

**Statement of Timothy A Molino
On Behalf of BSA | The Software Alliance**

“Patent Reform: Protecting Innovation and Entrepreneurship.”

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Chairman Vitter, Ranking Member Cardin and members of the Committee, thank you for the opportunity to testify on this very important subject.

My name is Tim Molino. I am the Policy Director for BSA | The Software Alliance.¹ One of the principal issues I cover at BSA is intellectual property (IP) policy, including patent issues affecting the software industry. Prior to joining BSA, I worked in the Senate and prior to that, I spent eight years as a patent litigator. I am testifying today to advocate for the urgent need for legislation to address abuses that all too often occur during patent litigation.

BSA is the world’s leading voice for the software industry. We represent both large and small software companies that provide consumers and businesses with products and services that improve productivity – and simply make life more fun. There is amazing innovation occurring in the software industry.

Intellectual property is core to a successful and robust software industry. A well-functioning intellectual property system - with protection for patents, copyrights, trademarks and trade secrets -- provides software developers the indispensable incentives to invest and apply their creative and inventive energies to innovate. Patent protection for software-related innovations is a vital part of this system, for small, medium, and well-established enterprises.

Although BSA members range in size – from very small to large, each was founded by one or two individuals with passion, an idea, and a vision for making that idea a marketplace reality. Unsurprisingly, each of our member companies also relies on patents to protect their innovations. For small businesses, patents are indispensable: they protect their ideas against copiers, preserve the value of their innovation as they build their businesses, and help them attract the investment capital they need to continue their research and development and to grow. In this way, the patent system retains its role as the engine for innovation, job creation, and economic expansion.

But that promise of innovation rings hollow if IP owners cannot enforce their patents or defend a patent suit in an efficient, cost-effective manner. Unfortunately, it is increasingly the case that bad actors are able to game the system through abusive litigation tactics. Some leverage the specialized nature and unique asymmetries in costs between plaintiffs and defendants that often characterize patent cases. They often take advantage of the fact that many smaller companies do not have the

¹ BSA’s members include: Adobe, Altium, Apple, ANSYS, Autodesk, Bentley Systems, CA Technologies, CNC/Mastercam, Dell, IBM, Intuit, Microsoft, Minitab, Oracle, salesforce.com, Siemens PLM Software, Symantec, Tekla, The MathWorks, and Trend Micro.

internal resources to assess risk and negotiate favorable rates for litigation counsel. Others exploit the highly technical nature and complexity of patent cases, taking advantage of a strained court system where judges lack the resources to meticulously oversee cases. These bad actors intentionally increase litigation costs and create delays for plaintiffs to make it too risky to enforce legitimate rights. Or, they drive up costs for defendants to extract settlements that far outweigh the actual value of the disputed patent rights. By enacting legislation to curb these abuses, Congress will help foster innovation and entrepreneurship for businesses, both small and large, across all sectors of the economy.

Importance of a Well-Functioning Patent System

BSA members and other innovators rely on a patent system that is strong, predictable, and efficient. BSA companies invest as much as 10 percent of their revenues in research and development each year. Often, the innovation arising out of this research and development is protected by patents. Our members hold more than 80,000 U.S. patents, and they regularly license these patented inventions to others. Licensing encourages the dissemination of technology and fosters innovation by enabling collaboration among stakeholders. It also ensures companies that invest in innovation are not put at a competitive disadvantage, by having their competitors use their inventions for free.

But BSA members are not only among America's most innovative companies: we are some of the biggest targets for abusive patent suits.

The Current Problems with Patent Litigation Hurt Small Businesses

Patent litigation is enormously expensive, and the costs are growing. A 2011 survey by the American Intellectual Property Law Association found that the median cost of a medium-sized patent litigation is approximately \$6 million dollars per party, double the cost reported in 2009 and four times the cost reported in 2001.² The threat that a plaintiff or defendant will be forced to confront these extraordinary expenses enables abusive litigation tactics. Regardless of whether they are a plaintiff or defendant, most small businesses simply cannot afford to litigate a patent dispute.

As I mentioned earlier, BSA members are software companies of all sizes, including many smaller companies. The impact of patent lawsuits "on smaller startups is particularly acute."³ One survey indicates that, over a six-year period, roughly 66 percent of unique patent defendants were firms with annual revenue of less than \$100 million.⁴ Commentators have thus noted that "small companies—not tech giants—are the predominant targets" in certain abusive lawsuits.⁵ Victims of abusive suits are often faced with foregoing hiring engineers, delayed time-to-market, and challenges in receiving funding.

² Am. Intellectual Prop. Law Ass'n, Report of the Economic Survey 2011, at I-155 to I-156 (2011)

³ Executive Office of the President, *Patent Assertion & U.S. Innovation*, at 10 (2013), <http://tinyurl.com/lvk6ajl>

⁴ Colleen V. Chien, *Startups & Patent Trolls*, Santa Clara Univ. Legal Studies Research Paper No. 09-12, at 1-2 (Sept. 28, 2012).

⁵ Brian J. Love & James C. Yoon, *Expanding Patent Law's Customer Suit Exception*, 93 B.U. L. Rev. 1605, 1611 (2013).

Expending scarce resources on litigating patents is appropriate when a company is faced with a meritorious patent claim. That is the foundation of a strong and effective patent system. At the same time, when suits are driven by abusive litigation, there are unwarranted negative effects on companies – especially small entrepreneurial businesses.

Many of our members have experienced directly the impact of expensive patent litigation on small businesses. For our smaller members, patent litigation is often a “bet-the-company” endeavor. This is not because of the potential damages or injunction, but rather it is simply because of the overwhelming cost to litigate a patent case. Not only are patent cases very expensive for most small businesses, they also require an intense amount of time and resources from top executives and innovators. At a time when it is imperative that these personnel focus on innovating and building their businesses, they are stuck litigating frivolous cases. Our larger companies also witness this when unscrupulous actors assert weak or invalid patents against their smaller customers or business partners.

BSA Priorities for Improving the Patent System

There is an urgent need for Congress to enact legislation that curbs abusive litigation behavior. This will help both large and small innovators and entrepreneurs by increasing transparency, addressing asymmetries that lead to abuse, and increasing fairness in the patent system. The proposed changes that BSA supports will lower the cost of patent litigation for all parties in a patent case. It will also foster more efficient and faster resolution of patent cases, which will help small entrepreneurs and innovators spend their time inventing rather than litigating.

Some argue that no legislative changes are needed to the patent system because the Supreme Court has ruled on several patent cases in the last few years. The Supreme Court’s rulings, while touching on some of the issues causing the abuse, are constrained by the letter of the patent statute and make only incremental changes in these areas. As a result, the Court’s decisions do not sufficiently address the causes of the abuse, specifically the gross imbalance in costs and information that are exploited by the unprincipled in litigation. In fact, the recent rulings have increased ambiguities in some areas. At bottom, the abuses have not ended – and are not likely to end – unless Congress takes action.

BSA believes that Congress can make several important changes to curb patent litigation abuse. None of these alone is sufficient to address the problem, but taken together, these improvements will remove skewed incentives and deter unscrupulous actors. Importantly, these changes will not undermine the property right granted by a patent. In fact, implementing these measures will strengthen confidence in the patent system and the rights it protects.

BSA’s priorities include:

Genuine Notice Pleadings – All too often, an unscrupulous plaintiff will file a complaint that provides little to no detail as to how or why the plaintiff believes its patents are being infringed by the defendant. A well-pleaded complaint will serve to focus the litigation and more appropriately target discovery. Thus, we support requiring a plaintiff to articulate its theories of infringement in a complaint. This is an important and logical step toward making patent lawsuits more efficient and the system more equitable.

Efficient Discovery – Much of the expense in patent litigation occurs during the discovery phase. Patent cases have a special proceeding called “claim construction,” where the judge issues an order defining the scope of the case. This order can be very helpful in narrowing the issues and would limit the cost of discovery if it were issued early in the case. Thus, we support requiring courts to delay the bulk of discovery until after a “claim construction” decision has been rendered.

Discovery Cost Shifting – Unscrupulous actors often attempt to force the targets of their suits to respond to discovery “fishing expeditions” in an effort to drive up costs – in legal fees and in executive and employee time and resources. BSA supports requiring the party seeking discovery to pay the related costs of the other side when the requested information is deemed by a judge to be unnecessary to prove the case. Such measures will increase efficiency and remove incentives for abuse.

Fee shifting – Section 285 of the Patent Act gives courts the authority to shift fees, but the high threshold set by the current statute has resulted in a clouded interpretation of the law. Thus, parties in patent cases are motivated to drive up litigation costs because there is still a low risk that fees will be assessed and the Federal Circuit does not have the statutory tools it needs to review lower court decisions on fees. We support strengthening Sec. 285 to require a losing party that asserts frivolous claims during a patent lawsuit to pay the prevailing party’s attorneys fees and to ensure that fees can be collected when they are ordered by the court.

Customer Stay – A relatively new tactic used by unscrupulous litigants is to file suit against the customers of companies that make an allegedly infringing product. The customers are accused to have infringed just by purchasing and using an off-the-shelf product from a reputable manufacturer. This is often done to derive multiple settlements from multiple targets. In many cases, a single suit against the manufacturer establishing whether its product infringes could resolve dozens of individual cases brought against its customers. However, it is sometimes difficult to stay the case against such customers pending the outcome of the suit against the manufacturer. Thus, BSA supports legislation that would require courts to stay cases against a customer when the manufacturer is an appropriate defendant and the manufacturer willingly agrees to take over the case.

Demand Letters – Bad actors will often send bogus letters threatening patent litigation to unsuspecting small businesses with the sole purpose of trying to extract a settlement. Often, these letters are sent to dozens if not hundreds of companies, without any real investigation into whether there is actually a basis for alleging infringement. The letters often provide little if any information regarding how a particular recipient is alleged to have infringed a patent or patents and make misleading claims and unsubstantiated threats. This makes it very difficult and expensive for a small business to determine whether they have any legitimate liability exposure or whether the demand is simply an effort to mislead them into paying a settlement. We support legislation that will protect end-users and inexperienced recipients from wide-spread, bad-faith demand letters. This goal can be achieved without undermining a patent-holder’s constitutional right to enforce its intellectual property through balanced federal legislation that preempts the confusing-quilt of individual demand letter laws now emerging in the states.

Broadest Reasonable Interpretation (BRI) – Some stakeholders have proposed provisions that would force the USPTO to abandon the “Broadest Reasonable Interpretation” standard it currently uses to review patents in post-grant proceedings, making it more difficult to invalidate a patent during the proceeding. BSA opposes proposals to eliminate the use of the BRI standard during Post Grant Review processes.

Proposals Not Directly Addressing Litigation Abuse are Untimely

The 2011 America Invents Act (AIA) is only now being implemented by the USPTO. The AIA created new mechanisms for USPTO to review issued patents. These review programs, while in their infancy, are providing the opportunity to help remove arguably invalid patents from the system. Despite a limited record of administrative determinations, some believe the existing programs should go farther, while others believe they go too far. In BSA’s view, action to revisit post-issuance review programs – including post-grant, inter partes, and the covered business method review programs - is premature and unwarranted. Unlike litigation abuses, which policymakers, academics, and our companies have observed for more than a decade, the lack of experience under these programs and the inadequate ability to assess their impact on the system overall argues against further changes.

Importance of the Availability of Software Patents

Software innovation has provided a key engine of economic growth and job creation over the past decade. Software is now an integral element of the cars we drive, the systems that heat our homes, and the telecommunications systems that allow us to remain in touch with our loved ones. Software truly does make our world a better place. The incentives to develop innovative software would be much diminished, harming every aspect of our lives if patents were unavailable. Both economic theory and practical experience suggest that the availability of patents for software promotes innovation by supplying additional incentives to inventors. Moreover, software patents are especially important for small businesses, as they level the playing field by allowing innovators to compete with others who do not invest in the risky and difficult process of innovation. Software patents also “play a role of some importance in the development of firms seeking to enter the software industry” insofar as they significantly improve a company’s efforts to obtain venture capital.⁶

Conclusion

BSA is committed to ensuring that our robust patent system remains the envy of the world. To advance this goal, we believe patents should be available for all types of inventions, including in software, and further that such availability serves the constitutional mandate to promote the advancement of science and the useful arts, pursuant to Article 1, Section of 8. While we value and are committed to a strong patent system, we also believe that there is an urgent need to end abusive litigation by focusing on legislation that addresses opportunistic behavior. We do not see these efforts as in tension, and we are confident that effective reform this can be accomplished without diminishing the rights of inventors to enforce their legitimate property rights.

⁶ Ronald J. Mann & Thomas W. Sager, *Patents, Venture Capital, and Software Start-Ups*, 36 Research Policy 193, 194 (2007), <http://tiny.cc/snd99w>.

We urge the Senate to move quickly to enact reforms that support a robust patent system while deterring abuse. We thank the Committee for the opportunity to testify today, and I look forward to answering your questions.