial complaint need not set forth the names of every individual involved in every “hostile environment” incident, or plead specific facts relating to the employer’s intent. Further, in many patent cases, the infringer intentionally hides facts necessary to show infringement, for example, by encrypting data. The Supreme Court recently withdrew Form 18, putting patent cases on even footing with every other area of civil litigation, thereby achieving the stated goals of the legislation.
- Opposes any fee-shifting proposal that is not bilateral and equally applicable to plaintiffs and defendants. IEEE-USA also opposes any fee-shifting proposal that creates any presumption of award of fees, or that would have the practical effect of requiring pre-suit bonding for a typical low-capitalization startup company.
- Opposes the “customer stay” provision. The Senate’s section-by-section discussion of S.1137 suggests that the provision is limited to end-users. If H.R. 9 aligned with this discussion, it might be a plausible solution to a real problem. However, the current bill text creates an exemption for many points in a distribution chain and makes enforcement essentially impossible for some classes of infringing exports.
- Supports provisions that put *Inter partes* reviews, business methods reviews, and post-grant reviews on equal footing with district court reviews of patent validity. The standards for claim interpretation and evidentiary burden should be the same to eliminate forum shopping.
- Opposes any provision that creates carve-outs based on either technology or class of entity. The law should discriminate against disfavored behavior and must neither favor nor disfavor by class of entity. For example, IEEE-USA members often start companies as spinouts from universities, but the companies themselves no longer fit the carve-outs in favor of universities. Similarly, our members need fair patent protection in other countries. Thus, we oppose language that would set a model in US patent law for similar discriminatory patent laws in other countries.

We ask that Congress not diminish the value of intellectual property and disincentivize investment in the ideas of future inventors and innovators. We urge you to consider more tempered proposals that carefully and specifically target bad behaviors. IEEE-USA joins many other pro-innovation organizations in enthusiastically supporting the Senate’s STRONG Act, and the House’s TROL Act. These bills focus specifically on the behavior that clearly distinguishes “trolls” and other bad actors from legitimate patent holders. Abusive demand letters are the lynchpin of the entire troll business model. Enacting carefully targeted fixes provides time to carefully evaluate further targeted measures that may be needed.

We thank you for your attention to these important matters. If we can be of any assistance, or if you have any questions, please do not hesitate to contact Erica Wissolik at (202) 530-8347 or e.wissolik@ieee.org.

Sincerely,

A handwritten signature in blue ink that reads "James A. Jefferies". The signature is written in a cursive style with a large initial 'J'.

James A. Jefferies
2015 President, IEEE-USA

CC: Members of the House Judiciary Committee