



May 26, 2015

The Honorable Mitch McConnell
Majority Leader
United States Senate
317 Russell Senate Office Building
Washington, DC 20510

The Honorable Harry Reid
Minority Leader
United States Senate
522 Hart Senate Office Building
Washington, DC 20510

Dear Majority Leader McConnell and Minority Leader Reid:

While the National Small Business Association (NSBA) supports reasonable efforts to protect small businesses from unnecessary patent infringement actions, and appreciates the efforts undertaken by the bill's sponsors, we urge you to oppose the *Protecting American Talent and Entrepreneurship (PATENT) Act* (S. 1137) due to its failure to protect small, innovative businesses and independent inventors.

Patent protections are particularly important for small businesses, which operate on much smaller margins and often rely more heavily on their intellectual property for revenue than large firms. According to the U.S. Small Business Administration, small businesses produce 16 times more patents per employee than large patenting firms, which has a direct correlation with job growth. Unfortunately, input from small inventors and their calls for restraint have not been given proper consideration.

S. 1137 includes a number of provisions that NSBA cannot support, including:

- Fee-shifting language, or so-called "loser pays" requirements which would, in addition to requiring courts to award attorneys' fees and costs to the winning party, make personally liable any investors or licensees of the patent with a "substantial financial interest" should the plaintiff not prevail. This would require the patent holder to certify their ability to pay these costs under a losing circumstance, all of which would greatly deter any small patent-holder from legal patent protection due to massive litigation costs;
- Changes to the post-grant review process which would allow for repeated contests, forcing the patent holder to burn through valuable resources;
- A provision to mandate the joinder of "interested parties" which would require the disclosure and potential liability of "interested parties" to the patent which will greatly stymie investment and remove any semblance of competitive confidentiality;
- A discovery stay which would limit discovery and even further stack the deck against the inventor trying to protect his or her patent by requiring the plaintiff to produce substantially more information and requiring small companies to post a bond to get the additional discovery they need, adding to litigation cost;
- Heightened pleading standards essentially requiring the inventor trying to protect her patent essentially prove her case before filing a case; and
- Customer stay language, whereby a patent infringer's customers could continue to sell a product that is in litigation – a huge incentive to foreign patent infringers.

These provisions, while helpful to the largest patenting companies, could decimate small patenting firms. Only a company with massive financial and legal resources would be able to protect its patents under this system. S. 1137 would place an unnecessary burden on individual inventors and legitimate small-business patentees, making it more difficult for them to grow their companies and raise much-needed capital.

As is often the case, people far and wide are citing "small-business concerns" as justification for this bill. Speaking on behalf of the nation's first small-business advocacy organization with 65,000 members across the country operating on a staunchly nonpartisan basis, I implore you to consider what actual small businesses want – and it is not S. 1137. Rather, small businesses have rallied behind the *Support Technology and Research for Our Nation's Growth (STRONG) Patents Act of 2015* (S. 632) which would improve the current patenting system and avoid many of the burdens associated with S. 1137.

Sincerely,

A handwritten signature in black ink, appearing to read "Todd McCracken". The signature is fluid and cursive, with a long horizontal stroke at the end.

Todd McCracken, NSBA President and CEO

Cc: Members of the Senate Judiciary Committee

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