

PATENT LICENSING PRINCIPLES AND PRACTICE



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An Information Toolkit for Policy Makers

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Patent Licensing Principles and Practice

AN INFORMATION TOOLKIT FOR POLICY MAKERS

ABOUT THIS TOOLKIT

The Patent Clause of the U.S. Constitution,¹ giving Congress the power to create and enforce the patent system, was enacted specifically to promote innovation of the useful arts and sciences in order to support U.S. economic growth. The patent system grants to all inventors the right to exclude others from making, using, or selling unauthorized patented products. This system promotes innovation by allowing independent inventors, start-ups, and other small businesses (collectively “small inventors”), who might not have the resources to make products, to innovate and license or sell their ideas to others. Without patent rights, small inventors would have little incentive to innovate, and large companies would have much greater incentive to copy than to innovate themselves.²

Recently, much attention has been called to the problem of “patent trolls” – companies or individuals who acquire and exploit patents in bad faith for the sole purpose of extorting money through unmeritorious claims.³ These abusive patent owners have little desire to encourage innovation, and instead undermine the patent system by, for example, obfuscating their identities, providing little or no infringement analyses, threatening litigation instead of good faith efforts at licensing, and/or targeting end-users of products rather than the manufacturer of the alleged infringing product. Recent reform efforts, however, have focused on the business model of enforcing patents and function of patent holders, disproportionately affecting patent owners and inventors who legitimately license rather than practice their inventions. There are without a doubt a handful of abusive patent owners whose bad-faith conduct needs to be addressed. As discussed below, however, caution and judgment is warranted where a few powerful, self-interested advocates⁴ push for shortsighted and draconian solutions that threaten to undermine the principles of innovation underlying the current patent system. These solutions, proposed in the name of eradicating the purportedly ubiquitous “patent troll,” in reality only make it more difficult for small inventors to enforce their patents and thus give greater freedom to large, more powerful corporations to copy and appropriate their ideas without fair

¹ U.S. Const. art. I, § 8, cl. 8.

² In fact, it’s been clearly demonstrated that countries with weak patent rights are far less innovative and have “excess incentive to copy.” See *Appendix A*.

³ “The term “Patent Trolls” has been used to describe *any* patent owner who licenses their invention rather than manufactures it. Because this term is over-inclusive and has fostered baseless bias against all companies who enforce their patents and not produce, we choose to describe the problem of patent abuse through behavior, not business model. Accordingly, “abusive patent owners” refers equally to those companies that make products and companies that do not and enforce their patents in an abusive manner.

⁴ These advocates often use the term “patent troll” to be intentionally inflammatory and as an excuse for blatant disregard of small patent owners’ rights. See *Appendix B*.

compensation. These reforms therefore fail to address the true problem facing the patent system – abusive behaviors perpetrated by both companies that make products and companies that do not.

This toolkit is meant to serve as a guide for policy makers and others, to provide a full, comprehensive picture of the issues surrounding patent enforcement (including licensing and litigation) and reform efforts and to clarify some of the misinformation regarding “Non-Practicing Entities” (NPEs), a reference often used freely and interchangeably, but inaccurately, with “patent troll”. Included is a recommendation for a reform approach that focuses on providing incentives for ethical conduct within patent licensing and litigation rather than punishing or increasing burdens for patent owners across the board. We believe respecting patent rights and incentivizing good patent enforcement behavior is the best way to promote innovation and strengthen economic growth as originally intended by the architects and signatories of Article 1, Section 8, Clause 8. In contrast, punishing only those who do not make products through over-inclusive legislation weakens the patent system, harms innovation, and ultimately puts the U.S. economy in harm’s way. It is our hope that this information is used as a tool to craft reform legislation that truly addresses the underlying issues behind abusive patent practices, thus strengthening the efficacy of innovation and the patent system as a whole.

WHY PATENT REFORM?

Much attention has been given in recent years to the problem of abusive behavior within the patent system; that is, legal entities using dubious patents to attempt to extract nuisance-value settlements against product-making companies, including small “mom and pop” shops. Actors who engage in this behavior drain both the time and resources of legitimate companies and weaken the resilience of the patent system as a whole. Solutions to this problem naturally entail efforts at curtailing abusive practices and eradicating dubious patents and, in fact, thousands of patents have been invalidated since *Alice Corp. v. CLS Bank*, the 2014 U.S. Supreme Court decision strengthening requirements for patentability.⁵

⁵ See Appendices C, D

Characteristics of Abusive Patent Practices

Those who abuse patent rights are defined by their behavior, not their business model. They include all patent holding entities (both practicing and non-practicing) that exhibit the following characteristics:

1. Demand Letters. Rather than enter into good-faith case-by-case negotiations based on legitimate claims, abusive patent owners use extortionist demand letters threatening litigation if payment is not received.

2. No Claim Charts. Abusive patent owners use the threat of litigation to exact payment, disregarding the legitimacy of a claim of infringement and refraining from examining the merits of the claim.

3. No Intent to Litigate. Because they often invest little resources into confirming the merits of their infringement claims, abusive patent owners generally have no intent to carry out the threat of litigation.

4. Litigation Gamesmanship. If an abusive patent owner does enter into litigation, it often uses abusive litigation tactics.

5. Irrational Settlement. Because their goal is to extract monies with the least expense, abusive patent owners will often settle at less than litigation cost.

6. Deceptive Ownership. To limit their liability, abusive patent owners will hide ownership interests and conceal their identities.

Current legislative efforts on the topic of patent reform, however, erroneously place undue burdens on legitimate businesses that do not engage in abusive behavior. Rather than targeting unethical practices, these bills would restrict the ability of certain kinds of patent holders – specifically small entities who do not make product – to enforce their patents based purely on the business model of the patent owner. It is noted that the last proposed Innovation Act exempted some of the more powerful NPEs, namely, research institutions, universities, financial institutions, companies who do not make product but are affiliated with a company that makes product, as well as certain patent aggregators, subjecting only the most vulnerable patent owners – individual inventors, small businesses, and startups – to the discriminatory burdens of the current reform bills.

In essence, previously proposed amendments would create a “second-class” patent holder, depriving good faith NPEs of their right to due process and precluding them from enforcing their presumptively valid patents.

By weakening patent owners' ability to enforce their patents, current legislation gives large, more powerful corporations free reign to copy the designs of small inventors without paying the customary royalty

Not only does this arbitrarily punish legitimate businesses, it also inhibits the fundamental purpose underlying the patent system: promoting and protecting innovation to ensure growth in the U.S. economy. By weakening patent owners' ability to enforce their patents, current legislation gives large, more powerful corporations free reign to copy the innovations of small inventors without paying the customary reasonable royalty, while at the same time viciously asserting their own patents with impunity against their competitors, both large and small. In

effect, this would erode and distort the incentives provided by the patent system, stifle the ability of small companies to innovate and compete, and fundamentally weaken our economy, while barely deterring the real culprits – those who misuse patents and the patent system to extort monies or for the purpose of stifling competition. Such abuses are perpetrated by both entities that make products and entities that do not.

The currently proposed patent reform legislation is ill advised and will inevitably create new problems (*i.e.*, unintended consequences) and more litigation, disproportionately benefiting large corporations at the expense of small companies and inventors. A truly comprehensive solution to this problem, such as proposed in this toolkit, will instead build on legislative, judicial and industry efforts to deter abusive practices across the board, incentivize good behavior, and promote the strength and efficacy of the patent system.

WHAT ARE NON-PRACTICING ENTITIES?

A Non-Practicing Entity is an owner of a patent who does not manufacture the product embodied by such patent.⁶ Our company, Finjan, falls within this category, as do many notable inventors including Thomas Edison and Susan Taylor Converse.⁷ By definition, most patent owners are NPEs, including operating

⁶ U.S. INT'L TRADE COMM'N TRIAL LAWYERS ASS'N, SECTION 337 AND ITS USE BY NON-PRACTICING ENTITIES 1 (2013).

⁷ Susan Taylor Converse was one of the first women to receive a patent, issued August 3, 1875, for her invention - a one-piece flannel Emancipation Suit – that eliminated the need for a suffocating corset -- which became an immediate success. Unable to produce the Suit herself, she licensed her patent to a manufacturer for a 25-cent per piece royalty. A number of women's groups lobbied for Converse to give up the royalty, an effort that she rejected. Linking the 'emancipation' of women from constrictive undergarments to her own freedom to profit from her intellectual property, Converse responded "With all your zeal for women's rights, how could you even suggest that one woman like myself should give of her head and hand labor without fair compensation?" *Women in History, Mothers of Invention – First Women to File for American Patents*, Mary Bellis, <http://inventors.about.com/od/womeninventors/a/Women-In-History.htm>.

Myths about NPEs

1. “All NPEs are patent trolls.”

The majority of NPEs exercise ethical business practices, license in good faith, and are dedicated to the preservation and innovation of the patent industry. These NPEs are strongly opposed to the abusive and iniquitous tactics used by a small subset of patent owners, both non-producing and producing.

2. “Litigation by NPEs is rising dramatically.”

While raw numbers make it look like there has been a sharp increase in the number of litigation in recent years, this number is misleading. First, AIA joinder rules have changed, making it so multiple defendants cannot be joined in the same suit. This has caused a superficially sharp increase in the number of suits reported. Second, the number of patents issued has also risen a substantial amount, coinciding with the increase in litigation. Third, litigation decreased substantially in the wake of the U.S. Supreme Court’s decision in *Alice*, dropping 23% from the second quarter of 2014.

3. “NPEs harm innovation.”

The majority of NPEs are innovators, inventors, researchers, and others who strongly believe in the value of technology and the integrity of intellectual property. NPEs work to support a patent system that functions to promote innovation and reward inventors for the fruits of their labor, investing a substantial amount into research and development.

4. “NPEs harm small businesses.”

In 2014, fewer than 17% of cases filed by NPEs were directed against companies with an annual income of \$200 million or less. Many NPEs have official policies against pursuing litigation with SMEs. The major winners of current patent reform legislation attempts are large corporations who can afford to infringe the patents of small inventors and producers who do not have the resources to litigate.

companies, universities, among others, because they own and assert patents not practiced in their products. Current legislative efforts, however, only distinguish between companies that make any product, whether or not the product has any relationship to the owned patents, and companies that do not manufacture products at all. This means that any patent holding entity could, for example, escape restrictions by making a sham product.

This distinction is based on the misguided belief that NPEs engage in abusive behaviors while product making companies do not. One look at the litigation tactics used in the *Apple v. Samsung* patent wars, however, certainly disproves this assumption. Conversely, most NPEs are not “patent trolls” since they, including Finjan, exercise ethical business practices when it comes to asserting their patent rights, and engage in good faith attempts to make their technologies available to a wide variety of manufacturers through licensing. Indeed, unless compelled, most operating companies tend to seek injunctions and significant monetary damage awards against their competitors rather than license their technology.

NPEs play an important role within the patent system. The core purpose of universities, inventors, venture funds, and research institutions is to innovate and create new technologies that benefit the public. The ability to patent their inventions, and profit from their patents, is what enables universities, for example, to invest in further research and innovation. This core purpose applies to all innovators, not just those who choose to make product. As the inventor of Polaroid, Edwin Land, said in a 1959 speech presented at the Boston Patent Law Association’s annual dinner:

It should be the role of our patent system to bring encouragement, a sense of reward, and a stimulus to prompt publication to men [and women] in applied science. There are a thousand new fields ready to be opened. Only a handful of these will be explored by large corporations, leaving many areas untouched. Without the protection of the patent system, young scientific entrepreneurs cannot be counted on to develop the rest.

The patent system is designed to foster innovation; disallowing the existence of highly efficient entities that specialize in research and development directly contravenes this goal. Unlike abusive patent owners, most NPEs engage in good faith efforts to secure reasonable licenses for their inventions and make their products available to the public.

Critics of the patent industry claim that patents curtail innovation by preventing other manufacturers from using and improving upon previously existing inventions. This is untrue for several reasons. First, a manufacturer that wants to use an invention simply needs to obtain a license on reasonable terms. The majority of NPEs are fully willing to license their patents at reasonable rates and want to

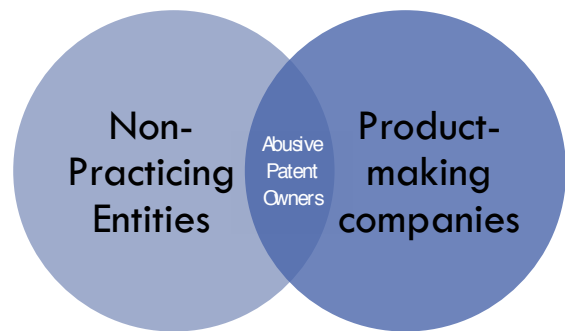
encourage the use of their inventions by manufacturers. In fact, the entities more likely to withhold patent licenses are operating companies, which have an incentive to prevent other companies from competing with their products. As most understand, however, stifling competition can stifle innovation.

Second, companies that do not wish to obtain a license for a particular patent always have the option of “designing around” the patent – bringing the product outside of the scope of the patent claims in order to avoid infringement. By definition, design around products are innovations; rather than copy the model of

By definition, design around products are innovations; rather than copy the model of previous inventions, producers must build the proverbial “better mousetrap”

previous inventions, producers must build the proverbial “better mousetrap” that the patent system was designed to encourage. What is more, the authors here believe that design around efforts and solutions are a quicker path to innovation than patent infringement litigation. Thus, by reducing incentives to copy, the ethical enforcement of patents promotes – not stifles – innovation.

Finally, placing restrictions on all NPEs fails to address the real problem behind abusive patent practices: the practice of abusing the patent system to gain profit by threat of bad-faith litigation. In fact, plenty of entities that make products engage in troll-like behavior, shaking down other companies that cannot afford prolonged litigation, even if the case for infringement is relatively weak. Thus, any measure designed to fight abusive patent practices must take into account the underlying issue of bad-faith behavior rather than the business model of the entity.



CURRENT REFORM LEGISLATION AND PROPOSED SOLUTIONS

While the recently formed super coalition of corporate giants, known as “United for Patent Reform”, espouses the need for aggressive and hurried patent reform, the cogency of this claim is suspect.⁸ Not only are the effects of patent reform under the newly implemented America Invents Act yet unclear, recent court decisions promise to curb patent abuse significantly. The Supreme Court’s decision in *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, for example, made it easier for courts to award attorneys’ fees to sanction parties for filing frivolous lawsuits.⁹ Since these decisions, the number of cases in which attorneys’ fees are awarded has significantly increased. In addition, the Supreme Court tightened standards for patent eligibility in *Nautilus v. Biosig* and *Alice Corp. v. CLS Bank*. Since *Alice*, the number of invalidated patents has skyrocketed, decreasing litigation by a margin of over 23%.¹⁰ The fact of the matter is, ethical or good faith NPE enforcement efforts do not harm the U.S. economy, rather, much evidence indicates that such NPE activities actually promote innovation.¹¹

⁸ See Appendix E. In addition, as discussed in the update, much of the data cited supporting patent reform comes from an outdated and widely discredited survey from 2011-2012 concerning the surge of patent “troll” litigation.

⁹ See Appendices F, G.

¹⁰ See Appendix D.

¹¹ Schwartz, David, and Jay Kesan. “Analyzing the Role of Non-Practicing Entities in the Patent System.” *Cornell Law Review* 99, no. 2 (2014): 425-56.

It is clear that unknowns and unintended results of hasty reform have proven both costly and ineffective to all concerned. Without understanding the effects of these changes, sweeping reform efforts have the potential to undermine the patent system by adding costs, increasing delay, disrupting legitimate patent suits, and making patent enforcement unpredictable, among other unforeseeable consequences. Indeed, increasing the burdens on small patent owners may lead some small inventors to abandon rather than enforce their patents, contributing to the erosion and decay of the innovative principles of the patent system and our national fabric. Instead, we submit that legislators prudently focus on carefully tailored, targeted reforms directed at specific abusive acts and counteract particular bad actors without burdening the majority.

Below is an analysis of the proposed reforms.

Proposed Reform	Analysis
Step One: Notice of Infringement	
<p>Demand Letters. This proposed reform would punish NPEs whose demand letters, claiming patent infringement, do not meet a minimum level of transparency requirements.</p>	<p>Most good faith NPEs already meet the requirements for demand letter transparency, and it makes little sense to distinguish between NPEs and product-making companies for these standards. <i>Rather than punish senders of “bad” demand letters, which would require substantial resources to enforce and encourage the “not get caught” mentality, reform efforts should provide incentives or standards for companies to engage in good behaviors.</i> This could include sending a <u>notice</u> letter and requiring specificity of claims and intent. (See Sample Notice Letter at Exhibit J).</p>
<p>Claim Targets. This proposed reform forbids NPEs from targeting consumers, <i>i.e.</i>, the “end users” of a manufacturer’s products.</p>	<p>That this is even included in patent reform proposals is interesting, considering that there has been little evidence to support the proposition that patent owners are targeting end users at all. This is likely just a scare tactic used by large corporations to promote their agenda (“even you, the consumer, can get sued!”), when in fact they are fully capable of indemnifying their customers against patent suits, and should, in light of their profit margins. If this is a concern, then auto-joinder of manufacturers to suits against the users of their infringing products is a fairer solution. (See Finjan’s Best Practices at Exhibit I).</p>
Step Two: Initiation of Proceedings	
<p>Complaint Revisions. This reform would impose heightened pleading standards that solely target NPEs and require the production of information such as a list of previously filed suits.</p>	<p>The information required by the heightened pleading standards is tangential and arbitrary, and does not actually address the underlying problem, which is lack of transparency from bad-faith patent holders and the intentional obfuscation of patent owners and stakeholders. Instead, this reform increases the litigation burdens of good-faith NPEs, while giving producing companies who engage in bad faith behaviors a free pass. <i>Transparency is key, however, it must be applied against all patent holders, not just non-producing ones.</i> (See Sample Complaint at Exhibit K).</p>

<p>Payment for Adjudication. This reform would require all NPEs to post a “bond” ensuring that they are able to pay, in the event that they lose, the alleged infringers’ attorneys’ fees. This must happen before they can adjudicate a claim, reasonable or not.</p>	<p>Not only does this place an unfair burden on a newly created “second class” patent holder, it focuses on the business model of the patent owner rather than resolving abusive litigation behaviors. Ironically, this reform legislation would prevent an individual inventor with a valid claim who might not have the resources for a bond from protecting his patent rights, while still allowing for abusive patent owners with large resources to litigate. <i>Such a requirement amounts to depriving legitimate patent owners their due process rights to enforce their patents against infringers.</i>¹² (See Finjan’s Analysis of 2014 Innovation Act at Exhibit M).</p>
<p>Step Three: Discovery</p>	
<p>Discovery Reforms. This reform would require NPEs to pay the entire cost of discovery for both parties.</p>	<p>This arbitrary distinction between companies that make products and companies that do not fails to address abusive litigation tactics used by both sides, depriving legitimate patent holders their ability to obtain pertinent discovery and enforce the patent and property rights guaranteed them by the Constitution. The cost of discovery can better be managed by the creation of standardized federal patent discovery rules for all parties. <i>Rather than reinvent the discovery wheel for each patent case, a list of core discovery should be mandated for all parties in the action. A party (plaintiff or defendant) seeking discovery beyond the core information, should pay for the reasonable cost of that discovery.</i></p>
<p>Step Four: Adjudication and Judgment</p>	
<p>Restructuring Proceedings. This reform would move the Markman hearing - the part of a patent infringement case where a judge decides what the patent claims cover - to the beginning of the adjudication process.</p>	<p>Many U.S. District Courts already do this. Further analysis is required, however, on whether upfront placement of the Markman hearing on the court calendar does, in fact, promote judicial efficiency.</p>
<p>Loser Pays All. This reform would enact fee-shifting provisions that obligate NPEs (and not product companies) to pay the prevailing party’s attorneys’ fees.</p>	<p>Most patent owners asserting weak or invalid claims have no intent to litigate at all, and thus this cost-shifting would have no effect on extortionate behavior. The only effect this provision would have would be to arbitrarily impose substantial burdens on a subset of patent holders with reasonable claims. <i>In addition, the fee-shifting provisions seem highly unnecessary as the decision in Octane Fitness gave courts wide discretion to award attorneys’ fees in cases they deem objectively unreasonable.</i>¹³</p>

¹² This would also incentivize accused infringers to hire the most expensive counsel to represent them, forcing the legitimate patent owner to walk away or accept unreasonably low compensation in light of artificially inflated litigation costs. Truly, the sole beneficiary of this requirement will be the trial bar.

¹³ See Appendix F.

Recommendation

The focus on business model of current reform efforts, without regard to changing behaviors, substantially burdens a subset of patent owners who operate in good faith. By making it harder for non-product-making patent holders to enforce their rights, current reform efforts are discriminatory, violate legitimate patent owners' of their due process rights, and stand to substantially harm the growth of innovation and economic strength in the U.S. If independent inventors are unable to enforce their patents, their incentives to innovate also disappear, and large product making companies will copy their designs rather than innovate themselves.

Rather than broadly punishing bad behaviors or inhibiting entities with specific business models, patent system players should instead invest in reform efforts that incentivize good practices and strengthen rather than weaken the patent system.

Unlike reform efforts punishing bad behaviors, which encourage the “don't get caught” mentality rather than greater transparency, incentivizing good behavior fundamentally improves the operation and efficiency of the patent system and the principles of innovation inherent to it. Changing the incentive structure also allows for industry-initiated change that is not only more effective but also costs far less in resources and money than would be required by bad-behavior enforcement mechanisms under current patent reform efforts.

One way to incentivize good behavior would be to create industry-wide standards, akin to the “Better Business Bureau”, under which patent licensing entities may obtain certification as *prima facie* evidence of good faith. Finjan is already leading the way to create a model example of behavioral standards in order to promote ethical practices in patent ownership and enforcement.¹⁴ Specifically, the creation of standards may include such topics as:

- **Notice letters.** Unlike the highly criticized demand letter, creating a standard for notice letters that would encourage senders to identify the patent being infringed and explain the way their claims are being violated. Senders would also be asked to specify the owner of the patents and be forthright about the patent's validity status. This would limit the ability of bad-faith asserters to extort royalties based on vague claims, and identify all relevant stakeholders for sake of transparency. Unlike punishing “bad” demand letter practices, which encourage patent owners to only go so far as to avoid punishment, creating standards for clear and concise notice letters will serve to encourage better practices across the board. (See Sample Notice Letter at Exhibit J.)
- **Claim charts.** The creation of standards for detailed, specific claim charts to accompany the notice letter reduces the guesswork for companies who need to know exactly what product components they need to obtain licenses for or to design around. Providing such claim charts early in the parties' communications should foster meaningful discussions on the merits of each party's patent position.
- **Complaints.** Like claim charts, standardizing complaints to include more information increases judicial efficiency and reduces guesswork about interested parties, claim strength, and liability. (See Sample Complaint at Exhibit K.)

Rather than broadly punishing bad behaviors or inhibiting entities with specific business models, patent system players should instead invest in reform efforts that incentivize good practices and strengthen rather than weaken the patent system

¹⁴ See Appendices H, I.

- **Nondisclosure/Standstill agreements.** Where demand letters tend to convey a threat of litigation, having the parties entered into a nondisclosure/standstill agreement serves to remove the threat of litigation, thereby creating a safe zone for the parties to resolve their dispute on the merits through actual arm's length negotiations. (See Sample Agreement at Exhibit L.)
- **Discovery rules.** Creating or amending standardized Federal Patent Discovery Rules and Disclosure Schedules that govern all patent cases and litigants would reduce the burden of discovery, promote efficiency in litigation, and limit costs by requiring both sides to pay for their respective cost of discovery beyond core documents.
- **Ethical practices.**¹⁵ Industry-supported standards surrounding ethical practices in good-faith negotiations, licensing, and transparency will inform court decisions about willful misconduct on the part of the accused infringer.
- **Defendant behavior.** While seldom discussed in the patent arena, also inhibiting the efficiency and sustainability of the patent system are the defendants who purposefully misappropriate patent designs, refuse to negotiate licenses in good faith and/or completely ignore and lack respect for the rights of patent owners and innovators. Often, accused infringers will ignore patent owners' attempts to discuss the merits of their claims, choosing instead to force the patent owner to sue them in court. Such bad behavior amounts to reckless and deliberate disregard of the patent owner's patent rights. Those who choose to ignore another's patent rights should be held accountable by a potential finding of willful infringement. Reform efforts should hold both plaintiffs and defendants accountable for their bad behavior. Requiring all parties to enter into good faith negotiations will promote the efficient and timely resolution of claims, thus decreasing the overall amount and cost of litigation.

The certification process not only incentivizes behavioral modification to meet ethical licensing standards, but also serves as evidence of a good faith motive, thus improving working relationships between certified licensors and licensees and strengthening the innovative function of patent licensing. Similar to having the Better Business Bureau seal on one's business website and materials, certifications of the licensor can provide a level of assurance to the prospective licensee that such certified patent owner/licensors' practices conform to acceptable patent enforcement practices. In the event that the currently proposed discriminatory patent reform legislation is passed, certification can provide a mechanism for good faith patent licensors to obtain exemption. The certification approach provides a much better solution to encouraging positive behaviors and protecting the rights of patent holders, while at the same time improving the efficiency, viability, and innovative potential of the entire patent system. In any case, regardless of such certification, patent owners who exercise and comply with the above best practices should also be exempt from any of the onerous reform proposals targeted at otherwise abusive patent practices. (See Licensing Executive Society Standards at Exhibit H.)

¹⁵ See Appendix H.

CONCLUSION

Even though there is much support behind yet another round of patent reforms, it is undisputed that the AIA is still in its infancy and has not yet been properly vetted through our patent system as a whole. Notwithstanding, we have already benefitted from judicial and administrative decisions regarding, for example, fee-shifting (e.g., *Octane Fitness*¹⁶) and patentable subject matter (e.g., *Alice*¹⁷), among others. Time, not more hasty legislation, will effectively ferret out more issues related to abusive patent behavior. As the Senator of the Roman Empire, Publius Cornelius Tacitus, is quoted for saying: *“Truth is confirmed by inspection and delay; falsehood by haste and uncertainty.”* (Publius Cornelius Tacitus, Born: 56 AD, Gaul, France; Died: 117 AD).

*“Truth is confirmed by inspection
and delay; falsehood by haste
and uncertainty.” – Publius
Cornelius Tacitus*

To the extent, however, our lawmakers are compelled to push further reforms, we urge them to do so with a full understanding of the issues, and mindful of how an over-inclusive reform against all non-producing patent owners is fundamentally unfair and will result in the deprivation of many legitimate patent owner’s due process right as afforded to all U.S. citizens under the Fifth and Fourteenth Amendments of the Constitution.

There can be no dispute that abusive patent owners and abusive patent practices – by both producing and non-producing players – exist and their behavior must be curbed. In this toolkit we have recommended tried-and-true ways to “level the playing field” so that legitimate, non-producing patent owners’ rights can be exempt from the onerous restrictions now being considered. We believe this is truly a “win-win” proposal: bad behavior will be effectively reduced, good behavior will be productively incentivized, judicial efficiencies will be maximized, and the patent system as a whole will inherently benefit from a more managed trial bar. Significantly, the original intent of the Article 1, Section 8, Clause 8 of promoting innovation and growth of the U.S. economy is sustained for our Nation’s future.

¹⁶ See Appendix F.

¹⁷ See Appendix C.

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