

Senate Small Business Committee finds consensus on patent reform

By Gene Quinn & Steve Brachmann on March 19, 2015
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Significant consensus was reached between representatives of small business and universities at a hearing of the U.S. Senate Committee on Small Business and Entrepreneurship on March 19, 2015. The hearing was held to take testimony relating to proposed reforms to the U.S. patent system. The day's discussion prompted Sen. Chris Coons ([D-DE](#)) to make the comment that the argument over whether there is any need to diminish the rights of patent owners has been "turned on its head."

At the outset of the hearing, committee chairman Sen. David Vitter ([R-LA](#)) set the terms of the debate in a very succinct manner. The goal of that day's testimony was to identify ways of addressing reforms to the patent system that would dissuade abuse without hindering innovation or harming small business owners. "It's very important that any legislation achieves this goal," Vitter said. "Small businesses and innovators are absolutely at the center of our economy."

Indeed, the tone of the hearing was reminiscent of the hearing yesterday in the Senate Judiciary Committee, where Senator after Senator explained that they want to enact reforms laser focused on abusive behaviors without compromising the rights of innovators.

The targeted focus on curtailing abusive and exploitative behaviors involving patent rights without harming what works about our patent system took up most of the discussion at the hearing earlier today, which should cause U.S. patent holders all over to breathe a sigh of relief. Vitter cited what he called some "disturbing efforts" to lump well intended business lawsuits along with the concept of patent trolling. Senator Vitter put it into fairly unequivocal terms at the end of his opening remarks: "Licensing a patent is not a bad thing." This echoed Senator Chuck Grassley ([R-IA](#)) remarks from yesterday during the Judiciary hearing when he emphatically stated that licensing patent rights is not a bad thing in and of itself. Even Senator Chuck Schumer ([D-NY](#)), who has been a proponent of what many consider heavy handed patent reform, yesterday likewise recognized that a delicate balance must be achieved otherwise the cure for abusive behavior could wind up being worse than the disease.

The patent system is extremely important to small businesses, which in turn drive much of American innovation, as was pointed out by Senator Ben Cardin (D-MD) who noted that small businesses produce 16 times the amount of patented inventions when compared to large businesses. Senator Cardin also stated the need to balance two conflicting schools of thought on patent system reforms that seemed to be separated along the lines of small businesses and universities.

First to give testimony was [David Winwood](#), President-Elect of the Association of University Technology Managers and the Chief Business Development Officer of the Louisiana State University's Pennington Biomedical Research Center. Winwood started by pointing out the economic benefits of university research to the nation, including the \$518 billion in American GDP and \$1.18 trillion overall national economic impact since 1996 that it has supported. He also lauded the framework set up by the [Bayh-Dole Act](#), which has allowed for the commercialization of university innovations.

Winwood had some grave concerns where it came to the passage of [H.R.9, known as the Innovation Act](#). "H.R.9 stifles a university's ability to enforce patent rights," Winwood said. He cautioned that the overzealous pursuit of patent trolls in the face of recent actions by the Supreme Court and new post-grant proceedings put in place by the U.S. Patent and Trademark Office could have the unintended consequence of putting the U.S. patent system out of reach for universities and small businesses alike.

Some of the day's most colorful comments came from [Robert Schmidt](#), co-chair of the Small Business Technology Council. He represented more than 5,000 member firms of the Small Business Innovation Research (SBIR) program and also spoke to the potentially negative effects that could be created by the passage of the Innovation Act. Schmidt cited findings by the U.S. Federal Reserve indicating that patents are the top indicator of a region's wealth and noted that 37 percent of American engineers and scientists are employed by small businesses. As for H.R.9, Schmidt made it very clear what he thought about it, saying that it would be more aptly named the "Ending the American Dream Act." His concerns related to functions of the Innovation Act that could enable endless review and undermine legitimate licensing activities.

Software-related patents have been an area of much uncertainty in the patent system thanks to actions like the Supreme Court's decision in *Alice Corp v. CLS International*. Speaking on behalf of small software businesses was [Tim Molino](#), director of policy at the Business Software Alliance. "The promise of patents rings hollow if a patent holder cannot enforce rights," Molino said. He very specifically stated that legislation should ensure that litigation provides genuine notice that sets forth clear allegations and enables courts to make early claims construction decisions before the expensive process of discovery. Awarding fees only when a party asserts an objectively unreasonable claim should also deter weaker cases. "With recent Supreme Court rulings, some argue that we

don't need legislation," Molino said. "Those decisions have only nibbled at the corners of abuse."

Rachel King, founder and CEO of GlycoMimetics, a pharmaceutical company focused on sickle cell diseases and leukemia, did a good job at framing the unique issues facing biotech companies as a result of patent system abuses. As King noted, unlike smartphones or many other high-tech products that might rely on hundreds of patents, each pharmaceutical drug developed by her company relies on only one or two patents. Each drug that is successful requires tens of millions of dollars to develop and could take up to 15 years to commercialize. That is a long interim time during which patent rights for a drug must be protected.

Most readers will be familiar with the demand letter abuses that many have used to characterize patent trolls, but King outlined an entirely new kind of abuse enabled by inter-partes review (IPR) and other post-grant proceedings created by the America Invents Act to which biotech companies are unusually susceptible. Because so many patents challenged through *inter partes* review are invalidated, King cited a situation where a hedge fund could short sell a biotech company's stock and file an IPR to make money when the stock plunges because investors are so wary of IPR challenges. "I think that should be criminal," King said. King did not cite an example of this having happened, but there are indeed reports that this has been happening. Unfortunately, those who are threatened by the extortion-like threat of paying or facing an IPR combined with short sale have been reluctant to come forward. Recently Kyle Bass has been alleged to be using IPR in this type of creative way, and there are many who worry that if this goes unchecked a new cottage industry will develop. [See Bio Statement Following Kyle Bass' IPR Petition.](#)

Rounding out the testimony was [Craig Bandes](#), President and CEO of Pixelligent Technologies, a developer of LED lighting solutions. Many of the products developed by Pixelligent are licensed out for use in other devices and Bandes specifically brought up 3M, Dow Chemical and LG as companies with which he does business. Often, the strong IP rights held by Pixelligent are crucial to allaying any fears on behalf of larger firms that the Pixelligent technologies could be indefensible in court pursuant to a claim of infringement. "We have to be able to prove that we have protections because ultimately, if there's a problem, we're on the hook," Bandes said.

Bandes also brought up the backlog of patent applications being processed by the USPTO as a source of concern, citing the 2+ year wait before a patent is typically issued and the 600,000 patents that have yet to be issued by the patent office. "Think about the amount of economic value held up there," Bandes said, indicating to the Senate subcommittee that he would have better standing when negotiating with other companies if he could talk more about the patents held in Pixelligent's portfolio rather than the patents that they have pending. Bandes was quick to point out that he appreciated the work of patent

examiners but felt that there could be more, especially given the fact that the PTO is one of the few government agencies that self-funds its activities. “Imagine if you re-invested that money like a business to grow that team,” Bandes said.

Some of the questions presented to the witness panel after they gave their initial testimony focused on the subject of fee shifting. Winwood specifically spoke to the problems of both fee shifting and joinder statutes and the problems posed to universities who don't have deep wells of resources to take on the additional risks posed by fee shifting. In addition, a joinder statute could have the negative consequence of wrapping post-doc students or faculty into a lawsuit, diverting their activities from research and further providing an onerous financial burden on a university's ability to protect its patent rights. Schmidt set the fee shifting arguments in the most dire terms during that morning's hearing. “I don't think anyone understands, if you need to pay \$5 million, that's not just petty cash,” Schmidt said. “It's taking my house, and then my spouse and children. Congress is telling me, ‘Schmidt, you're too poor to invent.’”

Senator Gary Peters (D-MI) was able to quickly find common ground among all of the members of the witness panel by focusing on the “innovation tax,” or the funneling of money away from the PTO as a result of sequestration measures which had been put in place. Asked whether Congress should put a law in place mandating that user fee resources remain in the patent office, all of the respondents quickly answered yes. “Congress, we need to act on this, no one disagrees with this,” Peters said.

The same level of consensus couldn't be found on the issue of which piece of legislation reform was best for the U.S. patent system. The overwhelming majority favored the STRONG Patents Act sponsored by Senator Coons, Senator Dick Durbin (D-IL) and Senator Mazie Hirono (D-HI), which most believed created the kind of framework necessary for handling abusive behaviors without affecting the legitimate rights of patent owners. Tim Molino of BSA, however, was still a proponent of the Innovation Act instead of STRONG. Molino's reasoning involved the fact that the AIA had just been established and that it was too early to deem certain post-grant review activities stemming from that act as abusive. His position confused Senator Hirono who pointed out that the Innovation Act would include even broader regulations than the STRONG Act. King also strongly disagreed with Molino's sentiments that post-grant review abuses were only alleged and weren't clearly happening.

All things considered, it seems that the Senate Small Business Committee is interested in focusing narrowly on those things that could directly address abusive behaviors, but is firmly intent on not doing any harm to innovators. With the Senate Small Business Committee and the Senate Judiciary Committee largely singing from the same sheet music it would seem that there is not an appetite in the Senate for anything as broad and dramatic as the Innovation Act. That suggests that if there will be patent reform in this Congress it will be more modest and at least attempt at being innovator friendly.