

114TH CONGRESS
1ST SESSION

S. 632

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

MARCH 3, 2015

Mr. COONS (for himself, Mr. DURBIN, and Ms. HIRONO) 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 Patents Act of 2015” or the “STRONG Patents
7 Act of 2015”.

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—STRONG 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. Elimination of Form 18.

Sec. 107. Elimination of USPTO fee diversion.

Sec. 108. Willful infringement.

Sec. 109. Divided infringement.

Sec. 110. Institutions of higher education.

Sec. 111. 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—STRONG PATENTS ACT**

4 **SEC. 101. FINDINGS.**

5 Congress finds that—

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

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

13 (3) patent protection has led to patient cures,
 14 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 only a few years ago, in
21 2011;

22 (10) unintended consequences of the com-
23 prehensive 2011 reform of patent laws are con-
24 tinuing to become evident, including the strategic fil-

1 ing of post-grant review proceedings to depress stock
2 prices and extort settlements;

3 (11) the Judicial Conference of the United
4 States is in the process of making significant revisions to rules governing pleadings and discovery in
5 the Federal Rules of Civil Procedure, with changes
6 scheduled to take effect in December 2015;

8 (12) the Supreme Court recently issued rulings
9 in *Octane Fitness, LLC v. Icon Health & Fitness, Inc.*, 134 S.Ct. 1749 (2014) and *Highmark Inc. v. Allcare Health Management System, Inc.*, 134 S.Ct. 1744 (2014) that significantly reduced the burden
10 on an alleged infringer to recover attorney fees from
11 the patent owner, and increased the incidence of fees
12 shifted to the losing party; and
13

14 (13) efforts by Congress to reform the patent
15 system without careful scrutiny create a serious risk
16 of making it more costly and difficult for legitimate
17 innovators to protect their patents from infringement, thereby weakening United States companies
18 and the United States economy.

19 **SEC. 102. INTER PARTES REVIEW.**

20 (a) CLAIM CONSTRUCTION.—Section 316(a) of title
21 35, United States Code, is amended—
22

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

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

5 (3) by adding at the end the following:

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

8 “(A) each claim of a patent shall be con-
9 strued as the claim would be construed under
10 section 282(b) in an action to invalidate a pat-
11 ent, including by construing each claim of the
12 patent in accordance with—

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

17 “(ii) the prosecution history per-
18 taining to the patent; and

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

23 (b) AMENDMENT OF CLAIMS.—Section 316(d) of title
24 35, United States Code, is amended to read as follows:

25 “(d) AMENDMENT OF THE PATENT.—

1 “(1) IN GENERAL.—During an inter partes re-
 2 view instituted under this chapter, the patent owner
 3 may move to amend the patent in 1 or more of the
 4 following ways:

5 “(A) Cancel any challenged patent claim.

6 “(B) For each challenged claim, propose a
 7 reasonable number of substitute claims.

8 “(2) INITIAL AMENDMENT.—If the patent
 9 owner has not amended the patent under this sub-
 10 section, a motion to amend filed by the patent owner
 11 shall be granted if the proposed number of sub-
 12 stitute claims is reasonable.

13 “(3) ADDITIONAL AMENDMENTS.—

14 “(A) PERMISSION TO FILE MOTIONS.—If
 15 the patent owner has amended the patent under
 16 this subsection, additional motions to amend
 17 may be permitted upon—

18 “(i) the joint request of the petitioner
 19 and the patent owner to materially advance
 20 the settlement of a proceeding under sec-
 21 tion 317; or

22 “(ii) the request of the patent owner
 23 for good cause shown.

24 “(B) DISCRETION TO GRANT MOTIONS.—

25 The Patent Trial and Appeal Board shall deter-

1 mine, in its discretion, whether to grant or deny
2 a motion filed under this paragraph.

3 “(4) SCOPE OF CLAIMS.—An amendment to a
4 patent under this subsection may not enlarge the
5 scope of the claims of the patent or introduce new
6 matter.”.

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

9 “(e) EVIDENTIARY STANDARDS.—

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

14 “(2) BURDENS OF PROOF.—In an inter partes
15 review instituted under this chapter, the petitioner
16 shall have the burden of proving—

17 “(A) a proposition of unpatentability of a
18 previously issued claim by clear and convincing
19 evidence; and

20 “(B) a proposition of unpatentability of a
21 proposed amended claim by a preponderance of
22 the evidence.”.

23 (d) STANDING.—Section 311 of title 35, United
24 States Code, is amended by adding at the end the fol-
25 lowing:

1 “(d) PERSONS THAT MAY PETITION.—

2 “(1) DEFINITION.—In this subsection, the term
3 ‘charged with infringement’ means a real and sub-
4 stantial controversy regarding infringement of a pat-
5 ent exists such that the petitioner would have stand-
6 ing to bring a declaratory judgment action in Fed-
7 eral court.

8 “(2) NECESSARY CONDITIONS.—A person may
9 not file with the Office a petition to institute an
10 inter partes review of a patent unless the person, or
11 a real party in interest or privy of the person, has
12 been—

13 “(A) sued for infringement of the patent;

14 or

15 “(B) charged with infringement under the
16 patent.”.

17 (e) DISCOVERY OF REAL PARTY IN INTEREST.—Sec-
18 tion 316(a)(5) of title 35, United States Code, is amended
19 to read as follows:

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

23 “(A) the deposition of witnesses submitting
24 affidavits or declarations;

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

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

5 (f) EVIDENCE SUPPORTING PRELIMINARY RE-
6 SPONSE.—Section 313 of title 35, United States Code, is
7 amended—

8 (1) by striking “If an” and inserting the fol-
9 lowing:

10 “(a) IN GENERAL.—If an”; and

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

12 “(b) SUPPORTING EVIDENCE.—In filing a prelimi-
13 nary response under subsection (a), the patent owner may
14 present any supporting evidence that the petitioner is per-
15 mitted to present under section 312(a)(3).

16 “(c) REPLY AND SURREPLY.—If the Patent Trial
17 and Appeal Board permits the petitioner to submit a reply
18 to a preliminary response filed under subsection (a) and
19 the petitioner presents additional evidence in that reply,
20 the patent owner may submit a brief surreply, which shall
21 be limited to addressing the additional evidence, including
22 with appropriate rebuttal evidence.”.

23 (g) COORDINATION OF PROCEEDINGS.—Section
24 314(a) of title 35, United States Code, is amended—

1 (1) by striking “THRESHOLD.—The Director”
2 and inserting the following: “REQUIREMENTS FOR
3 AUTHORIZATION BY DIRECTOR.—

4 “(1) THRESHOLD.—The Director”; and
5 (2) by adding at the end the following:

6 “(2) PATENTS THAT ARE SUBJECTS OF OTHER
7 PROCEEDINGS.—The Director may not institute an
8 inter partes review of a patent while the patent is
9 the subject of a—

10 “(A) reissue proceeding under chapter 25;

11 or

12 “(B) reexamination proceeding under
13 chapter 30.”.

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

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

17 (1) in paragraph (11), by striking “; and” and
18 inserting a semicolon;

19 (2) in paragraph (12), by striking the period at
20 the end and inserting “; and”; and

21 (3) by adding at the end the following:

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

24 “(A) each claim of a patent shall be con-
25 strued as the claim would be construed under

1 section 282(b) in an action to invalidate a pat-
 2 ent, including by construing each claim of the
 3 patent in accordance with—

4 “(i) the ordinary and customary
 5 meaning of the claim as understood by a
 6 person having ordinary skill in the art to
 7 which the claimed invention pertains; and

8 “(ii) the prosecution history per-
 9 taining to the patent; and

10 “(B) if a court has previously construed a
 11 claim of a patent or a claim term in a civil ac-
 12 tion to which the patent owner was a party, the
 13 Office shall consider that claim construction.”.

14 (b) AMENDMENT OF CLAIMS.—Section 326(d) of title
 15 35, United States Code, is amended to read as follows:

16 “(d) AMENDMENT OF THE PATENT.—

17 “(1) IN GENERAL.—During a post-grant review
 18 instituted under this chapter, the patent owner may
 19 move to amend the patent in 1 or more of the fol-
 20 lowing ways:

21 “(A) Cancel any challenged patent claim.

22 “(B) For each challenged claim, propose a
 23 reasonable number of substitute claims.

24 “(2) INITIAL AMENDMENT.—If the patent
 25 owner has not amended the patent under this sub-

1 section, a motion to amend filed by the patent owner
2 shall be granted if the proposed number of sub-
3 stitute claims is reasonable.

4 “(3) ADDITIONAL AMENDMENTS.—

5 “(A) PERMISSION TO FILE MOTIONS.—If
6 the patent owner has amended the patent under
7 this subsection, additional motions to amend
8 may be permitted upon—

9 “(i) the joint request of the petitioner
10 and the patent owner to materially advance
11 the settlement of a proceeding under sec-
12 tion 327; or

13 “(ii) the request of the patent owner
14 for good cause shown.

15 “(B) DISCRETION TO GRANT MOTIONS.—

16 The Patent Trial and Appeal Board shall deter-
17 mine, in its discretion, whether to grant or deny
18 a motion filed under this paragraph.

19 “(4) SCOPE OF CLAIMS.—An amendment to a
20 patent under this subsection may not enlarge the
21 scope of the claims of the patent or introduce new
22 matter.”.

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

25 “(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) BURDENS OF PROOF.—In a post-grant re-
6 view instituted under this chapter, the petitioner
7 shall have the burden of proving—

8 “(A) a proposition of unpatentability of a
9 previously issue claim by clear and convincing
10 evidence; and

11 “(B) a proposition of unpatentability of a
12 proposed amended claim by a preponderance of
13 the evidence.”.

14 (d) STANDING.—Section 321 of title 35, United
15 States Code, is amended by adding at the end the fol-
16 lowing:

17 “(d) PERSONS THAT MAY PETITION.—

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

24 “(2) NECESSARY CONDITIONS.—A person may
25 not file with the Office a petition to institute a post-

1 grant review of the patent unless the person, or a
2 real party in interest or privy of the person, dem-
3 onstrates—

4 “(A) a reasonable possibility of being—

5 “(i) sued for infringement of the pat-
6 ent; or

7 “(ii) charged with infringement under
8 the patent; or

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

11 (e) DISCOVERY OF REAL PARTY IN INTEREST.—Sec-
12 tion 326(a)(5) of title 35, United States Code, is amended
13 to read as follows:

14 “(5) setting forth standards and procedures for
15 discovery of relevant evidence, including that such
16 discovery shall be limited to—

17 “(A) the deposition of witnesses submitting
18 affidavits or declarations; and

19 “(B) evidence identifying the petitioner’s
20 real parties in interest.”.

21 (f) EVIDENCE SUPPORTING PRELIMINARY RE-
22 SPONSE.—Section 323 of title 35, United States Code, is
23 amended—

24 (1) by striking “If a” and inserting the fol-
25 lowing:

1 “(a) IN GENERAL.—If a”; and

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

3 “(b) SUPPORTING EVIDENCE.—In filing a prelimi-
4 nary response under subsection (a), the patent owner may
5 present any supporting evidence that the petitioner is au-
6 thorized to present under section 322(a)(3).

7 “(c) REPLY AND SURREPLY.—If the Patent Trial
8 and Appeal Board permits the petitioner to submit a reply
9 to a preliminary response filed under subsection (a) and
10 the petitioner presents additional evidence in that reply,
11 the patent owner may submit a brief surreply, which shall
12 be limited to addressing that evidence, including with ap-
13 propriate rebuttal evidence.”.

14 (g) COORDINATION OF PROCEEDINGS.—Section
15 324(a) of title 35, United States Code, is amended—

16 (1) by striking “THRESHOLD.—The Director”
17 and inserting the following: “REQUIREMENTS FOR
18 AUTHORIZATION BY THE DIRECTOR.—

19 “(1) THRESHOLD.—The Director”; and

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

21 “(2) PATENTS THAT ARE SUBJECTS OF OTHER
22 PROCEEDINGS.—The Director may not institute a
23 post-grant review of a patent while the patent is the
24 subject of a—

1 “(A) reissue proceeding under chapter 25;
2 or
3 “(B) reexamination proceeding under
4 chapter 30.”.

5 **SEC. 104. COMPOSITION OF POST-GRANT REVIEW AND**
6 **INTER PARTES REVIEW PANELS.**

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

9 “(c) 3-MEMBER PANELS.—

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

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

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

22 **SEC. 105. REEXAMINATION OF PATENTS.**

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

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

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

15 (b) REEXAMINATION BARRED BY CIVIL ACTION.—
16 Section 303 of title 35, United States Code, is amended
17 by adding at the end the following:

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

23 **SEC. 106. ELIMINATION OF FORM 18.**

24 Effective 1 year after the date of enactment of this
25 Act, the Supreme Court, using existing resources, shall
26 eliminate Form 18 in the Appendix to the Federal Rules

1 of Civil Procedure (relating to Complaint for Patent In-
2 fringement), if Form 18 remains in existence at that time.

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

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

6 (1) in subsection (b), by striking “Patent and
7 Trademark Office Appropriation Account” and in-
8 serting “United States Patent and Trademark Of-
9 fice Innovation Promotion Fund”;

10 (2) in subsection (c)—

11 (A) in paragraph (1)—

12 (i) by striking “To the extent” and all
13 that follows through “fees” and inserting
14 “Fees”; and

15 (ii) by striking “shall be collected by
16 and shall, subject to paragraph (2), be
17 available to the Director” and inserting
18 “shall be collected by the Director and
19 shall be available to the Director until ex-
20 pended”;

21 (B) by striking paragraph (2); and

22 (C) by redesignating paragraph (3) as
23 paragraph (2);

24 (3) by redesignating subsections (d) and (e) as
25 subsections (e) and (f), respectively;

1 (4) by inserting after subsection (c) the fol-
2 lowing:

3 “(d) REVOLVING FUND.—

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

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

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

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

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

25 “(A) this title; or

1 “(B) the Trademark Act of 1946.

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

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

15 “(i) this title; and

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

17 “(B) all expenses incurred pursuant to any
18 obligation, representation, or other commitment
19 of the Office.”;

20 (5) in subsection (e), as redesignated, by strik-
21 ing “The Director” and inserting “REFUNDS.—The
22 Director”; and

23 (6) in subsection (f), as redesignated, by strik-
24 ing “The Secretary” and inserting “REPORT.—The
25 Secretary”.

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

3 (1) EFFECTIVE DATE.—The amendments made
4 by subsection (a) shall take effect on the first day
5 of the first fiscal year that begins on or after the
6 date of enactment of this Act.

7 (2) REMAINING BALANCES.—There shall be de-
8 posited in the Fund, on the effective date described
9 in paragraph (1), any available unobligated balances
10 remaining in the Patent and Trademark Office Ap-
11 propriation Account, and in the Patent and Trade-
12 mark Fee Reserve Fund established under section
13 42(c)(2) of title 35, United States Code, as in effect
14 on the date before the effective date.

15 (3) TERMINATION OF RESERVE FUND.—Upon
16 the payment of all obligated amounts in the Patent
17 and Trademark Fee Reserve Fund under paragraph
18 (2), the Patent and Trademark Fee Reserve Fund
19 shall be terminated.

20 **SEC. 108. WILLFUL INFRINGEMENT.**

21 Section 284 of title 35, United States Code, is
22 amended to read as follows:

23 **“§ 284. Damages**

24 “(a) Upon finding for the claimant the court shall
25 award the claimant damages adequate to compensate for

1 the infringement, but in no event less than a reasonable
2 royalty for the use made of the invention by the infringer,
3 together with interest and costs as fixed by the court.
4 When the damages are not found by a jury, the court shall
5 assess them.

6 “(b) In either event the court may exercise its discre-
7 tion to increase the damages up to 3 times the amount
8 found or assessed upon determining, by a preponderance
9 of the evidence, that the infringement was willful or in
10 bad faith.

11 “(c) Increased damages under this section shall not
12 apply to provisional rights under section 154(d).”.

13 **SEC. 109. DIVIDED INFRINGEMENT.**

14 Section 271 of title 35, United States Code, is
15 amended by adding at the end the following:

16 “(j) For a finding of liability for actively inducing in-
17 fringement of a process patent under subsection (b), or
18 for contributory infringement of a process patent under
19 subsection (c), it shall not be a requirement that the steps
20 of the patented process be practiced by a single entity.”.

21 **SEC. 110. INSTITUTIONS OF HIGHER EDUCATION.**

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

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

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

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

14 “(3) the applicant is an institution of higher
15 education as defined in section 101(a) of the Higher
16 Education Act of 1965 (20 U.S.C. 1001(a)); or

17 “(4) the applicant is an organization described
18 in section 501(c)(3) of the Internal Revenue Code of
19 1986 and exempt from taxation under section
20 501(a) of such Code that holds title to patents and
21 patent applications on behalf of such an institution
22 of higher education for the purpose of facilitating
23 commercialization of the technologies of the patents
24 and patent applications.”.

1 **SEC. 111. ASSISTING SMALL BUSINESSES IN THE U.S. PAT-**
2 **ENT SYSTEM.**

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

6 (b) SMALL BUSINESS ADMINISTRATION REPORT.—
7 Not later than 1 year after the date of enactment of this
8 Act, the Small Business Administration, using existing re-
9 sources, shall submit to the Committee on Small Business
10 and Entrepreneurship of the Senate and the Committee
11 on Small Business of the House of Representatives a re-
12 port analyzing the impact of—

13 (1) patent ownership by small business con-
14 cerns; and

15 (2) civil actions against small business concerns
16 arising under title 35, United States Code, relating
17 to patent infringement.

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

20 (1) IN GENERAL.—Not later than 6 months
21 after the date of enactment of this Act, the Director
22 of the Administrative Office of the United States
23 Courts shall designate not fewer than 6 of the dis-
24 trict courts of the United States that are partici-
25 pating in the patent cases pilot program established
26 under section 1 of Public Law 111–349 (28 U.S.C.

1 137 note) for the purpose of expanding that pro-
2 gram to address special issues raised in patent in-
3 fringement suits against individuals or small busi-
4 ness concerns.

5 (2) PROCEDURES FOR SMALL BUSINESSES.—

6 Not later than 2 years after the date of enactment
7 of this Act, each district court designated under
8 paragraph (1) shall develop procedures for expe-
9 diting cases in which an individual or small business
10 concern is accused of patent infringement.

11 (3) PARTICIPATING JUDGES.—

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

19 (B) EDUCATION AND TRAINING.—The
20 Federal Judicial Center, using existing re-
21 sources, shall prepare educational and training
22 materials to assist district court judges de-
23 scribed in subparagraph (A) in developing ex-
24 pertise in patent and plant variety protection
25 cases.

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

4 (d) FREE ONLINE AVAILABILITY OF PUBLIC SEARCH
 5 FACILITY MATERIALS.—Section 41(i) of title 35, United
 6 States Code, is amended by adding at the end the fol-
 7 lowing:

8 “(5) FREE ONLINE AVAILABILITY OF PUBLIC
 9 SEARCH FACILITY MATERIALS.—The Director shall
 10 make available online and at no charge all patent
 11 and trademark information that is available at the
 12 Public Search Facility of the Office located in Alex-
 13 andria, Virginia, including—

14 “(A) search tools and databases;

15 “(B) informational materials; and

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

17 **TITLE II—TARGETING ROGUE**
 18 **AND OPAQUE LETTERS**

19 **SEC. 201. DEFINITIONS.**

20 In this title:

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

23 (A) made knowingly false or knowingly
 24 misleading statements, representations, or omis-
 25 sions;

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

5 (C) made statements, representations, or
6 omissions with awareness of the high prob-
7 ability of the statements, representations, or
8 omissions to deceive and the sender inten-
9 tionally avoided the truth.

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

12 (3) FINAL DETERMINATION.—The term “final
13 determination” means, with respect to the invalidity
14 or unenforceability of a patent, that the invalidity or
15 unenforceability has been determined by a court of
16 the United States or the United States Patent and
17 Trademark Office in a final decision that is
18 unappealable or for which any opportunity for ap-
19 peal is no longer available.

20 **SEC. 202. UNFAIR OR DECEPTIVE ACTS OR PRACTICES IN**
21 **CONNECTION WITH THE ASSERTION OF A**
22 **UNITED STATES PATENT.**

23 (a) IN GENERAL.—It shall be an unfair or deceptive
24 act or practice within the meaning of section 5(a)(1) of
25 the Federal Trade Commission Act (15 U.S.C. 45(a)(1))

1 for a person, in connection with the assertion of a United
2 States patent, to engage in a pattern or practice of send-
3 ing written communications that state or represent that
4 the recipients are or may be infringing, or have or may
5 have infringed, the patent and bear liability or owe com-
6 pensation to another, if—

7 (1) the sender of the communications, in bad
8 faith, states or represents in the communications
9 that—

10 (A) the sender is a person with the right
11 to license or enforce the patent at the time the
12 communications are sent, and the sender is not
13 a person with such a right;

14 (B) a civil action asserting a claim of in-
15 fringement of the patent has been filed against
16 the recipient;

17 (C) a civil action asserting a claim of in-
18 fringement of the patent has been filed against
19 other persons;

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

22 (E) the sender is the exclusive licensee of
23 the patent asserted in the communications;

1 (F) persons other than the recipient pur-
2 chased a license for the patent asserted in the
3 communications;

4 (G) persons other than the recipient pur-
5 chased a license, and the sender does not dis-
6 close that such license is unrelated to the al-
7 leged infringement or the patent asserted in the
8 communications;

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

11 (I) the sender or an affiliate of the sender
12 previously filed a civil action asserting a claim
13 of infringement of the patent based on the ac-
14 tivity that is the subject of the written commu-
15 nication when the sender knew such activity
16 was held, in a final determination, not to in-
17 fringe the patent;

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

20 (A) a patent claim that has been held to
21 be unenforceable due to inequitable conduct, in-
22 valid, or otherwise unenforceable against the re-
23 cipient, in a final determination;

1 (B) activities undertaken by the recipient
2 after expiration of the patent asserted in the
3 communications; or

4 (C) activity of the recipient that the sender
5 knew was authorized, with respect to the patent
6 claim or claims that are the subject of the com-
7 munications, by a person with the right to li-
8 cense the patent; or

9 (3) the sender of the communications, in bad
10 faith, fails to include—

11 (A) the identity of the person asserting a
12 right to license the patent to, or enforce the
13 patent against, the recipient, including the iden-
14 tity of any parent entity and the ultimate par-
15 ent entity of such person, unless such person is
16 a public company and the name of the public
17 company is identified;

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

21 (C) an identification, to the extent reason-
22 able under the circumstances, of at least one
23 product, service, or other activity of the recipi-
24 ent that is alleged to infringe the identified pat-
25 ent;

1 (D) a description, to the extent reasonable
2 under the circumstances, of how the product,
3 service, or other activity of the recipient in-
4 fringes an identified patent and patent claim; or

5 (E) a name and contact information for a
6 person the recipient may contact about the as-
7 sertions or claims relating to the patent con-
8 tained in the communications.

9 (b) AFFIRMATIVE DEFENSE.—With respect to sub-
10 section (a), there shall be an affirmative defense that
11 statements, representations, or omissions were not made
12 in bad faith (as defined in subparagraphs (B) and (C) of
13 section 201(1)) if the sender can demonstrate that such
14 statements, representations, or omissions were mistakes
15 made in good faith. Evidence that the sender in the usual
16 course of business sends written communications that do
17 not violate the provisions of this title shall be sufficient
18 to demonstrate good faith. Good faith may also be dem-
19 onstrated by other evidence.

20 (c) RULE OF CONSTRUCTION.—For purposes of sec-
21 tions 203 and 204, the commission of an act or practice
22 that is declared under this section to be an unfair or de-
23 ceptive act or practice within the meaning of section
24 5(a)(1) of the Federal Trade Commission Act (15 U.S.C.

1 45(a)(1)) shall be considered to be a violation of this sec-
2 tion.

3 **SEC. 203. ENFORCEMENT BY FEDERAL TRADE COMMIS-**
4 **SION.**

5 (a) VIOLATION OF RULE.—A violation of section 202
6 shall be treated as a violation of a rule defining an unfair
7 or deceptive act or practice prescribed under section
8 18(a)(1)(B) of the Federal Trade Commission Act (15
9 U.S.C. 57a(a)(1)(B)).

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

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

22 **SEC. 204. PREEMPTION OF STATE LAWS ON PATENT DE-**
23 **MAND LETTERS AND ENFORCEMENT BY**
24 **STATE ATTORNEYS GENERAL.**

25 (a) PREEMPTION.—

1 (1) IN GENERAL.—This title preempts any law,
2 rule, regulation, requirement, standard, or other pro-
3 vision having the force and effect of law of any
4 State, or political subdivision of a State, expressly
5 relating to the transmission or contents of commu-
6 nications relating to the assertion of patent rights.

7 (2) EFFECT ON OTHER STATE LAWS.—Except
8 as provided in paragraph (1), this title shall not be
9 construed to preempt or limit any provision of any
10 State law, including any State consumer protection
11 law, any State law relating to acts of fraud or decep-
12 tion, and any State trespass, contract, or tort law.

13 (b) ENFORCEMENT BY STATE ATTORNEYS GEN-
14 ERAL.—

15 (1) IN GENERAL.—In any case in which the at-
16 torney general of a State has reason to believe that
17 an interest of the residents of that State has been
18 adversely affected by any person who violates section
19 202, the attorney general of the State, may bring a
20 civil action on behalf of such residents of the State
21 in a district court of the United States of appro-
22 priate jurisdiction—

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

1 (B) to obtain civil penalties on behalf of
2 recipients who suffered actual damages as a re-
3 sult of such violation.

4 (2) MAXIMUM CIVIL PENALTY.—Notwith-
5 standing the number of actions which may be
6 brought against a person under this subsection, a
7 person may not be liable for a total of more than
8 \$5,000,000 for a series of related violations of sec-
9 tion 202.

10 (3) INTERVENTION BY THE FTC.—

11 (A) NOTICE AND INTERVENTION.—The at-
12 torney general of a State shall provide prior
13 written notice of any action under paragraph
14 (1) to the Commission and provide the Commis-
15 sion with a copy of the complaint in the action,
16 except in any case in which such prior notice is
17 not feasible, in which case the attorney general
18 shall serve such notice immediately upon insti-
19 tuting such action. The Commission shall have
20 the right—

21 (i) to intervene in the action;

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

24 (iii) to file petitions for appeal.

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

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

16 (A) conduct investigations;

17 (B) administer oaths or affirmations; or

18 (C) compel the attendance of witnesses or
19 the production of documentary and other evi-
20 dence.

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