



June 2, 2015

The Honorable Chuck Grassley
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Patrick Leahy
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Grassley and Ranking Member Leahy:

On behalf of the member companies of BSA | The Software Alliance¹, I write to express our deep concern regarding proposed changes to the U.S. Patent and Trademark Office's post grant review proceedings. We are especially concerned with any changes to the post grant proceedings created by the America Invents Act (AIA) that will undo the careful balance struck by the 2011 law. Specifically, proposed changes to the Inter Partes Review proceeding ("IPR") and to the Transitional Program for Covered Business Method Patents ("CBM") are problematic.

Our members appreciate your leadership in efforts to advance meaningful legislation to address abuses that too often occur in patent litigation. In particular, we view your introduction of the PATENT Act (S. 1137) as a positive step toward ending this abuse.

We are deeply concerned, however, that some stakeholders are attempting to turn the bill, which reins in abusive litigation, into a bill that undercuts key provisions of the careful and productive compromise embodied in the AIA, and which was the result of broad stakeholder input and concessions from all sides. The AIA created new post-issuance review programs, including the IPR and CBM programs. These programs have been in effect for little more than two years. This is hardly enough time for Congress to determine whether significant changes to the programs are warranted.

In particular, we are deeply troubled by proposals to abandon the "broadest reasonable interpretation" claims construction standard in IPR proceedings in favor of "one of ordinary skill in the art." This is a significant change that would greatly disrupt the IPR system without sufficient justification for the modification. Similarly, applying a "presumption of validity" would change the very nature of the inquiry and require Patent Trial and Appeals Board ("PTAB") judges to resolve any reasonable doubts against the petitioner. Such a presumption has no place in a proceeding in which the expert PTAB judges have already found "a reasonable likelihood that the petitioner would prevail with respect to at least one of the claims in the challenged patent." In addition, some stakeholders have urged that the evidentiary standard for IPR be changed from "preponderance" to "clear and convincing." This would also significantly disrupt the agreement that was reached during the debate over the America Invents Act.

¹ BSA's members include: Adobe, Altium, ANSYS, Apple, 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

Furthermore, we oppose proposals to extend the controversial Transitional Program for Covered Business Method Patents. As the program's name signifies, it was intended by Congress to be temporary and to expire in 2020. The sunset was the cornerstone of a compromise that provided a special avenue to challenge a subset of business method patents on terms more favorable to the challenger than other post-grant reviews. Given the special and unprecedented nature of the program, USPTO was directed by the AIA to study its impact and operation and to report to Congress in 2015. Any move to extend the program now, before that report is made to Congress, and only two years into the program and five years before its expiration, would disrupt the 2011 compromise and cast a shadow over patents for highly innovative software technologies.

We believe Congress should remain focused on fixing the longstanding, well-documented litigation abuse problem that has plagued our nation's patent system for years. We look forward to working with you to achieve this goal without undermining the consensus Congress achieved with the AIA.

Sincerely,

A handwritten signature in black ink that reads "Victoria A. Espinel". The signature is written in a cursive style with a large initial "V" and "E".

Victoria A. Espinel
President and CEO