

UNITED *for* PATENT REFORM

March 16, 2015

The Honorable Christopher Coons
United States Senate
127A Russell Senate Office Building
Washington, DC 20510

Dear Senator Coons:

The undersigned members of United for Patent Reform (UPR) have formed a broad coalition of diverse American businesses to pursue comprehensive solutions to abusive patent litigation. We write this letter to express our concern that the recently introduced STRONG Patents Act of 2015 will undermine reforms enacted in 2011, distract Congress from addressing the urgent problems caused by patent trolls, and, in fact, will make it easier for trolls to bring frivolous litigation.

In 2011, after years of efforts, Congress brought new strength to our nation's patent system and new vigor to the Patent and Trademark Office's administration of that system when it passed the America Invents Act (AIA) with overwhelming bipartisan support. Among the most significant improvements made possible by the AIA was the creation of post-grant review procedures at the PTO. Now, the validity of claims can be challenged directly before the PTO, using the depth and breadth of the PTO's expertise in an efficient and cost-effective administrative proceeding. These streamlined procedures can—and do—eliminate, narrow, or clarify ambiguous or otherwise flawed patents, and have already proven to be highly effective weapons in the battle against the poor quality patents that are the delight of patent trolls.

Congress has successfully completed the hard work of updating and strengthening the PTO. The AIA was many years in the making, but the salutary effects of its enactment are finally being enjoyed across our economy. Now that the modernization of the PTO and its practices is done, Congress has turned its focus to the next step in protecting and improving our innovation economy—stopping abusive patent litigation in the federal courts. UPR welcomes these efforts—including those of Senators Leahy, Schumer, Grassley, and Cornyn—to address the entirely different, but dire, problem of patent trolls. As someone with strong interest and expertise in the U.S. patent system, UPR encourages your engagement on this issue as well. UPR cannot, however, support the STRONG Act.

The STRONG Act fails to address the critical problem of patent trolls. Instead, it makes drastic and unwarranted changes to the successful new post-grant administrative procedures created by the AIA. The STRONG Act—if adopted—would aid patent trolls by neutralizing some of the valuable tools Congress has created to challenge the poor quality patents on which trolls rely. By undermining these effective administrative procedures for challenging poor quality patents, the STRONG Act would be a significant step backwards for the U.S. patent system.

UPR supports legislation that addresses litigation abuse, takes back a patent system increasingly held hostage by patent trolls, and returns it to its original purpose: fostering innovation and investment that benefits the entire American economy. The provisions of the STRONG Act do not support that goal, and in fact, undermine patent reform in several critical ways. UPR expressly opposes the following provisions of the STRONG Act:

- Eliminating the BRI Standard: For over 90 years, the PTO has applied the “broadest reasonable interpretation” standard for claim construction at all stages of patent examination and reexamination to protect real innovation and to prevent needless litigation.¹ The STRONG Act will replace that time-honored and well-established standard with the one used during litigation. That litigation standard—crafted to protect patentees in a litigation environment where they can no longer amend their claims—is fundamentally incompatible with administrative proceedings where the patent owner faces a lower burden of proof and retains the ability to amend claims. UPR expressly opposes this change which will only perpetuate the vague and overly-broad patents often asserted by patent trolls.
- Allowing Amendments to Claims as a Matter of Right: The AIA allows patent owners to make a motion to amend their claims during an AIA proceeding, but wisely leaves the decision of whether a particular amendment is appropriate to the discretion of the PTO. The PTO has allowed claims to be amended during inter-parties review (IPR), and it is currently reviewing its regulations on when amendments should be allowed. The STRONG Act strips this discretion and allows amendments as a matter of right. This standard is unworkable within the limited time frame allowed by the AIA and the narrow issues presented to the PTO during an IPR. If enacted, the STRONG Act will allow trolls to game the system and change their litigation attacks mid-course.
- Raising the Challenger’s Burden of Proof: Under the STRONG Act, invalidating a patent claim in a post-grant procedure will require a challenger to overcome a presumption of validity and to prove invalidity by clear and convincing evidence instead of the current requirement of a preponderance of the evidence. This new higher standard—which would be inconsistent with the standard applied by the PTO in every other proceeding—will make it more difficult to successfully challenge bad patents and will not further the goal of improving patent quality. It would also take a standard meant to be used by judges to show deference to an administrative agency’s (the PTO’s) decisions and apply that standard to the agency itself, reflecting a clear misunderstanding of its purpose.

¹ *In re Carr*, 297 F. 542, 544 (D.C. Cir. 1924) (“[W]e have uniformly ruled that claims will be given the broadest interpretation of which they reasonably are susceptible.”).

- Limiting Who Can Challenge Patent Claims Before the PTO: Under the STRONG Act, only parties who have been sued for patent infringement will be allowed to challenge patent claims before the PTO. This change lets trolls game who will be eligible to challenge their patents before the PTO. All members of the public are harmed by poor quality patents and should be permitted to challenge them before the PTO.
- Allowing the Patentee to Submit New Evidence: Under the STRONG Act, the patentee will be allowed a second bite at the apple by submitting new evidence on appeal during post-grant review that was not previously submitted to the PTO during the IPR or PGR. This change will only increase the cost and duration of the proceedings, which contradicts the goals of the AIA.

These provisions—by no means a comprehensive list of the problematic proposals in the STRONG Act to which we object—contradict UPR’s goal of enacting legislative reform that will reduce litigation abuses and strengthen the patent system by ensuring access to efficient and fair mechanisms to reexamine questionable patents. The new administrative proceedings created by Congress in the AIA have proven to be powerful and effective tools for achieving one of Congress’s top priorities—ensuring the quality of U.S. patents. The AIA gave the American public an efficient and cost-effective means of challenging the vague and overly broad patents that patent trolls assert in their lawsuits.

In addition to undermining those effective post-grant procedures at the PTO, the STRONG Act also undermines other protections against patent trolls. Among other concerns the bill raises, it would explicitly overturn the recent Supreme Court case in *Limelight Networks v. Akamai Technologies*, which held that a defendant cannot be liable for induced infringement when no one has directly infringed the patent. By eliminating this rule, the STRONG Act would allow trolls to sue companies that merely provide general purpose goods and services for actions allegedly taken by their customers, over whom the companies have no control. Similarly, the STRONG Act would upset settled case law and dramatically lower the standard for willful infringement from a finding of intentional conduct to simply bad faith. By making it easier for trolls to be awarded treble damages, the STRONG Act provides an economic incentive that will lead to an explosion of new willful infringement claims from patent troll. And while the STRONG Act includes provisions providing the FTC with authority to regulate bad faith assertions of patent infringement, those provisions do not address the abusive demand letters sent by patent trolls. The STRONG Act limits the FTC’s authority, prevents state attorneys general from protecting their citizens from abusive patent trolls, and creates numerous loopholes that will allow trolls to escape liability. These changes will aid, rather than prevent, the abusive litigation tactics favored by trolls.

The introduction of the STRONG Act—which negates many of the salutary changes the AIA made at the PTO and undermines other important protections—will only distract Congress from the real problem facing the U.S. patent system: abusive patent litigation by patent trolls. Rather than revisit the battles fought during the passage of the AIA, UPR urges Congress to develop reforms that return the American patent system to one that fosters entrepreneurial activity rather than abusive litigation.

Sincerely,

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