

December 10, 2014

The Honorable Bob Goodlatte
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

The Honorable John Conyers
Ranking Member
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

The Honorable Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Chuck Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Goodlatte, Chairman Leahy, Rep. Conyers, and Senator Grassley:

The undersigned represent a broad coalition whose members represent the majority of the nation's patent holders and inventors. We are a diverse array of American innovators, ranging from universities and non-profit foundations, to start-ups and small businesses, to manufacturing, technology, and life sciences companies. Together we represent thousands of organizations that employ millions of workers in the United States. All of our members believe that the future of the U.S. economy, including domestic job growth and our competitive advantage in the global economy, depends on a strong patent system that incentivizes innovators to invent and protects their inventions from unfair copying by others.

We appreciate the hard work you and your staffs have undertaken to craft a bill to target abusive practices in patent litigation, and we accept your challenge to our member groups to work with you to craft a responsible bill to address those abuses. As we have demonstrated in the past, we are willing to work with you and other stakeholders to develop targeted and measured reforms that address harmful patent enforcement practices. However, we will continue to strongly oppose legislation that would weaken the overall patent system and thereby diminish innovation and job creation in the United States.

In addition, there have been several major judicial and administrative developments in patent law since the last time your committees fully considered these issues and drafted proposed legislation. As a result of these developments, we are even more concerned that some of the measures under consideration over the past year go far beyond what is necessary or desirable to combat abusive litigation. Indeed, new patent lawsuit filings already have dropped dramatically – 40 percent, year over year, from September 2013 to 2014. Recent developments include the following:

- The Supreme Court decided five patent cases this past year, including *Alice Corporation v. CLS Bank*, *Nautilus v. Biosig Instruments*, *Limelight Networks v. Akamai Technologies*, *Octane Fitness v. ICON Health & Fitness*, and *Highmark Inc. v. Allcare Health Management Systems*, that are already making it easier to defeat patents, including the kind of patents that often are asserted in abusive litigation, and disincentivizing the

bringing of meritless claims. They certainly require thorough Congressional consideration as changes to the patent system are debated.

- The Leahy-Smith America Invents Act (AIA), which includes a number of provisions to increase patent quality and reduce abusive practices, was fully implemented less than two years ago, and its effects are only now beginning to take hold. For example, the AIA created new procedures – “inter partes review” (IPR) and “covered business method patent review” (CBM) – to allow anyone to challenge patents in a fast, relatively inexpensive proceeding before the Patent Trial and Appeal Board (PTAB). These administrative proceedings are already impacting the litigation landscape: judges in patent cases are now granting 80% of all motions to stay patent litigation if the patent is also involved in a parallel IPR or CBM proceeding. This is not to suggest that improvements are not needed with respect to implementation by the U.S. Patent & Trademark Office (USPTO), particularly with respect to concerns raised that these proceedings may be structured in a way that fails to afford basic due process to patent owners. In just two years since the USPTO implemented the new procedures in late 2012, petitioners have challenged claims of more than 2,300 patents. In concluded proceedings, fully 75% of the involved claims have been found unpatentable and only about 20% of patents have survived the proceeding with no changes.
- This past October, the Judicial Conference of the United States adopted changes to the Federal Rules of Civil Procedure that will ensure that patent cases meet the heightened pleading standards required of all other federal cases. The changes also will ensure that discovery in patent litigation will be “proportional to the needs of the case,” reducing the ability of patent plaintiffs to use unnecessary discovery requests to drive up costs for defendants in an effort to force unwarranted settlements. These rule changes make any statutory provision heightening pleading standards or limiting the scope of discovery in patent cases unnecessary and repetitive, since courts now have been directed to limit excessive and abusive discovery requests and ensure adequately described pleadings in patent cases. The rule changes are currently pending before the Supreme Court and are expected to be sent to Congress in early 2015.
- The Federal Trade Commission and state attorneys general also are aggressively using their authority to combat abusive patent demand letters and protect small businesses and consumers from unscrupulous practices. Instead of collecting settlement fees, senders of mass demand letters now find themselves mired in legal proceedings and their patents subject to challenges. Settlements between MPHJ Technology Investments LLC and the New York Attorney General and the FTC in January and November show the effectiveness of consumer protection and unfair competition laws at protecting small businesses from abusive and deceptive representations in demand letters.

Taken together, these judicial and administrative developments, and the plunge in the patent litigation rate, have fundamentally changed the landscape under which patent legislation should be considered. As Congress considers potential changes to the patent system that threaten the constitutionally-guaranteed property rights of innovators, it must assess the full

effects of the AIA, changes to the Federal Rules of Civil Procedure, the case law developments, and these administrative developments.

We look forward to working with you and your colleagues to make improvements to patent law that protect small businesses, consumers, and the general public from abusive patent practices, while zealously guarding the United States' competitive edge as the dominant global leader in innovation.

Thank you for your consideration of our views.

Sincerely,

American Council on Education
Association of American Medical Colleges
Association of American Universities
Association of Public and Land-grant Universities
Association of University Technology Managers
Biotechnology Industry Organization (BIO)
Innovation Alliance (IA)
Medical Device Manufacturers Association (MDMA)
Pharmaceutical Research and Manufacturers of America (PhRMA)
USBIC Educational Forum

cc: The Honorable Harry Reid
Majority Leader
United States Senate
Washington, DC 20510

The Honorable Mitch McConnell
Minority Leader
United States Senate
Washington, DC 20510

The Honorable Richard J. Durbin
Majority Whip
United States Senate
Washington, DC 20510

The Honorable John Cornyn
Minority Whip
United States Senate
Washington, DC 20510

The Honorable John Boehner
Speaker
United States house of Representatives
Washington, DC 20515

The Honorable Nancy Pelosi
Minority Leader
United States House of Representatives
Washington, DC 20515

The Honorable Kevin McCarthy
Majority Leader
United States House of Representatives
Washington, DC 20515

The Honorable Steny Hoyer
Minority Leader
United States House of Representatives
Washington, DC 20515

Members of the House Judiciary Committee

Members of the Senate Committee on the Judiciary