

## STATEMENT FOR THE RECORD

From Conservatives for Property Rights

U.S. Senate Judiciary Subcommittee on Intellectual Property Hearing

“Innovation in America: How Congress Can Make Our Patent System STRONGER”

Wednesday, September 11, 2019

Chairman Tillis, Ranking Member Coons, and Members of the Subcommittee:

Thank you for convening this hearing to consider legislation to begin to reverse some of the damage to our patent system done by courts, Congress, and the Patent Trial and Appeal Board (PTAB).

Conservatives for Property Rights (CPR) is a coalition that emphasizes the central importance of private property in all its forms — physical, personal, and intellectual. The right to private property ranks among the unalienable rights the Founders referenced in the Declaration of Independence and which is specified in the U.S. Constitution itself — the only right named in the Constitution rather than added later by the Bill of Rights, which Americans hold dear. Thus, secure private property rights should not be construed as a conservative or liberal concern, but as a unifying, fundamental American principle.

This coalition fully supports the STRONGER Patents Act. S. 2082 represents a good first legislative step toward rectifying the increasingly dire situation of a broken system in which U.S. patents are increasingly insecure, increasingly detached from private property rights to one’s inventions and discoveries, and increasingly threaten the ability of inventors to enjoy the fruits of their labor. The current director of the U.S. Patent & Trademark Office (PTO) has been a welcome, level-headed leader. He brings the perspective of a patent legal practitioner who has counseled commercial clients for whom patents are important. Further, CPR supports the rulemaking PTO Director Andrei Iancu initiated that now requires PTAB to apply the *Phillips* claim construction standard.<sup>1</sup> But legislation is needed to rein in PTAB more broadly and more permanently.

We commend Senators Chris Coons and Tom Cotton, in particular, as the bipartisan lead sponsors of the STRONGER Patents Act, for their leadership on this important property rights matter. The consequences of action, inaction, or the wrong action by this subcommittee at issue here today will have long-term impact on whether the U.S. patent system — and the innovation and entrepreneurship that private property-based U.S. patents and invention have sparked — begins the restoration of the ability to rely on secure private property rights to one’s inventions that patents are supposed to protect.

The STRONGER Patents Act would strengthen private property rights in this manner. S. 2082 would curb many of the worst aspects of the inter partes review proceedings at the PTAB and appropriately make a federal court’s decision outweigh that of the PTAB. Postgrant administrative proceedings have given patent infringers, hedge funds, and speculators a

---

<sup>1</sup> See CPR’s statement and comments in support of adoption of the *Phillips* standard at PTAB here: [https://docs.wixstatic.com/ugd/651e0c\\_8aa9b40d9c3a49a5af9ec2239bb483f7.pdf](https://docs.wixstatic.com/ugd/651e0c_8aa9b40d9c3a49a5af9ec2239bb483f7.pdf)

playground to challenge patent validity repeatedly and viciously.<sup>2</sup> Since the America Invents Act's creation of PTAB, this quasijudicial administrative body has armed patent infringers and other parties with multiple weapons to attack patents and strategies to game the system.

Patent owners can face the same patent challenged simultaneously in PTAB and federal court, the inferior administrative body's rulings can cancel those of the superior judiciary, and patent challengers may bring repeated challenges against the same patent, typically as a means of tying up the patent owner in expensive, unending litigation until the patent expires or the challenger wins by patent invalidation. Such abuse deprives inventors of a property right constitutionally declared to be exclusive for a set period of time. The administrative PTAB has arrogated judicial power from Article III courts in patent property rights matters.

The STRONGER Patents Act imposes limits on inter partes challenges, addresses problem areas such as claim construction, burden of proof, standing, appeals rights, ascertaining challengers' real party in interest, requires deference to Article III judicial reviews of patent validity, and provides greater due process to patent owners with respect to the PTAB judges involved at different stages. These measures would help alleviate some of the damage inflicted on our patent system in recent decades, on inventors who face the prospect of lost commercial traction during what is supposed to be their exclusive ownership and use of their invention, and on the erosion of property rights in a patent.

Also, CPR strongly supports the provision that would undo the adverse effect of the U.S. Supreme Court's *eBay v. MercExchange* decision. Its effect has been courts imposing a hard and fast presumption *against* an injunction.<sup>3</sup> STRONGER Patents would appropriately improve the prospects of obtaining injunctive relief against patent infringers.

Once a patent has been found both valid and infringed, following years of litigation at great expense defending one's intellectual property, it is appropriate that the prevailing patent owner be afforded a presumption of permanent injunction. Otherwise, promised rights of patent exclusivity are not exclusive in fact. Such a presumption in favor of injunctive relief is reasonable, correct, just, and the only way of making "exclusive" mean the right to exclude that a patent supposedly secures.

The status quo under *eBay* deprives patent owners from getting patent infringers to the negotiating table and obtaining market-based terms and rates. The continued commercial benefit and ongoing sale or use of the invention tilts the table in favor of the proven infringer. The continued commercial gains the infringer enjoys even after having lost in court effectively depresses the invention's value and deprives the patent owner of the ability to walk away with the proven infringer no longer making and selling the patented invention. Thus, *eBay* replaces the right to exclude with de facto compulsory licensing. STRONGER would rectify this.

In conclusion, Conservatives for Property Rights urges the subcommittee to pass the STRONGER Patents Act. S. 2082 is constructive, pro-property rights legislation.

---

<sup>2</sup> See discussion of private property rights in U.S. patents threatened by PTAB and its one-sided track record, in an amicus curiae brief CPR executive director James Edwards joined in the case of *Oil States Energy Services v. Greene's Energy Group*, available here: [https://docs.wixstatic.com/ugd/651e0c\\_e785439cafd9457fb1af124d785ea7da.pdf](https://docs.wixstatic.com/ugd/651e0c_e785439cafd9457fb1af124d785ea7da.pdf)

<sup>3</sup> See "Injunctions Give Teeth to Property Rights," Human Events, July 1, 2019, here: <https://humanevents.com/2019/07/03/injunctions-give-teeth-to-property-rights/>