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

Mr. Coons introduced the following bill; which was read twice and referred to the Committee on

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.

Be it enacted by the Senate and House of Representa-

tives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) Short Title.—This Act may be cited as the “Support Technology and Research for Our Nation’s Growth and Economic Resilience Patents Act of 2019” or the “STRONGER Patents Act of 2019”.

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(b) Table of Contents.—The table of contents for this Act is as follows:

Sec. 1. Short title; table of contents.

TITLE I—STRONGER 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. Restoration of patents as property rights.
Sec. 107. Elimination of USPTO fee diversion.
Sec. 108. Institutions of higher education.
Sec. 109. 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.

TITLE I—STRONGER PATENTS ACT

SEC. 101. FINDINGS.

Congress finds that—

(1) the patent property rights enshrined in the Constitution of the United States provide the foundation for the exceptional innovation environment in the United States;

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

(3) patent protection has led to patient cures, positive changes to the standard of living for all peo-
ple in the United States, and improvements to the agricultural, telecommunications, and electronics industries, among others;

(4) the United States patent system is an essential part of the country’s economic success;

(5) strong patent protection improves the chances of success for small companies and increases their chances of securing financing from investors;

(6) intellectual property-intensive industries in the United States generate tens of millions of jobs for individuals in the United States;

(7) intellectual property-intensive industries in the United States account for more than one-third of the country’s gross domestic product;

(8) in the highly competitive global economy, the United States needs to uphold strong patent protections to maintain its position as the world’s premier innovative country;

(9) Congress last enacted comprehensive reforms of the patent system in 2011;

(10) unintended consequences of the comprehensive 2011 reform of patent laws are continuing to become evident, including the strategic filing of post-grant review proceedings to depress stock prices and extort settlements, the filing of repetitive
petitions for inter partes and post-grant reviews that have the effect of harassing patent owners, and the unnecessary duplication of work by the district courts of the United States and the Patent Trial and Appeal Board;

(11) the Judicial Conference of the United States has made significant revisions to rules governing pleadings and discovery in the Federal Rules of Civil Procedure, which took effect in December 2015;

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

(13) efforts by Congress to reform the patent system without careful scrutiny create a serious risk of making it more costly and difficult for legitimate innovators to protect their patents from infringement, thereby weakening United States companies and the United States economy.
SEC. 102. INTER PARTES REVIEW.

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

(1) in paragraph (9), by inserting after “substitute claims,” the following: “including the standard for how substitute claims should be construed,”;

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

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

(4) by adding at the end the following new paragraph:

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

“(A) each challenged claim of a patent, or claim proposed in a motion to amend, shall be construed as the claim would be construed under section 282(b) in an action to invalidate a patent, including by construing each such claim in accordance with—

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

“(ii) the prosecution history pertaining to the patent; and
“(B) if a court has previously construed a challenged claim of a patent or a challenged claim term in a civil action to which the patent owner was a party, the Office shall consider that claim construction.”.

(b) Burden of Proof.—Section 316(e) of title 35, United States Code, is amended to read as follows:

“(e) Evidentiary Standards.—

“(1) Presumption of validity.—The presumption of validity under section 282(a) shall apply to a previously issued claim that is challenged during an inter partes review under this chapter.

“(2) Burden of Proof.—In an inter partes review instituted under this chapter, the petitioner shall have the burden of proving a proposition of unpatentability of a previously issued claim by clear and convincing evidence.”.

(c) Standing.—Section 311 of title 35, United States Code, is amended by adding at the end the following new subsection:

“(d) Persons That May Petition.—

“(1) Definition.—In this subsection, the term ‘charged with infringement’ means a real and substantial controversy regarding infringement of a patent exists such that the petitioner would have stand-
ing to bring a declaratory judgment action in Fed-
eral court.

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

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

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

(d) LIMITATION ON REVIEWS.—Section 314(a) of title 35, United States Code, is amended to read as fol-

“(a) THRESHOLD.—

“(1) LIKELIHOOD OF PREVAILING.—Subject to paragraph (2), the Director may not authorize an inter partes review to be instituted unless the Direc-
tor determines that the information presented in the petition filed under section 311 and any response filed under section 313 show that there is a reason-
able likelihood that the petitioner would prevail with respect to at least one of the claims challenged in the petition.
“(2) Previous Institution.—The Director may not authorize an inter partes review to be instituted on a claim challenged in a petition if the Director has previously instituted an inter partes review or post-grant review with respect to that claim.”.

(e) Reviewability of Institution Decisions.—Section 314 of title 35, United States Code, is amended by striking subsection (d) and inserting the following:

“(d) No Appeal.—

“(1) Nonappealable Determinations.—

“(A) Threshold Determination.—A determination by the Director on the reasonable likelihood that the petitioner will prevail under subsection (a)(1) shall be final and nonappealable.

“(B) Denials of Institution.—A determination by the Director not to institute an inter partes review under this section shall be final and nonappealable.

“(2) Appealable Determinations.—Any aspect of a determination by the Director to institute an inter partes review under this section, other than a determination described in paragraph (1)(A), may
be reviewed during an appeal of a final written decision issued under section 318(a).”.

(f) **Eliminating Repetitive Proceedings.**—Section 315(e) of title 35, United States Code, is amended to read as follows:

“(e) Estoppel.—

“(1) Proceedings before the Office.—A person petitioning for an inter partes review of a claim in a patent under this chapter, or the real party in interest or privy of the petitioner, may not petition for a subsequent inter partes review before the Office with respect to that patent on any ground that the petitioner raised or reasonably could have raised in the initial petition, unless, after the filing of the initial petition, the petitioner, or the real party in interest or privy of the petitioner, is charged with infringement of additional claims of the patent.

“(2) Civil actions and other proceedings.—A person petitioning for an inter partes review of a claim in a patent under this chapter that results in an institution decision under section 314, or the real party in interest or privy of the petitioner, may not assert either in a civil action arising in whole or in part under section 1338 of title 28
or in a proceeding before the International Trade Commission under section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) that the claim is invalid based on section 102 or 103 of this title, unless the invalidity argument is based on allegations that the claimed invention was in public use, on sale, or otherwise available to the public before the effective filing date of the claimed invention.”.

(g) Real Party in Interest.—

(1) Clarification of definition.—Section 315 of title 35, United States Code, is amended by adding at the end the following new subsection:

“(f) Petitioner.—For purposes of this chapter, a person that directly or through an affiliate, subsidiary, or proxy makes a financial contribution to the preparation for, or conduct during, an inter partes review on behalf of the petitioner shall be considered a real party in interest of the petitioner.”.

(2) Discovery of real party in interest.—Section 316(a)(5) of title 35, United States Code, is amended to read as follows:

“(5) setting forth standards and procedures for discovery of relevant evidence, including that such discovery shall be limited to—
“(A) the deposition of witnesses submitting affidavits or declarations;

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

“(C) what is otherwise necessary in the interest of justice;”.

(h) Priority of Federal Court Validity Determinations.—

(1) In general.—Section 315 of title 35, United States Code, as amended by subsections (f) and (g), is further amended—

(A) by redesignating subsections (c) through (f) as subsections (d) through (g), respectively; and

(B) by inserting after subsection (b) the following new subsection:

“(c) Federal Court Validity Determinations.—

“(1) Institution barred.—An inter partes review of a patent claim may not be instituted if, in a civil action arising in whole or in part under section 1338 of title 28 or in a proceeding before the International Trade Commission under section 337 of the Tariff Act of 1930 (19 U.S.C. 1337), a court has entered a final judgment—
“(A) that decides the validity of the patent claim with respect to section 102 or 103; and

“(B) from which an appeal under section 1295 of title 28 may be taken, or from which an appeal under section 1295 of title 28 was previously available but is no longer available.

“(2) STAY OF PROCEEDINGS.—

“(A) IN GENERAL.—If, in a civil action arising in whole or in part under section 1338 of title 28 or in a proceeding before the International Trade Commission under section 337 of the Tariff Act of 1930 (19 U.S.C. 1337), a court has entered a final judgment that decides the validity of a patent claim with respect to section 102 or 103 and from which an appeal under section 1295 of title 28 may be taken, the Patent Trial and Appeal Board shall stay any ongoing inter partes review of that patent claim pending a final decision.

“(B) TERMINATION.—If the validity of a patent claim described in subparagraph (A) is finally upheld by a court or the International Trade Commission, as applicable, the Patent Trial and Appeal Board shall terminate the inter partes review.”.
(2) TECHNICAL AND CONFORMING AMENDMENTS.—Chapter 31 of title 35, United States Code, is amended—
(A) in section 315(b), by striking “subsection (c)” and inserting “subsection (d)”;
(B) in section 316(a)—
(i) in paragraph (11), by striking “section 315(c)” and inserting “section 315(d)”;
(ii) in paragraph (12), by striking “section 315(c)” and inserting “section 315(d)”;
(C) in section 317(a), by striking “section 315(e)” and inserting “section 315(f)”.

SEC. 103. POST-GRANT REVIEW.
(a) CLAIM CONSTRUCTION.—Section 326(a) of title 35, United States Code, is amended—
(1) in paragraph (9), by inserting after “substitute claims,” the following: “including the standard for how substitute claims should be construed,”;
(2) in paragraph (11), by striking “; and” and inserting a semicolon;
(3) in paragraph (12), by striking the period at the end and inserting “; and”; and
(4) by adding at the end the following new paragraph:

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

“(A) each challenged claim of a patent shall be construed as the claim would be construed under section 282(b) in an action to invalidate a patent, including by construing each challenged claim of the patent in accordance with—

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

“(ii) the prosecution history pertaining to the patent; and

“(B) if a court has previously construed a challenged claim of a patent or a challenged claim term in a civil action to which the patent owner was a party, the Office shall consider that claim construction.”.

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

“(e) EVIDENTIARY STANDARDS.—
“(1) Presumption of validity.—The presumption of validity under section 282(a) shall apply to a previously issued claim that is challenged during a proceeding under this chapter.

“(2) Burden of proof.—In a post-grant review instituted under this chapter, the petitioner shall have the burden of proving a proposition of unpatentability of a previously issued claim by clear and convincing evidence.”.

(c) Standing.—Section 321 of title 35, United States Code, is amended by adding at the end the following new subsection:

“(d) Persons that may petition.—

“(1) Definition.—In this subsection, the term ‘charged with infringement’ means a real and substantial controversy regarding infringement of a patent exists such that the petitioner would have standing to bring a declaratory judgment action in Federal court.

“(2) Necessary conditions.—A person may not file with the Office a petition to institute a post-grant review of a patent unless the person, or a real party in interest or privy of the person, demonstrates—

“(A) a reasonable possibility of being—
“(i) sued for infringement of the patent; or

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

“(B) a competitive harm related to the validity of the patent.”.

(d) LIMITATION ON REVIEWS.—Section 324(a) of title 35, United States Code, is amended to read as follows:

“(a) THRESHOLD.—

“(1) LIKELIHOOD OF PREVAILING.—Subject to paragraph (2), the Director may not authorize a post-grant review to be instituted unless the Director determines that the information presented in the petition filed under section 321, if such information is not rebutted, would demonstrate that it is more likely than not that at least one of the claims challenged in the petition is unpatentable.

“(2) PREVIOUS INSTITUTION.—The Director may not authorize a post-grant review to be instituted on a claim challenged in a petition if the Director has previously instituted an inter partes review or post-grant review with respect to that claim.”.
(e) **Reviewability of Institution Decisions.**—

Section 324 of title 35, United States Code, is amended by striking subsection (e) and inserting the following:

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“(e) No Appeal.—

“(1) Non-appealable determinations.—

“(A) Threshold determination.—A determination by the Director on the likelihood that the petitioner will prevail under subsection (a)(1) shall be final and nonappealable.

“(B) Exercise of discretion.—A determination by the Director not to institute a post-grant review under this section shall be final and nonappealable.

“(2) Appealable determinations.—Any aspect of a determination by the Director to institute a post-grant review under this section, other than a determination described in paragraph (1)(A), may be reviewed during an appeal of a final written decision issued under section 328(a).”.
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(f) **Eliminating Repetitive Proceedings.**—Section 325(e)(1) of title 35, United States Code, is amended to read as follows:

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“(1) Proceedings before the Office.—A person petitioning for a post-grant review of a claim in a patent under this chapter, or the real party in
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interest or privy of the petitioner, may not petition for a subsequent post-grant review before the Office with respect to that patent on any ground that the petitioner raised or reasonably could have raised in the initial petition, unless, after the filing of the initial petition, the petitioner, or the real party in interest or privy of the petitioner, is charged with infringement of additional claims of the patent.”.

(g) Real Party in Interest.—

(1) Clarification of Definition.—Section 325 of title 35, United States Code, is amended by adding at the end the following new subsection:

“(g) Real Party in Interest.—For purposes of this chapter, a person that directly or through an affiliate, subsidiary, or proxy, makes a financial contribution to the preparation for, or conduct during, a post-grant review on behalf of the petitioner shall be considered a real party in interest of the petitioner.”.

(2) Discovery of Real Party in Interest.—Section 326(a)(5) of title 35, United States Code, is amended to read as follows:

“(5) setting forth standards and procedures for discovery of relevant evidence, including that such discovery shall be limited to—
“(A) the deposition of witnesses submitting affidavits or declarations;

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

“(C) what is otherwise necessary in the interest of justice;”.

(h) PRIORITY OF FEDERAL COURT VALIDITY DETERMINATIONS.—

(1) IN GENERAL.—Section 325 of title 35, United States Code, as amended by subsections (f) and (g), is further amended—

(A) by redesignating subsections (c) through (g) as subsections (d) through (h), respectively; and

(B) by inserting after subsection (b) the following new subsection:

“(c) FEDERAL COURT VALIDITY DETERMINATIONS.—

“(1) INSTITUTION BARRED.—A post-grant review of a patent claim may not be instituted if, in a civil action arising in whole or in part under section 1338 of title 28 or in a proceeding before the International Trade Commission under section 337 of the Tariff Act of 1930 (19 U.S.C. 1337), a court has entered a final judgment—
“(A) that decides the validity of the patent claim with respect to section 102 or 103; and

“(B) from which an appeal under section 1295 of title 28 may be taken, or from which an appeal under section 1295 of title 28 was previously available but is no longer available.

“(2) STAY OF PROCEEDINGS.—

“(A) IN GENERAL.—If, in a civil action arising in whole or in part under section 1338 of title 28 or in a proceeding before the International Trade Commission under section 337 of the Tariff Act of 1930 (19 U.S.C. 1337), a court has entered a final judgment that decides the validity of a patent claim with respect to section 102 or 103 and from which an appeal under section 1295 of title 28 may be taken, the Patent Trial and Appeal Board shall stay any ongoing post-grant review of that patent claim pending a final decision.

“(B) TERMINATION.—If the validity of a patent claim described in subparagraph (A) is finally upheld by a court or the International Trade Commission, as applicable, the Patent Trial and Appeal Board shall terminate the post-grant review.”.
(2) Technical and Conforming Amendments.—Chapter 32 of title 35, United States Code, is amended—

(A) in section 326(a)(11), by striking “section 325(c)” and inserting “section 325(d)”; and

(B) in section 327(a), by striking “section 325(e)” and inserting “section 325(f)”.

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

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

“(c) 3-Member Panels.—

“(1) In general.—Each appeal, derivation proceeding, post-grant review, and inter partes review shall be heard by at least 3 members of the Patent Trial and Appeal Board, who shall be designated by the Director.

“(2) Ineligibility to hear review.—A member of the Patent Trial and Appeal Board who participates in the decision to institute a post-grant review or an inter partes review of a patent shall be ineligible to hear the review.

“(3) Rehearings.—Only the Patent Trial and Appeal Board may grant rehearings.”.
SEC. 105. REEXAMINATION OF PATENTS.

(a) Request for Reexamination.—Section 302 of title 35, United States Code, is amended to read as follows:

“§ 302. Request for reexamination

“Any person at any time may file a request for reexamination by the Office of any claim of a patent on the basis of any prior art cited under the provisions of section 301. The request must be in writing and must be accompanied by payment of a reexamination fee established by the Director pursuant to the provisions of section 41. The request must identify all real parties in interest and certify that reexamination is not barred under section 303(d). The request must set forth the pertinency and manner of applying cited prior art to every claim for which reexamination is requested. Unless the requesting person is the owner of the patent, the Director promptly will send a copy of the request to the owner of record of the patent.”.

(b) Reexamination Barred by Civil Action.—Section 303 of title 35, United States Code, is amended by adding at the end the following new subsection:

“(d) An ex parte reexamination may not be instituted if the request for reexamination is filed more than 1 year after the date on which the requester or a real party in interest or privy of the requester is served with a complaint alleging infringement of the patent.”.
SEC. 106. RESTORATION OF PATENTS AS PROPERTY RIGHTS.

Section 283 of title 35, United States Code, is amended—

(1) by striking “The several courts” and inserting the following:

“(a) IN GENERAL.—The several courts”; and

(2) by adding at the end the following:

“(b) INJUNCTION.—Upon a finding by a court of infringement of a patent not proven invalid or unenforceable, the court shall presume that—

“(1) further infringement of the patent would cause irreparable injury; and

“(2) remedies available at law are inadequate to compensate for that injury.”.

SEC. 107. ELIMINATION OF USPTO FEE DIVERSION.

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

(1) in subsection (a), by striking “All fees” and inserting “FEES FOR SERVICE BY PTO.—All fees”;

(2) in subsection (b)—

(A) by striking “All fees” and inserting “‘INNOVATION PROMOTION FUND.—All fees’”; and

(B) by striking “Patent and Trademark Office Appropriation Account” and inserting
“(3) in subsection (c)—

(A) by striking “(c)(1)” and all that follows through the end of paragraph (1) and inserting the following: “(c) COLLECTION OF FUNDS FOR PTO ACTIVITIES.—

“(1) IN GENERAL.—Fees authorized in this title or any other Act to be charged or established by the Director shall be collected by the Director and shall be available to the Director until expended to carry out the activities of the Patent and Trademark Office.”;

(B) by striking paragraph (2);

(C) by striking “(3)(A) Any” and inserting the following: “(2) USE OF FEES.—

“(A) PATENT FEES.—Any”; and

(D) by striking “(B) Any fees that are collected under section 31 of the Trademark Act of 1946” and inserting the following:

“(B) TRADEMARK FEES.—Any fees that are collected under section 31 of the Trademark Act of 1946 (as defined in subsection (d)) (15 U.S.C. 1113)”;}
(4) by redesignating subsections (d) and (e) as subsections (e) and (f), respectively;

(5) by inserting after subsection (e) the following new subsection:

“(d) REVOLVING FUND.—

“(1) DEFINITIONS.—In this subsection—

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

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

“(2) ESTABLISHMENT.—There is established in the Treasury a revolving fund to be known as the ‘United States Patent and Trademark Office Innovation Promotion Fund’.
“(3) Derivation of Resources.—There shall be deposited into the Fund any fees collected under—

“(A) this title; or

“(B) the Trademark Act of 1946.

“(4) Expenses.—Amounts deposited into the Fund under paragraph (3) shall be available, without fiscal year limitation, to cover—

“(A) all expenses to the extent consistent with the limitation on the use of fees set forth in subsection (c), including all administrative and operating expenses, determined in the discretion of the Director to be ordinary and reasonable, incurred by the Director for the continued operation of all services, programs, activities, and duties of the Office relating to patents and trademarks, as such services, programs, activities, and duties are described under—

“(i) this title; and

“(ii) the Trademark Act of 1946; and

“(B) all expenses incurred pursuant to any obligation, representation, or other commitment of the Office.”;
(6) in subsection (e), as redesignated, by striking “The Director” and inserting “REFUNDS.—The Director”; and

(7) in subsection (f), as redesignated, by striking “The Secretary” and inserting “REPORT.—The Secretary”.

(b) EFFECTIVE DATE; TRANSFER FROM AND TERMINATION OF OBSOLETE FUNDS.—

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

(2) REMAINING BALANCES.—On the effective date described in paragraph (1), there shall be deposited in the United States Patent and Trademark Office Innovation Promotion Fund established under section 42(d)(2) of title 35, United States Code (as added by subsection (a)), any available unobligated balances remaining in the Patent and Trademark Office Appropriation Account, and in the Patent and Trademark Fee Reserve Fund established under section 42(c)(2) of title 35, United States Code, as in effect on the date before the effective date.

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

SEC. 108. INSTITUTIONS OF HIGHER EDUCATION.

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

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

“(1) the applicant’s employer, from which the applicant obtains the majority of the applicant’s income, is an institution of higher education as defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a));

“(2) the applicant has assigned, granted, conveyed, or is under an obligation by contract or law, to assign, grant, or convey, a license or other ownership interest in the particular applications to such an institution of higher education;

“(3) the applicant is such an institution of higher education; or

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

SEC. 109. ASSISTING SMALL BUSINESSES IN THE U.S. PATENT SYSTEM.

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

(b) SMALL BUSINESS ADMINISTRATION REPORT.—Not later than 1 year after the date of the enactment of this Act, the Small Business Administration, using existing resources, shall submit to the Committee on Small Business and Entrepreneurship of the Senate and the Committee on Small Business of the House of Representatives a report analyzing the impact of—

(1) patent ownership by small business concerns; and

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

(c) EXPANSION OF PATENT PILOT PROGRAM IN CERTAIN DISTRICT COURTS.—

(1) IN GENERAL.—Not later than 180 days after the date of the enactment of this Act, the Di-
rector of the Administrative Office of the United States Courts shall designate not fewer than 6 of the district courts of the United States that are participating in the patent cases pilot program established under section 1 of Public Law 111–349 (28 U.S.C. 137 note) for the purpose of expanding that program to address special issues raised in patent infringement suits against individuals or small business concerns.

(2) PROCEDURES FOR SMALL BUSINESSES.—
Not later than 2 years after the date of the enactment of this Act, each district court designated under paragraph (1) shall develop procedures for expediting cases in which an individual or small business concern is accused of patent infringement.

(3) PARTICIPATING JUDGES.—

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

(B) EDUCATION AND TRAINING.—The Federal Judicial Center, using existing re-
sources, shall prepare educational and training materials to assist district court judges described in subparagraph (A) in developing expertise in patent and plant variety protection cases.

(4) FUNDS.—There are authorized to be appropriated such sums as may be necessary to carry out paragraph (3)(A).

(d) FREE ONLINE AVAILABILITY OF PUBLIC SEARCH FACILITY MATERIALS.—Section 41(i) of title 35, United States Code, is amended by adding at the end the following new paragraph:

“(5) FREE ONLINE AVAILABILITY OF PUBLIC SEARCH FACILITY MATERIALS.—The Director shall make available online and at no charge all patent and trademark information that is available at the Public Search Facility of the Office located in Alexandria, Virginia, including, except to the extent that licenses with third-party contractors would make such provision financially unviable—

“(A) search tools and databases;

“(B) informational materials; and

“(C) training classes and materials.”.
TITLE II—TARGETING ROGUE
AND OPAQUE LETTERS

SEC. 201. DEFINITIONS.

In this title:

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

(A) made knowingly false or knowingly misleading statements, representations, or omissions;

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

(C) made statements, representations, or omissions with awareness of the high probability of the statements, representations, or omissions to deceive and the sender intentionally avoided the truth.

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

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

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

(a) IN GENERAL.—It shall be an unfair or deceptive
act or practice within the meaning of section 5(a)(1) of
for a person, in connection with the assertion of a United
States patent, to engage in a pattern or practice of send-
ing written communications that state or represent that
the recipients are or may be infringing, or have or may
have infringed, the patent and bear liability or owe com-
pensation to another, if—

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

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

(B) a civil action asserting a claim of in-
fringement of the patent has been filed against
the recipient;
(C) a civil action asserting a claim of infringement of the patent has been filed against other persons;

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

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

(F) persons other than the recipient purchased a license for the patent asserted in the communications;

(G) persons other than the recipient purchased a license, and the sender does not disclose that such license is unrelated to the alleged infringement or the patent asserted in the communications;

(H) an investigation of the recipient’s alleged infringement occurred; or

(I) the sender or an affiliate of the sender previously filed a civil action asserting a claim of infringement of the patent based on the activity that is the subject of the written communication when the sender knew such activity was held, in a final determination, not to infringe the patent;
(2) the sender of the communications, in bad faith, seeks compensation for—

(A) a patent claim that has been held to be unenforceable due to inequitable conduct, invalid, or otherwise unenforceable against the recipient, in a final determination;

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

(C) activity of the recipient that the sender knew was authorized, with respect to the patent claim or claims that are the subject of the communications, by a person with the right to license the patent; or

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

(A) the identity of the person asserting a right to license the patent to, or enforce the patent against, the recipient, including the identity of any parent entity and the ultimate parent entity of such person, unless such person is a public company and the name of the public company is identified;
(B) an identification of at least one patent issued by the United States Patent and Trademark Office alleged to have been infringed;

(C) an identification, to the extent reasonable under the circumstances, of at least one product, service, or other activity of the recipient that is alleged to infringe the identified patent;

(D) a description, to the extent reasonable under the circumstances, of how the product, service, or other activity of the recipient infringes an identified patent and patent claim; or

(E) a name and contact information for a person the recipient may contact about the assertions or claims relating to the patent contained in the communications.

(b) AFFIRMATIVE DEFENSE.—With respect to subsection (a), there shall be an affirmative defense that statements, representations, or omissions were not made in bad faith (as defined in subparagraphs (B) and (C) of section 201(1)) if the sender can demonstrate that such statements, representations, or omissions were mistakes made in good faith. Evidence that the sender in the usual course of business sends written communications that do not violate the provisions of this title shall be sufficient
to demonstrate good faith. Good faith may also be demonstrated by other evidence.

(c) Rule of Construction.—For purposes of sections 203 and 204, the commission of an act or practice that is declared under this section to be an unfair or deceptive act or practice within the meaning of section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)) shall be considered to be a violation of this section.

SEC. 203. ENFORCEMENT BY FEDERAL TRADE COMMISSION.

(a) Violation of Rule.—A violation of section 202 shall be treated as a violation of a rule defining an unfair or deceptive act or practice prescribed under section 18(a)(1)(B) of the Federal Trade Commission Act (15 U.S.C. 57a(a)(1)(B)).

(b) Powers of Commission.—The Commission shall enforce this title in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of the Federal Trade Commission Act (15 U.S.C. 41 et seq.) were incorporated into and made a part of this title. Any person who violates section 202 shall be subject to the penalties and entitled to the privileges and immunities provided in the Federal Trade Commission Act.
(c) Effect on Other Laws.—Nothing in this title shall be construed in any way to limit or affect the authority of the Commission under any other provision of law.

SEC. 204. PREEMPTION OF STATE LAWS ON PATENT DEMAND LETTERS AND ENFORCEMENT BY STATE ATTORNEYS GENERAL.

(a) Preemption.—

(1) In General.—This title preempts any law, rule, regulation, requirement, standard, or other provision having the force and effect of law of any State, or political subdivision of a State, expressly relating to the transmission or contents of communications relating to the assertion of patent rights.

(2) Effect on Other State Laws.—Except as provided in paragraph (1), this title shall not be construed to preempt or limit any provision of any State law, including any State consumer protection law, any State law relating to acts of fraud or deception, and any State trespass, contract, or tort law.

(b) Enforcement by State Attorneys General.—

(1) In General.—In any case in which the attorney general of a State has reason to believe that an interest of the residents of that State has been adversely affected by any person who violates section
202, the attorney general of the State may bring a
civil action on behalf of such residents of the State
in a district court of the United States of appro-
priate jurisdiction—

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

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

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

(3) INTERVENTION BY THE FTC.—

(A) NOTICE AND INTERVENTION.—The at-
torney general of a State shall provide prior
written notice of any action under paragraph
(1) to the Commission and provide the Commiss-
ion with a copy of the complaint in the action,
except in any case in which such prior notice is
not feasible, in which case the attorney general
shall serve such notice immediately upon insti-
tuting such action. The Commission shall have the right—

(i) to intervene in the action;

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

(iii) to file petitions for appeal.

(B) LIMITATION ON STATE ACTION WHILE FEDERAL ACTION IS PENDING.—If the Commission has instituted a civil action for violation of section 202, no State attorney general may bring an action under this subsection during the pendency of that action against any defendant named in the complaint of the Commission for any violation of such section alleged in the complaint.

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

(A) conduct investigations;

(B) administer oaths or affirmations; or
(C) compel the attendance of witnesses or the production of documentary and other evidence.