

# The STRONGER Patents Act of 2017

Support Technology & Research for Our Nation's Growth and Economic Resilience

## *Why STRONGER Patents?*

- A number of changes over the past decade have weakened the U.S. patent system, from Supreme Court decisions to the unintended consequences of new post-grant administrative proceedings at the U.S. Patent and Trademark Office.
- **The result is that the U.S. patent system is now ranked tenth worldwide by the U.S. Chamber of Commerce. Until this year, it was always ranked first.**
- These changes risk undermining investor confidence in technology-intensive small businesses, ceding the U.S.'s historic edge in innovation to Europe or China.
- The impact of undermining the patent system will be significant—patent-intensive industries create high-paying jobs that have a wage premium of 74%, and the U.S. currently has a trade surplus of about \$85 billion due to the licensing of IP rights.
- Strong patents are also vital to technology-intensive startups. Research shows that if a startup receives a patent, its chance of securing venture capital increases over 50% and it is likely to have better growth in employment and sales.

# *What Can We Do?*

*Enact balanced reforms to restore the U.S. patent system to the world's gold standard.*

- **Protect American Inventors from Illegal Infringement**

U.S. courts should treat a patent like any other property right, permitting preliminary injunctions to protect patent owners against infringement while cases are pending, and granting permanent relief to protect a patent owner from ongoing infringement after a court determines the patent to be valid and infringed. A presumption that patent owners are entitled to injunctive relief will also encourage infringers to negotiate fair licenses based on the free market, keeping cases out of court.

- **Ensure Fairness in Patent Office Administrative Challenges**

Five years after the Leahy-Smith America Invents Act created proceedings at the Patent Office to allow faster and cheaper challenges to patents, it has become clear that further changes are needed to limit repetitive and harassing challenges against patent owners and to ensure that the proceedings are fair to all parties, including solo inventors and small businesses.

- **Protect Small Businesses and Consumers from Abusive Patent Demand Letters**

Changes are needed to ensure that the Federal Trade Commission and state attorneys general have the tools they need to protect consumers and small businesses from bad-faith, abusive demand letters.

- **Fully Fund the USPTO to Ensure Timely, High-Quality Patents**

Inventors' patent application fees should remain at the USPTO. It's not fair to tax inventors for government spending. Adequate, dependable funding is critical for timely, higher-quality patents.

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## SECTION BY SECTION

### Section 101 – Findings

### Section 102 & 103 – Inter Partes Reviews and Post Grant Reviews

- **Section A: Claim Construction** – Harmonizes the claim-construction standard used in post-issuance proceedings at the Patent Trial and Appeal Board (PTAB) with the standard used in district court litigation.
- **Section B: Burden of Proof** – Maintains the presumption of validity for patent rights in post-issuance proceedings, and clarifies that unpatentability may be proved for existing claims by the “clear and convincing evidence” standard used in district court litigation.
- **Section C: Standing** – Minimizes abuse of post-issuance proceedings by ensuring that a petitioner has a business or financial reason to bring a case before the PTAB, reducing incentives for privateering or extortion of nuisance settlements.
- **Section D: Limitation on Reviews (*new*)** – Reduces repetitive and harassing attacks on patents by authorizing the Director to initiate review only once per claim of a patent.

- **Section E: Interlocutory Appeals from Institution Decisions (*new*)** – Mere institution of a post-issuance proceeding can have a negative impact on a patent regardless of the final outcome, so an immediate appeal in limited circumstances is provided to address clear errors and allow for more appellate court guidance on recurring legal issues.

- **Section F: Eliminating Repetitive Proceedings (*new*)** – Petitioners can only challenge a patent once, unless they are later charged with infringement of additional claims. If a inter partes review is instituted, the petitioner cannot bring challenges of the same type in district court to eliminate duplicative proceedings.

- **Section G: Real-Party-in-Interest** – Clarifies that an entity making financial contributions to challenge is a real-party-in-interest estopped from future challenges, ensuring that no entity gets multiple bites at the apple to challenge a patent (*new*). Also provides for enough discovery to ensure that entities are not gaming the proceedings.

- **Section H: Priority of Federal Court Validity Determinations (*new*)** – Clarifies that if a district court reviews the validity of a patent before the PTAB, the post-issuance proceeding should not start, or should be paused pending appeal.

- **Section I: Amendment of Claims (*new*)** – Provides a pathway for patent owners to enter into an “expedited” examination procedure instead of amending claims before the PTAB. Clarifies that if amendments are pursued in front of the PTAB the inventor is entitled to an amended claim unless the cumulative evidence shows that he or she is not.

- **Section 104 – Composition of PGR and IPR Panels**

Clarifies the intent of the Leahy-Smith America Invents Act that U.S. Patent and Trademark Office (USPTO) adjudicators who decide whether to permit a post-grant proceeding are distinct from the PTAB judges who will decide the outcome of a petition.

- **Section 105 – Re-Examination of Patents**

Harmonizes treatment of re-examination proceedings with the treatment of inter partes review (IPR) post-grant proceedings to provide clear guidelines for treatment of parallel proceedings.

- **Section 106 – Restoration of Patents as Property Rights (new)**

Restores the presumption of injunctive relief upon a finding that a patent is valid and infringed.

- **Section 107 – Elimination of USPTO Fee Diversion**

Eliminates fee diversion through the establishment of a new USPTO revolving fund in the U.S. Treasury. Adequate, dependable funding is critical for timely, higher-quality patents.

- **Section 108 – Infringement**

- *Proving Induced Infringement (new)* – Clarifies that proving inducement only requires showing that the alleged infringer intended to cause the acts that constitute infringement.

- *Outsourcing to Avoid Liability (new)* – Closes a loophole that allows companies to avoid infringement by designing a product in the U.S. but outsourcing manufacturing.

- *Divided Infringement* – Eliminates the single-entity rule for defendants who have intentionally caused the infringement of a patent, clarifying *Akamai v. Limelight*.

- **Section 109 – Institutions of Higher Education**

Clarifies that universities qualify as micro-entities under the Leahy-Smith America Invents Act.

- **Section 110 – Assisting Small Businesses in the U.S. Patent System**

-Small Business Administration Report – Requires the SBA to draft two reports examining how small businesses rely on patents and the prevalence of abusive demand letters.

-Expansion of Patent Pilot Program to Aid Small Business Defendants – Aims to expedite cases for small businesses and individuals by providing more training and law clerks.

-Expanded Access to Patent-Searching Databases – Provides greater access to patent-searching databases currently available only in-person at public search facilities.

## **Title II – Targeting Rogue and Opaque Letters**

Empowers the Federal Trade Commission to crack down on abusive, patent-related, demand letters. This section mirrors the bipartisan TROL (Targeting Rogue and Opaque Letters) Act that was reported favorably in the 113th Congress from the House Energy & Commerce Subcommittee on Commerce, Manufacturing, and Trade.