

116TH CONGRESS
1ST SESSION

S. 2082

To strengthen the position of the United States as the world’s leading innovator by amending title 35, United States Code, to protect the property rights of the inventors that grow the country’s economy.

IN THE SENATE OF THE UNITED STATES

JULY 10, 2019

Mr. COONS (for himself, Mr. COTTON, Mr. DURBIN, Ms. HIRONO, Mr. KENNEDY, and Mr. CRAMER) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To strengthen the position of the United States as the world’s leading innovator by amending title 35, United States Code, to protect the property rights of the inventors that grow the country’s economy.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

4 (a) SHORT TITLE.—This Act may be cited as the
5 “Support Technology and Research for Our Nation’s
6 Growth and Economic Resilience Patents Act of 2019” or
7 the “STRONGER Patents Act of 2019”.

1 (b) TABLE OF CONTENTS.—The table of contents for
 2 this Act is as follows:

Sec. 1. Short title; table of contents.

TITLE I—STRONGER PATENTS ACT

Sec. 101. Findings.

Sec. 102. Inter partes review.

Sec. 103. Post-grant review.

Sec. 104. Composition of post-grant review and inter partes review panels.

Sec. 105. Reexamination of patents.

Sec. 106. Restoration of patents as property rights.

Sec. 107. Elimination of USPTO fee diversion.

Sec. 108. Institutions of higher education.

Sec. 109. Assisting small businesses in the U.S. patent system.

TITLE II—TARGETING ROGUE AND OPAQUE LETTERS

Sec. 201. Definitions.

Sec. 202. Unfair or deceptive acts or practices in connection with the assertion
 of a United States patent.

Sec. 203. Enforcement by Federal Trade Commission.

Sec. 204. Preemption of State laws on patent demand letters and enforcement
 by State attorneys general.

3 **TITLE I—STRONGER PATENTS** 4 **ACT**

5 **SEC. 101. FINDINGS.**

6 Congress finds that—

7 (1) the patent property rights enshrined in the
 8 Constitution of the United States provide the foun-
 9 dation for the exceptional innovation environment in
 10 the United States;

11 (2) strong patent rights encourage United
 12 States inventors to invest their resources in creating
 13 new inventions;

14 (3) patent protection has led to patient cures,
 15 positive changes to the standard of living for all peo-

1 ple in the United States, and improvements to the
2 agricultural, telecommunications, and electronics in-
3 dustries, among others;

4 (4) the United States patent system is an es-
5 sential part of the country's economic success;

6 (5) strong patent protection improves the
7 chances of success for small companies and increases
8 their chances of securing financing from investors;

9 (6) intellectual property-intensive industries in
10 the United States generate tens of millions of jobs
11 for individuals in the United States;

12 (7) intellectual property-intensive industries in
13 the United States account for more than one-third
14 of the country's gross domestic product;

15 (8) in the highly competitive global economy,
16 the United States needs to uphold strong patent
17 protections to maintain its position as the world's
18 premier innovative country;

19 (9) Congress last enacted comprehensive re-
20 forms of the patent system in 2011;

21 (10) unintended consequences of the com-
22 prehensive 2011 reform of patent laws are con-
23 tinuing to become evident, including the strategic fil-
24 ing of post-grant review proceedings to depress stock
25 prices and extort settlements, the filing of repetitive

1 petitions for inter partes and post-grant reviews that
2 have the effect of harassing patent owners, and the
3 unnecessary duplication of work by the district
4 courts of the United States and the Patent Trial
5 and Appeal Board;

6 (11) the Judicial Conference of the United
7 States has made significant revisions to rules gov-
8 erning pleadings and discovery in the Federal Rules
9 of Civil Procedure, which took effect in December
10 2015;

11 (12) the Supreme Court issued rulings in Oc-
12 tane Fitness, LLC v. Icon Health & Fitness, Inc.,
13 134 S.Ct. 1749 (2014) and Highmark Inc. v. Allcare
14 Health Management System, Inc., 134 S.Ct. 1744
15 (2014) that significantly reduced the burden on an
16 alleged infringer to recover attorney fees from the
17 patent owner, and increased the incidence of fees
18 shifted to the losing party; and

19 (13) efforts by Congress to reform the patent
20 system without careful scrutiny create a serious risk
21 of making it more costly and difficult for legitimate
22 innovators to protect their patents from infringe-
23 ment, thereby weakening United States companies
24 and the United States economy.

1 **SEC. 102. INTER PARTES REVIEW.**

2 (a) CLAIM CONSTRUCTION.—Section 316(a) of title
3 35, United States Code, is amended—

4 (1) in paragraph (9), by inserting after “sub-
5 stitute claims,” the following: “including the stand-
6 ard for how substitute claims should be construed,”;

7 (2) in paragraph (12), by striking “; and” and
8 inserting a semicolon;

9 (3) in paragraph (13), by striking the period at
10 the end and inserting “; and”; and

11 (4) by adding at the end the following new
12 paragraph:

13 “(14) providing that for all purposes under this
14 chapter—

15 “(A) each challenged claim of a patent, or
16 claim proposed in a motion to amend, shall be
17 construed as the claim would be construed
18 under section 282(b) in an action to invalidate
19 a patent, including by construing each such
20 claim in accordance with—

21 “(i) the ordinary and customary
22 meaning of the claim as understood by a
23 person having ordinary skill in the art to
24 which the claimed invention pertains; and

25 “(ii) the prosecution history per-
26 taining to the patent; and

1 “(B) if a court has previously construed a
 2 challenged claim of a patent or a challenged
 3 claim term in a civil action to which the patent
 4 owner was a party, the Office shall consider
 5 that claim construction.”.

6 (b) BURDEN OF PROOF.—Section 316(e) of title 35,
 7 United States Code, is amended to read as follows:

8 “(e) EVIDENTIARY STANDARDS.—

9 “(1) PRESUMPTION OF VALIDITY.—The pre-
 10 sumption of validity under section 282(a) shall apply
 11 to a previously issued claim that is challenged dur-
 12 ing an inter partes review under this chapter.

13 “(2) BURDEN OF PROOF.—In an inter partes
 14 review instituted under this chapter, the petitioner
 15 shall have the burden of proving a proposition of
 16 unpatentability of a previously issued claim by clear
 17 and convincing evidence.”.

18 (c) STANDING.—Section 311 of title 35, United
 19 States Code, is amended by adding at the end the fol-
 20 lowing new subsection:

21 “(d) PERSONS THAT MAY PETITION.—

22 “(1) DEFINITION.—In this subsection, the term
 23 ‘charged with infringement’ means a real and sub-
 24 stantial controversy regarding infringement of a pat-
 25 ent exists such that the petitioner would have stand-

1 ing to bring a declaratory judgment action in Fed-
2 eral court.

3 “(2) NECESSARY CONDITIONS.—A person may
4 not file with the Office a petition to institute an
5 inter partes review of a patent unless the person, or
6 a real party in interest or privy of the person, has
7 been—

8 “(A) sued for infringement of the patent;
9 or

10 “(B) charged with infringement under the
11 patent.”.

12 (d) LIMITATION ON REVIEWS.—Section 314(a) of
13 title 35, United States Code, is amended to read as fol-
14 lows:

15 “(a) THRESHOLD.—

16 “(1) LIKELIHOOD OF PREVAILING.—Subject to
17 paragraph (2), the Director may not authorize an
18 inter partes review to be instituted unless the Direc-
19 tor determines that the information presented in the
20 petition filed under section 311 and any response
21 filed under section 313 show that there is a reason-
22 able likelihood that the petitioner would prevail with
23 respect to at least one of the claims challenged in
24 the petition.

1 “(2) PREVIOUS INSTITUTION.—The Director
 2 may not authorize an inter partes review to be insti-
 3 tuted on a claim challenged in a petition if the Di-
 4 rector has previously instituted an inter partes re-
 5 view or post-grant review with respect to that
 6 claim.”.

7 (e) REVIEWABILITY OF INSTITUTION DECISIONS.—
 8 Section 314 of title 35, United States Code, is amended
 9 by striking subsection (d) and inserting the following:

10 “(d) NO APPEAL.—

11 “(1) NONAPPEALABLE DETERMINATIONS.—

12 “(A) THRESHOLD DETERMINATION.—A
 13 determination by the Director on the reasonable
 14 likelihood that the petitioner will prevail under
 15 subsection (a)(1) shall be final and nonappeal-
 16 able.

17 “(B) DENIALS OF INSTITUTION.—A deter-
 18 mination by the Director not to institute an
 19 inter partes review under this section shall be
 20 final and nonappealable.

21 “(2) APPEALABLE DETERMINATIONS.—Any as-
 22 pect of a determination by the Director to institute
 23 an inter partes review under this section, other than
 24 a determination described in paragraph (1)(A), may

1 be reviewed during an appeal of a final written deci-
2 sion issued under section 318(a).”.

3 (f) ELIMINATING REPETITIVE PROCEEDINGS.—Sec-
4 tion 315(e) of title 35, United States Code, is amended
5 to read as follows:

6 “(e) ESTOPPEL.—

7 “(1) PROCEEDINGS BEFORE THE OFFICE.—A
8 person petitioning for an inter partes review of a
9 claim in a patent under this chapter, or the real
10 party in interest or privy of the petitioner, may not
11 petition for a subsequent inter partes review before
12 the Office with respect to that patent on any ground
13 that the petitioner raised or reasonably could have
14 raised in the initial petition, unless, after the filing
15 of the initial petition, the petitioner, or the real
16 party in interest or privy of the petitioner, is
17 charged with infringement of additional claims of
18 the patent.

19 “(2) CIVIL ACTIONS AND OTHER PRO-
20 CEEDINGS.—A person petitioning for an inter partes
21 review of a claim in a patent under this chapter that
22 results in an institution decision under section 314,
23 or the real party in interest or privy of the peti-
24 tioner, may not assert either in a civil action arising
25 in whole or in part under section 1338 of title 28

1 or in a proceeding before the International Trade
 2 Commission under section 337 of the Tariff Act of
 3 1930 (19 U.S.C. 1337) that the claim is invalid
 4 based on section 102 or 103 of this title, unless the
 5 invalidity argument is based on allegations that the
 6 claimed invention was in public use, on sale, or oth-
 7 erwise available to the public before the effective fil-
 8 ing date of the claimed invention.”.

9 (g) REAL PARTY IN INTEREST.—

10 (1) CLARIFICATION OF DEFINITION.—Section
 11 315 of title 35, United States Code, is amended by
 12 adding at the end the following new subsection:

13 “(f) PETITIONER.—For purposes of this chapter, a
 14 person that directly or through an affiliate, subsidiary, or
 15 proxy makes a financial contribution to the preparation
 16 for, or conduct during, an inter partes review on behalf
 17 of the petitioner shall be considered a real party in interest
 18 of the petitioner.”.

19 (2) DISCOVERY OF REAL PARTY IN INTER-
 20 EST.—Section 316(a)(5) of title 35, United States
 21 Code, is amended to read as follows:

22 “(5) setting forth standards and procedures for
 23 discovery of relevant evidence, including that such
 24 discovery shall be limited to—

1 “(A) the deposition of witnesses submitting
2 affidavits or declarations;

3 “(B) evidence identifying the petitioner’s
4 real parties in interest; and

5 “(C) what is otherwise necessary in the in-
6 terest of justice;”.

7 (h) PRIORITY OF FEDERAL COURT VALIDITY DE-
8 TERMINATIONS.—

9 (1) IN GENERAL.—Section 315 of title 35,
10 United States Code, as amended by subsections (f)
11 and (g), is further amended—

12 (A) by redesignating subsections (c)
13 through (f) as subsections (d) through (g), re-
14 spectively; and

15 (B) by inserting after subsection (b) the
16 following new subsection:

17 “(c) FEDERAL COURT VALIDITY DETERMINA-
18 TIONS.—

19 “(1) INSTITUTION BARRED.—An inter partes
20 review of a patent claim may not be instituted if, in
21 a civil action arising in whole or in part under sec-
22 tion 1338 of title 28 or in a proceeding before the
23 International Trade Commission under section 337
24 of the Tariff Act of 1930 (19 U.S.C. 1337), a court
25 has entered a final judgment—

1 “(A) that decides the validity of the patent
2 claim with respect to section 102 or 103; and

3 “(B) from which an appeal under section
4 1295 of title 28 may be taken, or from which
5 an appeal under section 1295 of title 28 was
6 previously available but is no longer available.

7 “(2) STAY OF PROCEEDINGS.—

8 “(A) IN GENERAL.—If, in a civil action
9 arising in whole or in part under section 1338
10 of title 28 or in a proceeding before the Inter-
11 national Trade Commission under section 337
12 of the Tariff Act of 1930 (19 U.S.C. 1337), a
13 court has entered a final judgment that decides
14 the validity of a patent claim with respect to
15 section 102 or 103 and from which an appeal
16 under section 1295 of title 28 may be taken,
17 the Patent Trial and Appeal Board shall stay
18 any ongoing inter partes review of that patent
19 claim pending a final decision.

20 “(B) TERMINATION.—If the validity of a
21 patent claim described in subparagraph (A) is
22 finally upheld by a court or the International
23 Trade Commission, as applicable, the Patent
24 Trial and Appeal Board shall terminate the
25 inter partes review.”.

1 (2) TECHNICAL AND CONFORMING AMEND-
 2 MENTS.—Chapter 31 of title 35, United States
 3 Code, is amended—

4 (A) in section 315(b), by striking “sub-
 5 section (c)” and inserting “subsection (d)”;

6 (B) in section 316(a)—

7 (i) in paragraph (11), by striking
 8 “section 315(c)” and inserting “section
 9 315(d)”;

10 (ii) in paragraph (12), by striking
 11 “section 315(c)” and inserting “section
 12 315(d)”;

13 (C) in section 317(a), by striking “section
 14 315(e)” and inserting “section 315(f)”.

15 **SEC. 103. POST-GRANT REVIEW.**

16 (a) CLAIM CONSTRUCTION.—Section 326(a) of title
 17 35, United States Code, is amended—

18 (1) in paragraph (9), by inserting after “sub-
 19 stitute claims,” the following: “including the stand-
 20 ard for how substitute claims should be construed,”;

21 (2) in paragraph (11), by striking “; and” and
 22 inserting a semicolon;

23 (3) in paragraph (12), by striking the period at
 24 the end and inserting “; and”; and

1 (4) by adding at the end the following new
2 paragraph:

3 “(13) providing that for all purposes under this
4 chapter—

5 “(A) each challenged claim of a patent
6 shall be construed as the claim would be con-
7 strued under section 282(b) in an action to in-
8 validate a patent, including by construing each
9 challenged claim of the patent in accordance
10 with—

11 “(i) the ordinary and customary
12 meaning of the claim as understood by a
13 person having ordinary skill in the art to
14 which the claimed invention pertains; and

15 “(ii) the prosecution history per-
16 taining to the patent; and

17 “(B) if a court has previously construed a
18 challenged claim of a patent or a challenged
19 claim term in a civil action to which the patent
20 owner was a party, the Office shall consider
21 that claim construction.”.

22 (b) BURDEN OF PROOF.—Section 326(e) of title 35,
23 United States Code, is amended to read as follows:

24 “(e) EVIDENTIARY STANDARDS.—

1 “(1) PRESUMPTION OF VALIDITY.—The pre-
2 sumption of validity under section 282(a) shall apply
3 to a previously issued claim that is challenged dur-
4 ing a proceeding under this chapter.

5 “(2) BURDEN OF PROOF.—In a post-grant re-
6 view instituted under this chapter, the petitioner
7 shall have the burden of proving a proposition of
8 unpatentability of a previously issued claim by clear
9 and convincing evidence.”.

10 (c) STANDING.—Section 321 of title 35, United
11 States Code, is amended by adding at the end the fol-
12 lowing new subsection:

13 “(d) PERSONS THAT MAY PETITION.—

14 “(1) DEFINITION.—In this subsection, the term
15 ‘charged with infringement’ means a real and sub-
16 stantial controversy regarding infringement of a pat-
17 ent exists such that the petitioner would have stand-
18 ing to bring a declaratory judgment action in Fed-
19 eral court.

20 “(2) NECESSARY CONDITIONS.—A person may
21 not file with the Office a petition to institute a post-
22 grant review of a patent unless the person, or a real
23 party in interest or privy of the person, dem-
24 onstrates—

25 “(A) a reasonable possibility of being—

1 “(i) sued for infringement of the pat-
2 ent; or

3 “(ii) charged with infringement under
4 the patent; or

5 “(B) a competitive harm related to the va-
6 lidity of the patent.”.

7 (d) LIMITATION ON REVIEWS.—Section 324(a) of
8 title 35, United States Code, is amended to read as fol-
9 lows:

10 “(a) THRESHOLD.—

11 “(1) LIKELIHOOD OF PREVAILING.—Subject to
12 paragraph (2), the Director may not authorize a
13 post-grant review to be instituted unless the Director
14 determines that the information presented in the pe-
15 tition filed under section 321, if such information is
16 not rebutted, would demonstrate that it is more like-
17 ly than not that at least one of the claims challenged
18 in the petition is unpatentable.

19 “(2) PREVIOUS INSTITUTION.—The Director
20 may not authorize a post-grant review to be insti-
21 tuted on a claim challenged in a petition if the Di-
22 rector has previously instituted an inter partes re-
23 view or post-grant review with respect to that
24 claim.”.

1 (e) REVIEWABILITY OF INSTITUTION DECISIONS.—
 2 Section 324 of title 35, United States Code, is amended
 3 by striking subsection (e) and inserting the following:

4 “(e) NO APPEAL.—

5 “(1) NON-APPEALABLE DETERMINATIONS.—

6 “(A) THRESHOLD DETERMINATION.—A
 7 determination by the Director on the likelihood
 8 that the petitioner will prevail under subsection
 9 (a)(1) shall be final and nonappealable.

10 “(B) EXERCISE OF DISCRETION.—A deter-
 11 mination by the Director not to institute a post-
 12 grant review under this section shall be final
 13 and nonappealable.

14 “(2) APPEALABLE DETERMINATIONS.—Any as-
 15 pect of a determination by the Director to institute
 16 a post-grant review under this section, other than a
 17 determination described in paragraph (1)(A), may be
 18 reviewed during an appeal of a final written decision
 19 issued under section 328(a).”.

20 (f) ELIMINATING REPETITIVE PROCEEDINGS.—Sec-
 21 tion 325(e)(1) of title 35, United States Code, is amended
 22 to read as follows:

23 “(1) PROCEEDINGS BEFORE THE OFFICE.—A
 24 person petitioning for a post-grant review of a claim
 25 in a patent under this chapter, or the real party in

1 interest or privy of the petitioner, may not petition
 2 for a subsequent post-grant review before the Office
 3 with respect to that patent on any ground that the
 4 petitioner raised or reasonably could have raised in
 5 the initial petition, unless, after the filing of the ini-
 6 tial petition, the petitioner, or the real party in in-
 7 terest or privy of the petitioner, is charged with in-
 8 fringement of additional claims of the patent.”.

9 (g) REAL PARTY IN INTEREST.—

10 (1) CLARIFICATION OF DEFINITION.—Section
 11 325 of title 35, United States Code, is amended by
 12 adding at the end the following new subsection:

13 “(g) REAL PARTY IN INTEREST.—For purposes of
 14 this chapter, a person that directly or through an affiliate,
 15 subsidiary, or proxy, makes a financial contribution to the
 16 preparation for, or conduct during, a post-grant review on
 17 behalf of the petitioner shall be considered a real party
 18 in interest of the petitioner.”.

19 (2) DISCOVERY OF REAL PARTY IN INTER-
 20 EST.—Section 326(a)(5) of title 35, United States
 21 Code, is amended to read as follows:

22 “(5) setting forth standards and procedures for
 23 discovery of relevant evidence, including that such
 24 discovery shall be limited to—

1 “(A) the deposition of witnesses submitting
2 affidavits or declarations;

3 “(B) evidence identifying the petitioner’s
4 real parties in interest; and

5 “(C) what is otherwise necessary in the in-
6 terest of justice;”.

7 (h) PRIORITY OF FEDERAL COURT VALIDITY DE-
8 TERMINATIONS.—

9 (1) IN GENERAL.—Section 325 of title 35,
10 United States Code, as amended by subsections (f)
11 and (g), is further amended—

12 (A) by redesignating subsections (c)
13 through (g) as subsections (d) through (h), re-
14 spectively; and

15 (B) by inserting after subsection (b) the
16 following new subsection:

17 “(c) FEDERAL COURT VALIDITY DETERMINA-
18 TIONS.—

19 “(1) INSTITUTION BARRED.—A post-grant re-
20 view of a patent claim may not be instituted if, in
21 a civil action arising in whole or in part under sec-
22 tion 1338 of title 28 or in a proceeding before the
23 International Trade Commission under section 337
24 of the Tariff Act of 1930 (19 U.S.C. 1337), a court
25 has entered a final judgment—

1 “(A) that decides the validity of the patent
2 claim with respect to section 102 or 103; and

3 “(B) from which an appeal under section
4 1295 of title 28 may be taken, or from which
5 an appeal under section 1295 of title 28 was
6 previously available but is no longer available.

7 “(2) STAY OF PROCEEDINGS.—

8 “(A) IN GENERAL.—If, in a civil action
9 arising in whole or in part under section 1338
10 of title 28 or in a proceeding before the Inter-
11 national Trade Commission under section 337
12 of the Tariff Act of 1930 (19 U.S.C. 1337), a
13 court has entered a final judgment that decides
14 the validity of a patent claim with respect to
15 section 102 or 103 and from which an appeal
16 under section 1295 of title 28 may be taken,
17 the Patent Trial and Appeal Board shall stay
18 any ongoing post-grant review of that patent
19 claim pending a final decision.

20 “(B) TERMINATION.—If the validity of a
21 patent claim described in subparagraph (A) is
22 finally upheld by a court or the International
23 Trade Commission, as applicable, the Patent
24 Trial and Appeal Board shall terminate the
25 post-grant review.”.

1 (2) TECHNICAL AND CONFORMING AMEND-
 2 MENTS.—Chapter 32 of title 35, United States
 3 Code, is amended—

4 (A) in section 326(a)(11), by striking “sec-
 5 tion 325(c)” and inserting “section 325(d)”;
 6 and

7 (B) in section 327(a), by striking “section
 8 325(e)” and inserting “section 325(f)”.

9 **SEC. 104. COMPOSITION OF POST-GRANT REVIEW AND**
 10 **INTER PARTES REVIEW PANELS.**

11 Section 6(c) of title 35, United States Code, is
 12 amended to read as follows:

13 “(c) 3-MEMBER PANELS.—

14 “(1) IN GENERAL.—Each appeal, derivation
 15 proceeding, post-grant review, and inter partes re-
 16 view shall be heard by at least 3 members of the
 17 Patent Trial and Appeal Board, who shall be des-
 18 ignated by the Director.

19 “(2) INELIGIBILITY TO HEAR REVIEW.—A
 20 member of the Patent Trial and Appeal Board who
 21 participates in the decision to institute a post-grant
 22 review or an inter partes review of a patent shall be
 23 ineligible to hear the review.

24 “(3) REHEARINGS.—Only the Patent Trial and
 25 Appeal Board may grant rehearings.”.

1 **SEC. 105. REEXAMINATION OF PATENTS.**

2 (a) REQUEST FOR REEXAMINATION.—Section 302 of
3 title 35, United States Code, is amended to read as fol-
4 lows:

5 **“§ 302. Request for reexamination**

6 “Any person at any time may file a request for reex-
7 amination by the Office of any claim of a patent on the
8 basis of any prior art cited under the provisions of section
9 301. The request must be in writing and must be accom-
10 panied by payment of a reexamination fee established by
11 the Director pursuant to the provisions of section 41. The
12 request must identify all real parties in interest and certify
13 that reexamination is not barred under section 303(d).
14 The request must set forth the pertinency and manner of
15 applying cited prior art to every claim for which reexam-
16 ination is requested. Unless the requesting person is the
17 owner of the patent, the Director promptly will send a
18 copy of the request to the owner of record of the patent.”.

19 (b) REEXAMINATION BARRED BY CIVIL ACTION.—
20 Section 303 of title 35, United States Code, is amended
21 by adding at the end the following new subsection:

22 “(d) An ex parte reexamination may not be instituted
23 if the request for reexamination is filed more than 1 year
24 after the date on which the requester or a real party in
25 interest or privy of the requester is served with a com-
26 plaint alleging infringement of the patent.”.

1 **SEC. 106. RESTORATION OF PATENTS AS PROPERTY**
 2 **RIGHTS.**

3 Section 283 of title 35, United States Code, is
 4 amended—

5 (1) by striking “The several courts” and insert-
 6 ing the following:

7 “(a) IN GENERAL.—The several courts”; and

8 (2) by adding at the end the following:

9 “(b) INJUNCTION.—Upon a finding by a court of in-
 10 fringement of a patent not proven invalid or unenforce-
 11 able, the court shall presume that—

12 “(1) further infringement of the patent would
 13 cause irreparable injury; and

14 “(2) remedies available at law are inadequate to
 15 compensate for that injury.”.

16 **SEC. 107. ELIMINATION OF USPTO FEE DIVERSION.**

17 (a) FUNDING.—Section 42 of title 35, United States
 18 Code, is amended—

19 (1) in subsection (a), by striking “All fees” and
 20 inserting “FEES FOR SERVICE BY PTO.—All fees”;

21 (2) in subsection (b)—

22 (A) by striking “All fees” and inserting
 23 “‘INNOVATION PROMOTION FUND.—All fees’”;
 24 and

25 (B) by striking “Patent and Trademark
 26 Office Appropriation Account” and inserting

1 “United States Patent and Trademark Office
2 Innovation Promotion Fund”;

3 (3) in subsection (c)—

4 (A) by striking “(c)(1)” and all that fol-
5 lows through the end of paragraph (1) and in-
6 serting the following: “(c) COLLECTION OF
7 FUNDS FOR PTO ACTIVITIES.—

8 “(1) IN GENERAL.—Fees authorized in this
9 title or any other Act to be charged or established
10 by the Director shall be collected by the Director
11 and shall be available to the Director until expended
12 to carry out the activities of the Patent and Trade-
13 mark Office.”;

14 (B) by striking paragraph (2);

15 (C) by striking “(3)(A) Any” and inserting
16 the following: “(2) USE OF FEES.—

17 “(A) PATENT FEES.—Any”; and

18 (D) by striking “(B) Any fees that are col-
19 lected under section 31 of the Trademark Act
20 of 1946” and inserting the following:

21 “(B) TRADEMARK FEES.—Any fees that
22 are collected under section 31 of the Trademark
23 Act of 1946 (as defined in subsection (d)) (15
24 U.S.C. 1113)”;

1 (4) by redesignating subsections (d) and (e) as
2 subsections (e) and (f), respectively;

3 (5) by inserting after subsection (c) the fol-
4 lowing new subsection:

5 “(d) REVOLVING FUND.—

6 “(1) DEFINITIONS.—In this subsection—

7 “(A) the term ‘Fund’ means the United
8 States Patent and Trademark Office Innovation
9 Promotion Fund established under paragraph
10 (2); and

11 “(B) the term ‘Trademark Act of 1946’
12 means the Act entitled ‘An Act to provide for
13 the registration and protection of trademarks
14 used in commerce, to carry out the provisions
15 of certain international conventions, and for
16 other purposes’, approved July 5, 1946 (15
17 U.S.C. 1051 et seq.) (commonly referred to as
18 the ‘Trademark Act of 1946’ or the ‘Lanham
19 Act’).

20 “(2) ESTABLISHMENT.—There is established in
21 the Treasury a revolving fund to be known as the
22 ‘United States Patent and Trademark Office Inno-
23 vation Promotion Fund’.

1 “(3) DERIVATION OF RESOURCES.—There shall
2 be deposited into the Fund any fees collected
3 under—

4 “(A) this title; or

5 “(B) the Trademark Act of 1946.

6 “(4) EXPENSES.—Amounts deposited into the
7 Fund under paragraph (3) shall be available, with-
8 out fiscal year limitation, to cover—

9 “(A) all expenses to the extent consistent
10 with the limitation on the use of fees set forth
11 in subsection (c), including all administrative
12 and operating expenses, determined in the dis-
13 cretion of the Director to be ordinary and rea-
14 sonable, incurred by the Director for the contin-
15 ued operation of all services, programs, activi-
16 ties, and duties of the Office relating to patents
17 and trademarks, as such services, programs, ac-
18 tivities, and duties are described under—

19 “(i) this title; and

20 “(ii) the Trademark Act of 1946; and

21 “(B) all expenses incurred pursuant to any
22 obligation, representation, or other commitment
23 of the Office.”;

1 (6) in subsection (e), as redesignated, by strik-
 2 ing “The Director” and inserting “REFUNDS.—The
 3 Director”; and

4 (7) in subsection (f), as redesignated, by strik-
 5 ing “The Secretary” and inserting “REPORT.—The
 6 Secretary”.

7 (b) EFFECTIVE DATE; TRANSFER FROM AND TERMI-
 8 NATION OF OBSOLETE FUNDS.—

9 (1) EFFECTIVE DATE.—The amendments made
 10 by subsection (a) shall take effect on the first day
 11 of the first fiscal year that begins on or after the
 12 date of the enactment of this Act.

13 (2) REMAINING BALANCES.—On the effective
 14 date described in paragraph (1), there shall be de-
 15 posited in the United States Patent and Trademark
 16 Office Innovation Promotion Fund established under
 17 section 42(d)(2) of title 35, United States Code (as
 18 added by subsection (a)), any available unobligated
 19 balances remaining in the Patent and Trademark
 20 Office Appropriation Account, and in the Patent and
 21 Trademark Fee Reserve Fund established under sec-
 22 tion 42(c)(2) of title 35, United States Code, as in
 23 effect on the date before the effective date.

24 (3) TERMINATION OF RESERVE FUND.—Upon
 25 the payment of all obligated amounts in the Patent

1 and Trademark Fee Reserve Fund under paragraph
2 (2), the Patent and Trademark Fee Reserve Fund
3 shall be terminated.

4 **SEC. 108. INSTITUTIONS OF HIGHER EDUCATION.**

5 Section 123(d) of title 35, United States Code, is
6 amended to read as follows:

7 “(d) INSTITUTIONS OF HIGHER EDUCATION.—For
8 purposes of this section, a micro entity shall include an
9 applicant who certifies that—

10 “(1) the applicant’s employer, from which the
11 applicant obtains the majority of the applicant’s in-
12 come, is an institution of higher education as de-
13 fined in section 101(a) of the Higher Education Act
14 of 1965 (20 U.S.C. 1001(a));

15 “(2) the applicant has assigned, granted, con-
16 veyed, or is under an obligation by contract or law,
17 to assign, grant, or convey, a license or other owner-
18 ship interest in the particular applications to such
19 an institution of higher education;

20 “(3) the applicant is such an institution of
21 higher education; or

22 “(4) the applicant is an organization described
23 in section 501(c)(3) of the Internal Revenue Code of
24 1986 and exempt from taxation under section
25 501(a) of such Code that holds title to patents and

1 patent applications on behalf of such an institution
2 of higher education for the purpose of facilitating
3 commercialization of the technologies of the patents
4 and patent applications.”.

5 **SEC. 109. ASSISTING SMALL BUSINESSES IN THE U.S. PAT-**
6 **ENT SYSTEM.**

7 (a) DEFINITION.—In this section, the term “small
8 business concern” has the meaning given the term in sec-
9 tion 3 of the Small Business Act (15 U.S.C. 632).

10 (b) SMALL BUSINESS ADMINISTRATION REPORT.—
11 Not later than 1 year after the date of the enactment of
12 this Act, the Small Business Administration, using exist-
13 ing resources, shall submit to the Committee on Small
14 Business and Entrepreneurship of the Senate and the
15 Committee on Small Business of the House of Representa-
16 tives a report analyzing the impact of—

17 (1) patent ownership by small business con-
18 cerns; and

19 (2) civil actions against small business concerns
20 arising under title 35, United States Code, relating
21 to patent infringement.

22 (c) EXPANSION OF PATENT PILOT PROGRAM IN CER-
23 TAIN DISTRICT COURTS.—

24 (1) IN GENERAL.—Not later than 180 days
25 after the date of the enactment of this Act, the Di-

1 rector of the Administrative Office of the United
2 States Courts shall designate not fewer than 6 of the
3 district courts of the United States that are partici-
4 pating in the patent cases pilot program established
5 under section 1 of Public Law 111–349 (28 U.S.C.
6 137 note) for the purpose of expanding that pro-
7 gram to address special issues raised in patent in-
8 fringement suits against individuals or small busi-
9 ness concerns.

10 (2) PROCEDURES FOR SMALL BUSINESSES.—

11 Not later than 2 years after the date of the enact-
12 ment of this Act, each district court designated
13 under paragraph (1) shall develop procedures for ex-
14 pediting cases in which an individual or small busi-
15 ness concern is accused of patent infringement.

16 (3) PARTICIPATING JUDGES.—

17 (A) IN GENERAL.—In each district court
18 designated under paragraph (1), each district
19 court judge participating in the patent cases
20 pilot program established under section 1 of
21 Public Law 111–349 may appoint 1 additional
22 law clerk or secretary in excess of any other
23 limitation on the number of such employees.

24 (B) EDUCATION AND TRAINING.—The
25 Federal Judicial Center, using existing re-

1 sources, shall prepare educational and training
 2 materials to assist district court judges de-
 3 scribed in subparagraph (A) in developing ex-
 4 pertise in patent and plant variety protection
 5 cases.

6 (4) FUNDS.—There are authorized to be appro-
 7 priated such sums as may be necessary to carry out
 8 paragraph (3)(A).

9 (d) FREE ONLINE AVAILABILITY OF PUBLIC SEARCH
 10 FACILITY MATERIALS.—Section 41(i) of title 35, United
 11 States Code, is amended by adding at the end the fol-
 12 lowing new paragraph:

13 “(5) FREE ONLINE AVAILABILITY OF PUBLIC
 14 SEARCH FACILITY MATERIALS.—The Director shall
 15 make available online and at no charge all patent
 16 and trademark information that is available at the
 17 Public Search Facility of the Office located in Alex-
 18 andria, Virginia, including, except to the extent that
 19 licenses with third-party contractors would make
 20 such provision financially unviable—

21 “(A) search tools and databases;

22 “(B) informational materials; and

23 “(C) training classes and materials.”.

TITLE II—TARGETING ROGUE AND OPAQUE LETTERS

SEC. 201. DEFINITIONS.

In this title:

(1) **BAD FAITH.**—The term “bad faith” means, with respect to section 202(a), that the sender—

(A) made knowingly false or knowingly misleading statements, representations, or omissions;

(B) made statements, representations, or omissions with reckless indifference as to the false or misleading nature of such statements, representations, or omissions; or

(C) made statements, representations, or omissions with awareness of the high probability of the statements, representations, or omissions to deceive and the sender intentionally avoided the truth.

(2) **COMMISSION.**—The term “Commission” means the Federal Trade Commission.

(3) **FINAL DETERMINATION.**—The term “final determination” means, with respect to the invalidity or unenforceability of a patent, that the invalidity or unenforceability has been determined by a court of the United States or the United States Patent and

1 Trademark Office in a final decision that is
2 unappealable or for which any opportunity for ap-
3 peal is no longer available.

4 **SEC. 202. UNFAIR OR DECEPTIVE ACTS OR PRACTICES IN**
5 **CONNECTION WITH THE ASSERTION OF A**
6 **UNITED STATES PATENT.**

7 (a) IN GENERAL.—It shall be an unfair or deceptive
8 act or practice within the meaning of section 5(a)(1) of
9 the Federal Trade Commission Act (15 U.S.C. 45(a)(1))
10 for a person, in connection with the assertion of a United
11 States patent, to engage in a pattern or practice of send-
12 ing written communications that state or represent that
13 the recipients are or may be infringing, or have or may
14 have infringed, the patent and bear liability or owe com-
15 pensation to another, if—

16 (1) the sender of the communications, in bad
17 faith, states or represents in the communications
18 that—

19 (A) the sender is a person with the right
20 to license or enforce the patent at the time the
21 communications are sent, and the sender is not
22 a person with such a right;

23 (B) a civil action asserting a claim of in-
24 fringement of the patent has been filed against
25 the recipient;

1 (C) a civil action asserting a claim of in-
2 fringement of the patent has been filed against
3 other persons;

4 (D) legal action for infringement of the
5 patent will be taken against the recipient;

6 (E) the sender is the exclusive licensee of
7 the patent asserted in the communications;

8 (F) persons other than the recipient pur-
9 chased a license for the patent asserted in the
10 communications;

11 (G) persons other than the recipient pur-
12 chased a license, and the sender does not dis-
13 close that such license is unrelated to the al-
14 leged infringement or the patent asserted in the
15 communications;

16 (H) an investigation of the recipient's al-
17 leged infringement occurred; or

18 (I) the sender or an affiliate of the sender
19 previously filed a civil action asserting a claim
20 of infringement of the patent based on the ac-
21 tivity that is the subject of the written commu-
22 nication when the sender knew such activity
23 was held, in a final determination, not to in-
24 fringe the patent;

1 (2) the sender of the communications, in bad
2 faith, seeks compensation for—

3 (A) a patent claim that has been held to
4 be unenforceable due to inequitable conduct, in-
5 valid, or otherwise unenforceable against the re-
6 cipient, in a final determination;

7 (B) activities undertaken by the recipient
8 after expiration of the patent asserted in the
9 communications; or

10 (C) activity of the recipient that the sender
11 knew was authorized, with respect to the patent
12 claim or claims that are the subject of the com-
13 munications, by a person with the right to li-
14 cense the patent; or

15 (3) the sender of the communications, in bad
16 faith, fails to include—

17 (A) the identity of the person asserting a
18 right to license the patent to, or enforce the
19 patent against, the recipient, including the iden-
20 tity of any parent entity and the ultimate par-
21 ent entity of such person, unless such person is
22 a public company and the name of the public
23 company is identified;

1 (B) an identification of at least one patent
2 issued by the United States Patent and Trade-
3 mark Office alleged to have been infringed;

4 (C) an identification, to the extent reason-
5 able under the circumstances, of at least one
6 product, service, or other activity of the recipi-
7 ent that is alleged to infringe the identified pat-
8 ent;

9 (D) a description, to the extent reasonable
10 under the circumstances, of how the product,
11 service, or other activity of the recipient in-
12 fringes an identified patent and patent claim; or

13 (E) a name and contact information for a
14 person the recipient may contact about the as-
15 sertions or claims relating to the patent con-
16 tained in the communications.

17 (b) AFFIRMATIVE DEFENSE.—With respect to sub-
18 section (a), there shall be an affirmative defense that
19 statements, representations, or omissions were not made
20 in bad faith (as defined in subparagraphs (B) and (C) of
21 section 201(1)) if the sender can demonstrate that such
22 statements, representations, or omissions were mistakes
23 made in good faith. Evidence that the sender in the usual
24 course of business sends written communications that do
25 not violate the provisions of this title shall be sufficient

1 to demonstrate good faith. Good faith may also be dem-
 2 onstrated by other evidence.

3 (c) RULE OF CONSTRUCTION.—For purposes of sec-
 4 tions 203 and 204, the commission of an act or practice
 5 that is declared under this section to be an unfair or de-
 6 ceptive act or practice within the meaning of section
 7 5(a)(1) of the Federal Trade Commission Act (15 U.S.C.
 8 45(a)(1)) shall be considered to be a violation of this sec-
 9 tion.

10 **SEC. 203. ENFORCEMENT BY FEDERAL TRADE COMMIS-**
 11 **SION.**

12 (a) VIOLATION OF RULE.—A violation of section 202
 13 shall be treated as a violation of a rule defining an unfair
 14 or deceptive act or practice prescribed under section
 15 18(a)(1)(B) of the Federal Trade Commission Act (15
 16 U.S.C. 57a(a)(1)(B)).

17 (b) POWERS OF COMMISSION.—The Commission
 18 shall enforce this title in the same manner, by the same
 19 means, and with the same jurisdiction, powers, and duties
 20 as though all applicable terms and provisions of the Fed-
 21 eral Trade Commission Act (15 U.S.C. 41 et seq.) were
 22 incorporated into and made a part of this title. Any person
 23 who violates section 202 shall be subject to the penalties
 24 and entitled to the privileges and immunities provided in
 25 the Federal Trade Commission Act.

1 (c) EFFECT ON OTHER LAWS.—Nothing in this title
 2 shall be construed in any way to limit or affect the author-
 3 ity of the Commission under any other provision of law.

4 **SEC. 204. PREEMPTION OF STATE LAWS ON PATENT DE-**
 5 **MAND LETTERS AND ENFORCEMENT BY**
 6 **STATE ATTORNEYS GENERAL.**

7 (a) PREEMPTION.—

8 (1) IN GENERAL.—This title preempts any law,
 9 rule, regulation, requirement, standard, or other pro-
 10 vision having the force and effect of law of any
 11 State, or political subdivision of a State, expressly
 12 relating to the transmission or contents of commu-
 13 nications relating to the assertion of patent rights.

14 (2) EFFECT ON OTHER STATE LAWS.—Except
 15 as provided in paragraph (1), this title shall not be
 16 construed to preempt or limit any provision of any
 17 State law, including any State consumer protection
 18 law, any State law relating to acts of fraud or decep-
 19 tion, and any State trespass, contract, or tort law.

20 (b) ENFORCEMENT BY STATE ATTORNEYS GEN-
 21 ERAL.—

22 (1) IN GENERAL.—In any case in which the at-
 23 torney general of a State has reason to believe that
 24 an interest of the residents of that State has been
 25 adversely affected by any person who violates section

202, the attorney general of the State may bring a civil action on behalf of such residents of the State in a district court of the United States of appropriate jurisdiction—

(A) to enjoin further such violation by the defendant; or

(B) to obtain civil penalties on behalf of recipients who suffered actual damages as a result of such violation.

(2) MAXIMUM CIVIL PENALTY.—Notwithstanding the number of actions which may be brought against a person under this subsection, a person may not be liable for a total of more than \$5,000,000 for a series of related violations of section 202.

(3) INTERVENTION BY THE FTC.—

(A) NOTICE AND INTERVENTION.—The attorney general of a State shall provide prior written notice of any action under paragraph (1) to the Commission and provide the Commission with a copy of the complaint in the action, except in any case in which such prior notice is not feasible, in which case the attorney general shall serve such notice immediately upon insti-

tuting such action. The Commission shall have
the right—

(i) to intervene in the action;

(ii) upon so intervening, to be heard
on all matters arising therein; and

(iii) to file petitions for appeal.

(B) LIMITATION ON STATE ACTION WHILE
FEDERAL ACTION IS PENDING.—If the Commis-
sion has instituted a civil action for violation of
section 202, no State attorney general may
bring an action under this subsection during
the pendency of that action against any defend-
ant named in the complaint of the Commission
for any violation of such section alleged in the
complaint.

(4) CONSTRUCTION.—For purposes of bringing
any civil action under paragraph (1), nothing in this
title shall be construed to prevent the attorney gen-
eral of a State from exercising the powers conferred
on the attorney general by the laws of that State
to—

(A) conduct investigations;

(B) administer oaths or affirmations; or

1 (C) compel the attendance of witnesses or
2 the production of documentary and other evi-
3 dence.

○