Statement of Senator Patrick Leahy (D-Vt.),
Ranking Member, Senate Judiciary Committee,
Hearing on "S. 1137, the "PATENT ACT" – Finding Effective Solutions to Address Abusive Patent Practices"
May 7, 2015

Last week, seven bipartisan members of this Committee came together to introduce legislation to address abusive conduct in our patent system. This Committee now has been working on this issue for almost two years. Senator Lee and I introduced bipartisan legislation in the fall of 2013 that has been included in this package. Last Congress, Senators Cornyn and Grassley, Hatch, Schumer, and Feinstein all had individual bills. After long negotiations, I believe we have crafted a strong and fair compromise that will address abusive conduct while preserving the strength of our patent system.

Legislation is sorely needed on this issue. Small businesses in Vermont and across the country have been threatened with patent suits simply for using equipment they purchased off-the-shelf. Website owners have faced costly litigation for using basic software in e-commerce. Predatory conduct that takes advantage of the complexity of patent law does not serve the important goal for which our patent system was intended, to advance science and the useful arts.

Writing legislation that impacts our patent system requires care and balance. Congress spent years developing what ultimately became the Leahy-Smith America Invents Act of 2011. Throughout our negotiations on this patent abuse bill, I have emphasized the need to work with manufacturers, universities, and other patent holders to ensure we get the right balance. A number of those groups have now written to the Committee to welcome the substantial changes in the Senate bill. The Administration has praised this legislation, and yesterday, The New York Times Editorial Board came out in support of the bill.

It is worth highlighting some of the changes that have been made to the bill to respond to concerns raised by patent holders and others; changes which were personally important to me as we negotiated this legislation. The language in the PATENT Act provides for fee shifting only in cases where the court finds that the losing party was not "objectively reasonable." This is an important change from the approach of "presumptive loser pays" contained in the House's patent reform bill, the Innovation Act. It promotes judicial discretion and ensures the burden is on the party seeking fees to show that fees should be awarded. An additional exception allows the court to refrain from awarding fees if such an award would be unjust – cases that, in my view, would include causing undue financial harm to an individual inventor or a public institution of higher education.

The PATENT Act simplifies the pleading requirements that are contained in the Innovation Act, and ensures that a plaintiff is not required to plead information that is not accessible to them. I am grateful that the other authors of this bill worked with me to ensure that the standard of what a plaintiff is required to plead about infringement of their patent claims tracks Rule 8 of the Federal Rules of Civil Procedure, without creating a higher standard for plaintiffs to plead a plausible claim for relief.

I am also grateful for the significant work that was done to streamline the discovery provisions of the bill, to protect litigants from costly discovery while ensuring that legitimate plaintiffs are not prejudiced by unreasonable limitations on their ability to access information. Under the PATENT Act, discovery is stayed while the court resolves early, pre-answer motions about whether the case has been brought in the correct venue, against the correct defendants, and whether the complaint states a plausible claim for relief. Discovery is permitted if necessary to resolve those motions, to resolve a motion for preliminary relief, or if failure to allow discovery would cause specific prejudice to a party.

Taken together, these provisions will help promote efficiency in patent suits while ensuring that patent holders can fairly protect their rights in court. While the provisions are not perfect, they strike a meaningful balance that I am happy to support given the unusual complexities of patent litigation.

As this legislation proceeds to markup, we should continue to work on reasonable amendments to improve the bill. For example, some have raised concerns about unfair practices that are taking place in the "post-grant review" proceedings at the Patent and Trademark Office. Those proceedings are an important tool to improve patent quality, but if they are being misused, we should address those concerns. We are already working on those ideas, and I expect we will discuss them today.

Abusive practices by bad actors are a discredit to our strong patent system. It is in no one's interest that they continue. We should act on behalf of Main Street and the patent system alike.

I welcome the witnesses to today's hearing. I also want to recognize the many businesses and individuals in Vermont and across the country who have worked with us, and will continue working with us, to enact this bill into law. Main street businesses have shared their stories and worked with us to identify reasonable reforms that can address abuses in the system. Universities like the University of Vermont have worked with us and other patent holders to make sure we get the balance right. We value that input, and the bill is better as a result.

I look forward to this bill's swift consideration by the Committee.

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