

Statement of

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at the Computer & Communications Industry Association

**“Innovation in America: How Congress can make our patent system
STRONGER”**

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Chairman Tillis, Ranking Member Coons, and Members of the Subcommittee, thank you for the opportunity to discuss these issues with you today. My name is Joshua Landau. I serve as Patent Counsel for the Computer and Communications Industry Association, an international trade association which represents Internet, technology, and communications firms. Since 1972, CCIA has promoted competition in the technology and communications industries. Today, our member companies create hundreds of thousands of jobs in states and districts across the country, with the digital economy as a whole contributing \$1.35 trillion to U.S. GDP and generating a trade surplus of \$172.5 billion each year. CCIA members are recognized as technological leaders in many areas, including semiconductors, telecommunications systems, artificial intelligence hardware and software, cloud computing, and e-commerce.

Our members are also active participants in the patent system, with CCIA members regularly represented in the top 5 annual recipients of U.S. patents and holding an estimated 5% of all active U.S. patents. CCIA members are also frequently involved in patent litigation and America Invents Act (AIA) trials. This extensive participation in the patent system gives our members a broad, balanced view on how patents can best fulfill their Constitutional mandate to “promote the progress of the useful arts.”

My remarks today address three main points:

1. The Supreme Court’s 2006 *eBay* decision and the creation of *inter partes* review (IPR) proceedings by the 2011 Leahy-Smith America Invents Act have made positive changes to patent litigation and the broader innovation ecosystem.
2. The STRONGER Patents Act proposes changes to *inter partes* and post-grant reviews that are unnecessary and would unfairly bar defendants from using the effective, accurate, and less expensive *inter partes* review proceeding.
3. The pre-*eBay* automatic injunction rule that the STRONGER Patents Act seeks to restore contradicts basic principles of remedies, including the principles of equity, while primarily benefiting non-practicing entities.

In addition to the flaws described above, much of the remainder of the proposed bill is also likely to harm the American innovation economy. Changes such as requiring different panels to decide threshold questions of institution and the merits of the case—a requirement not employed anywhere else in the patent system or even the legal system—are also likely to harm the balanced system created by the America Invents Act. And imposition of a standing requirement eliminates the ability of petitioners to use *inter partes* review and post-grant review as a way to attempt to clear the patent landscape before investing in product development. CCIA supports the patent system’s function in pursuing the

Constitutional objective of promoting the progress of the useful arts,¹ but we believe the STRONGER Patents Act will hinder the achievement of that goal.

I. *eBay* and the AIA Positively Affected Patent Litigation and the Innovation Ecosystem

The Supreme Court’s unanimous *eBay v. MercExchange*² decision and the availability of AIA post-grant reviews such as IPR have positively impacted patent litigation and the national innovation environment. The *eBay* decision eliminated the rule that an injunction would be the automatic result in patent infringement cases.³ The 2011 Leahy-Smith America Invents Act created the *inter partes* review proceeding for reviewing a patent after grant.

Since these changes, innovation has thrived. Investment in research and development continues to accelerate. In fact, in many industries—including the Internet, technology, and communications industry that CCIA members operate in—R&D investment began to grow faster after the *eBay* decision in 2006 and sped up again after the introduction of IPR in 2012.⁴ Venture capital investment has increased by nearly 200% since the AIA, with 2018 labeled a “banner year” for venture capital and “record-setting” capital invested in early-stage startups.⁵ At the same time, the number of patent litigation cases featuring non-practicing entities has fallen and the cost of litigation has been reduced. Throughout the American innovation economy, the benefits of *eBay* and IPR are clear.

These changes have also contributed to a significant decline in the cost of patent litigation. While patent litigation remains extremely expensive, with a case typically costing between \$1,000,000 and \$3,000,000 depending on the amount at risk, the cost of litigation has declined by 30 to 50% since the *eBay* decision and the creation of IPR.⁶

¹ U.S. Constitution, Article I, Section 8, Clause 8.

² *eBay v. MercExchange*, 547 U.S. 388 (2006).

³ This is not true for Hatch-Waxman cases, which have a separate non-equitable injunction provision. See 35 U.S.C. § 271(e)(4). In those cases, injunctions generally issue automatically.

⁴ See Jaruzelski *et al.*, strategy+business, “Software-as-a-Catalyst”, Exhibit C (Oct. 15, 2016), available at <https://www.strategy-business.com/feature/Software-as-a-Catalyst?gko=7a1ae>.

⁵ NVCA/Pitchbook Venture Monitor 4Q2018 at 3, 11 (2019), available at https://nvca.org/wp-content/uploads/2019/01/4Q_2018_PitchBook_NVCA_Venture_Monitor.pdf; cf. CCIA Letter to U.S. House of Representatives Small Business Committee re: Innovation Nation Hearing (July 17, 2018), available at <http://www.ccianet.org/wp-content/uploads/2018/08/2018-07-17-HSBC-Letter-Re-USIJ-Testimony-and-Report.pdf> (summarizing evidence regarding VC investment and explaining the significant errors in the USIJ venture capital report).

⁶ See AIPLA 2019 Report of the Economic Survey at 50 (Sep. 10, 2019). Note that these estimated costs are not inflation-adjusted and thus the inflation-adjusted decline is actually higher. Litigation costs appear to have experienced a slight rebound between 2017 and 2019, likely driven by changes that have reduced access to IPR and made litigation lengthier and more expensive.

eBay and the AIA—especially the introduction of *inter partes* review—have also reduced the frequency of litigation.⁷ This reduction has come with minimal impact on operating company litigation, which has held steady over the past 20 years.⁸ Instead, nearly the entire decrease in growth has been due to a decrease in litigation by non-practicing entities.⁹ Between the reduced cost of litigation and the ability of *inter partes* review proceedings to substitute for some portion of lawsuits, a conservative estimate is that *inter partes* review has avoided at least \$460 million per year in deadweight losses—money that can be spent on research and development instead of on lawyers.¹⁰ And this cheaper proceeding is upheld on appeal at a comparable rate to decisions from federal district courts, showing that it is at least as accurate as district court determinations.¹¹

Importantly, the AIA has only reduced the frequency of patent litigation to the levels observed in the time period immediately prior to the AIA’s passage. Reducing the availability and effectiveness of *inter partes* review proceedings is highly likely to result in an increase in litigation cost and frequency, returning the patent litigation landscape to the same situation that necessitated the creation of *inter partes* review in the first place.

Finally, the *eBay* decision returned patent injunctions to the classical equitable principles guiding injunctions in all areas of law, reducing the ability to use the threat of an automatic injunction to extract windfall rewards. There is empirical evidence that the *eBay* decision led directly to increases in corporate R&D spending in the information and communications industry. In one study, evidence based on differential exposure to patent litigation showed that after the *eBay* decision, firms that were more exposed to patent litigation created more patents, created patents that were more likely to be cited by others, and shifted more money

⁷ See Miller *et al.*, *Who’s Suing Us? Decoding Patent Plaintiffs since 2000 with the Stanford NPE Litigation Dataset*, 21 Stan. Tech. L. Rev. 235, 261, Fig. 3 (2018), available at https://law.stanford.edu/wp-content/uploads/2018/09/Miller_LL_20180910.pdf#page=27. Note that Prof. Miller uses a defendant-lawsuit pair metric, which corrects for the spike in raw number of lawsuits that was triggered by the AIA’s change to joinder rules which prevented litigants from suing large numbers of defendants in a single suit. Without this correction, comparisons of pre- and post-AIA patent lawsuit numbers may be misleading.

⁸ *Id.*

⁹ *Id.*

¹⁰ See Joshua Landau, “*Inter Partes* Review: Five Years, Over \$2 Billion Saved”, *Patent Progress* (Sept. 14, 2017), available at <https://www.patentprogress.org/2017/09/14/inter-partes-review-saves-over-2-billion/>.

¹¹ See, e.g., Seastrunk *et al.*, “Federal Circuit PTAB Appeal Statistics—January 15, 2019”, Finnegan AIA Blog (Feb. 12, 2019), available at <https://www.finnegan.com/en/insights/blogs/america-invents-act/federal-circuit-ptab-appeal-statistics-january-15-2019.html>. District court overall affirmance rates are comparable to IPR affirmance rates; however, § 101 determinations are affirmed at a higher rate than other district court determinations, suggesting that IPR may in fact be more accurate than district court validity determinations.

into R&D.¹² A later, broader study found that, overall, *eBay* had only limited impact—positive or negative—on overall American innovative output.¹³ The *eBay* test also favors innovation by productive entities and competitors over innovation by non-competing entities by disfavoring injunctions on patents that are not being used to compete.¹⁴ The *eBay* decision did not significantly reduce the ability of operating companies to secure injunctions against competitors who unfairly use their technology, but primarily reduced the grant rate of injunctions for non-competing entities.¹⁵ This incentivizes invention by entities that actually bring that invention to fruition via a product, rather than entities that file for a patent and wait for someone else to independently invent that same technology, at which time they can benefit from the investment the manufacturer made in creating a product.

The changes proposed in the STRONGER Patents Act would risk eliminating these positive changes to the patent system.

II. The STRONGER Patents Act Threatens the Viability of the Congressionally Created AIA Trial System

The 2011 Leahy-Smith America Invents Act created AIA trials like *inter partes* review (IPR), in which patents are reviewed at some time after they've been granted. As discussed above, IPRs have had a significant and beneficial impact on litigation rates, the cost of litigation, and investment into innovation. In IPR, a panel of judges with expertise in both patent law and relevant areas of technology review whether a patent should have been granted, with both the patent owner and the petitioner permitted to provide evidence and argument. The STRONGER Patents Act proposes a variety of changes to AIA trials, including IPR. The majority of those changes are likely to reduce access to AIA trial proceedings and the effectiveness of those proceedings in achieving their Congressionally-created role of providing a cost-effective and accurate review of the validity of granted patents.

¹² Filippo Mezzanotti, *Roadblock to Innovation: The Role of Patent Litigation in Corporate R&D*, Working Paper 343911, Harvard University OpenScholar (2015), available at <https://www.kellogg.northwestern.edu/faculty/mezzanotti/documents/innovation.pdf>.

¹³ Filippo Mezzanotti & Timothy Simcoe, *Patent Policy and American Innovation After eBay: An Empirical Examination*, 48 Research Policy 1271 (2019), available at <https://www.kellogg.northwestern.edu/faculty/mezzanotti/documents/eBayInnovation.pdf>.

¹⁴ See Chris Seaman, *Permanent Injunctions in Patent Litigation After eBay: An Empirical Study*, 101 Iowa L. Rev. 1949, 90 (2016), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2632834.

¹⁵ See, e.g., Seaman *supra* n. 14; Joshua Landau, “Much Ado About Injunctions”, Patent Progress (Aug. 1, 2019), available at <https://www.patentprogress.org/2019/08/01/much-ado-about-injunctions/>.

A. STRONGER’s Single Institution Rule Incentivizes Patent Owner Gamesmanship and Patent Lawsuits Against Small Businesses

In particular, the STRONGER Patents Act would only permit a single IPR petition to be instituted against a given patent claim.¹⁶ That means that if an *inter partes* review is instituted against a claim, no other review may ever be instituted—even if the petition was filed by a completely different party who has located completely different prior art that clearly invalidates the patent. This incentivizes patent owners to target small and medium enterprises first, in order to trigger a petition from a less well-resourced party, before asserting their patent—now immunized against IPR—against deeper pocketed targets who might have more success in invalidating patents that should not have been issued to begin with.

This provision also raises the specter of collusive petitions, in which a party friendly to a patent owner would file a petition against the patent sufficient to achieve institution, then drop the petition after institution, in order to bar future petitions brought by serious challengers. Awareness that the owner of an improperly issued patent might use such tactics dates back to Thomas Jefferson, who noted that if “you make the first trial against the patentee conclusive against all others ... he will always have a collusive suit brought against himself at once.”¹⁷

Recent experiences confirm that some patent owners would be likely to use tactics such as employing a third party to file “good enough” petitions that would trigger IPR immunity. Currently, a number of patent owners are attempting to argue that well-established reexamination procedures are a Constitutional taking.¹⁸ In another recent case, a patent owner argued that estoppel bars a petitioner from telling jurors in district court that the Patent Trial and Appeal Board (PTAB) had invalidated the asserted patent.¹⁹ And it took a denial of *certiorari* by the Supreme Court to put an end to patent owners selling patents to Native American tribes in order to invoke tribal sovereign immunity to avoid inter partes review of a patent protecting a highly profitable drug.²⁰ A statutory mechanism to trigger a bar on IPRs would be nearly certain to be abused.

B. STRONGER’s One Petition Per Petitioner Per Patent Rule Bars Meritorious Petitions Without Justification

The Act would also create a bar against a petitioner filing a second petition against a given patent.²¹ Barring parallel petitions from a single petitioner would

¹⁶ S. 2082, STRONGER Patents Act of 2019, Sec. 102(d)(a)(2).

¹⁷ Letter from Thomas Jefferson to Hugh Williamson dated 13 November 1791, *U.S. National Archives* (1791), available at <https://founders.archives.gov/documents/Jefferson/01-22-02-0271>.

¹⁸ See *Christy v. U.S.*, Case No. 19-1738 (Fed. Cir. 2019).

¹⁹ See *BTG v. Amneal Corp.*, Case No. 19-1147 (Fed. Cir. 2019) (patent invalidity upheld on other grounds).

²⁰ See *Saint Regis Mohawk Tribe v. Mylan*, 896 F.3d 1322 (Fed. Cir. 2018), *cert. denied*, 139 S. Ct. 1547 (2019).

²¹ S. 2082, STRONGER Patents Act of 2019, Sec. 102(f)(e)(1).

create significant problems for petitioners faced with allegations of infringement of a patent with hundreds of claims²² or extremely long claims.²³ A petitioner must include all of the evidence they wish to rely upon in their petition, which can be difficult given the 14,000 word limit for IPR petitions. For example, U.S. Patent Number 8,144,182 has 86 claims totaling 4,314 words; even writing out the claims a single time would consume 31% of the word limit. U.S. Patent Number 7,237,634 is even worse, containing 306 claims totaling 18,545 words. It would literally be impossible to file a single petition that even included all of the claims of the ‘634 patent, much less one that explained the evidence that shows the claims are invalid.

These changes are neither justified nor necessary. Multiple petitions are almost always filed due to one of a few factors: a large number of claims, overly long claims, multiple defendants independently defending themselves using IPR, or the requirement to file a separate petition in order to join an earlier instituted petition.²⁴ None of these situations impose any undue burden on the patent owner or the PTAB, nor do they create any unfair situation that the patent owner did not themselves create by asserting patents with a multiplicity of claims or asserting against a large number of defendants. However, denying the ability of defendants to file the necessary parallel petitions to address such situations—or the ability to join an existing petition—creates a significant risk of gamesmanship by patent owners against defendants. In one recent case, a patent owner asserted a patent with 114 claims and refused to identify which claims would be asserted until only a short time before the petitioner was required to file their petition.²⁵ Preventing a petitioner from filing more than a single petition would place an impossible choice on such a defendant, forcing them to attempt to identify which claims the patent owner might assert, while incentivizing patent owners to delay identifying the claims to be asserted until after the deadline for filing an IPR had passed. Far from preventing unfairness, this provision would incentivize it.

The provision is also unnecessary. Multiple petitions which do not fall into at least one of the categories described above are extremely rare. Further, the PTAB already has—and is applying—the necessary discretion to address such petitions.²⁶

²² See, e.g., U.S. Pat. No. 7,237,634. The ‘734 patent has 306 claims and was challenged by an average of 8.33 petitions per defendant against whom it was asserted. Cf. Institution Decision, IPR2019-00358, Paper No. 12 at 19 (Aug. 5, 2019) (“filing of multiple petitions challenging the same patent may be appropriate where, as here, Petitioner has reasonable justification for multiple filings due to the multiplicity of claims to be challenged.”).

²³ See, e.g., U.S. Pat. No. 8,144,182, challenged in IPR2014-01457, -01458, and -01459. The ‘182 patent contains 86 claims; one representative claim contains 674 words. IPR petitions are limited to a total of 14,000 words.

²⁴ See CCIA Letter to USPTO Director Iancu re: Serial Petitions (Apr. 29, 2019), available at <http://www.ccianet.org/wp-content/uploads/2019/04/2019-4-29-FINAL-Letter-to-Director-Iancu-Re-Serial-Petitions.pdf>.

²⁵ See *UUSI LLC v. Apple*, Case No. 4:18-cv-04637-JD (N.D. Cal. 2018).

²⁶ See, e.g., *Valve Corp. v. Electronic Scripting Products*, IPR2019-00062 (Apr. 2, 2019) (precedential); *Apple v. Nartron*, IPR2019-00358 (Aug. 5, 2019).

A legislative provision such as that proposed in the STRONGER Patents Act would eliminate the detailed, case-by-case analysis that the PTAB currently conducts. Creation of a bright-line rule would bar numerous meritorious petitions without eliminating any questionable petitions, as the few questionable petitions that currently exist are already being addressed via the PTAB's existing procedures such as the *General Plastic* factors.²⁷

C. STRONGER's Deference Rule Creates Due Process Concerns

Finally, the STRONGER Patents Act appears to make a flawed assumption by treating a determination of validity over one set of prior art as determinative of validity overall. Federal courts do not declare a patent claim to be valid. They determine that, with respect to a particular set of prior art, a patent claim is not invalid.²⁸ The proposed bill would bar the USPTO from determining validity on any grounds based in prior art if a federal court had—even if only once under completely different prior art—examined the validity of the patent. It does so under a provision entitled “Priority of Federal Court Determinations”, but rather than providing priority, it simply bars the PTAB from reviewing a patent even if different prior art is at issue. Such a system would incentivize patent owner gamesmanship and would prevent later defendants from accessing the accurate, efficient, and cost-effective *inter partes* review system. Existing safeguards such as the one-year time bar and the AIA estoppel provisions are sufficient to ensure that a petitioner cannot generally attempt to litigate invalidity in two separate forums.

While deference to a federal court that has reviewed identical prior art might be appropriate, it is impossible to defer to a federal court that reviewed different prior art as there is no reasoned decision to which to defer. Similar legal constructs such as issue preclusion require that the party which is to be precluded has had an opportunity to litigate the issue and that the same issue was before the court. Neither safeguard is present here. A party that did not participate in a previous litigation might be barred from bringing a different issue—different prior art—to the PTAB through no action of their own. Such a provision at a minimum raises questions of due process.

These provisions, as well as others, render it likely that patent litigation defendants would increasingly avoid using or even be unable to use the *inter partes* review proceeding created by the AIA. These provisions also create a serious

²⁷ See *General Plastic Industrial Co., Ltd. v. Canon Kabushiki Kaisha*, IPR2016-01357, Paper 19 (Sept. 6, 2017).

²⁸ Typically, validity determinations are submitted to juries, rather than being decided by judges. It is unclear if this is required by the Constitution. Several scholars, as well as the Supreme Court, have at least suggested it is not. See Mark Lemley, *Why Do Juries Decide If Patents Are Valid?*, 99 Va. L. Rev. 1673 (2013), available at <http://www.virginialawreview.org/volumes/content/why-do-juries-decide-if-patents-are-valid>; cf. *Oil States v. Greene's Energy*, 138 S. Ct. 1365 (2018) (patent revocation may properly be considered without a jury in non-Article III contexts).

likelihood that the STRONGER Patents Act would reverse the positive changes accomplished by the America Invents Act.

III. Reversion to Automatic Injunctions Violates Basic Principles of Remedies and Equity

History has demonstrated that automatic grants of injunctions were problematic, incentivizing patent litigation abuse, disincentivizing innovation, and forcing productive companies to settle marginal lawsuits. Injunctions are a form of equitable relief, designed to provide a remedy when legal remedies such as damages are inadequate. The *eBay* decision overturned the Federal Circuit’s ahistorical rule, incompatible with the principles of equity, that an injunction should presumptively be issued on any finding of infringement. In its place, the Supreme Court’s *eBay* decision returned the test to the ordinary equitable principles of favoring legal remedies, such as damages, unless irreparable harm and inadequacy of legal remedies is proven.²⁹

The STRONGER Patents Act would force judges to ignore traditional equitable principles in favor of a presumption of irreparable harm and inadequate remedy. That presumption would effectively restore the automatic injunction rule, which creates a serious risk of compensating patent owners in excess of the value of their invention. The presumption also incentivizes settling meritless patent claims because of the high financial risk created by the possibility of an injunction. Nothing in other areas of law, or in the general historical law of injunctions, justifies overturning the non-automatic, equitable nature of injunctions. Further, no current policy consideration suggests that *eBay* has had a negative impact on innovative activity or on the ability of competing companies to ensure that their inventions are not used by their competitors.

The original patent statutes did not permit a grant of injunctive relief.³⁰ Injunctive relief was first permitted nearly 30 years after the first Patent Act and was permitted only “according to the course and principles of courts of equity.”³¹ That formulation—that injunctions would issue only in accordance with the principles of equity—remains in the modern patent statute, which states that a court “may grant injunctions in accordance with the principles of equity” as a remedy for infringement.³² Equitable injunctions have also never been an automatic remedy in other areas of law.³³ In other areas of intellectual property,

²⁹ *eBay*, 547 U.S. at 391.

³⁰ See Patent Act of 1790, 1 Stat. 109; Patent Act of 1793, 1 Stat. 318; Patent Act of 1800, 2 Stat. 37.

³¹ 3 Stat. 481 (1819).

³² 35 U.S.C. § 283.

³³ See *Harrisonville v. W.S. Dickey Clay Mfg. Co.*, 289 U.S. 334, 338 (1933) (“an injunction is not a remedy which issues as of course”).

injunctions issue only subject to the traditional equitable test.³⁴ The same is true in real property.³⁵

While injunctions should not be automatic, they are an appropriate remedy in some circumstances. In particular, when damages are insufficient to compensate for the harm that was suffered, an injunction may be appropriate—a situation most commonly found between competitors, where an inability to prevent the competitor from using their technology can lead to loss of market share, reduced customer goodwill, and price erosion.

Those types of injunctions remain essentially unaffected by the *eBay* decision. Injunctions, while no longer an automatic remedy, remain generally available against infringing competitors.³⁶ In fact, comparing pre- and post-*eBay* injunction grant rates for contested decisions, the grant rate only declined from 89.1% to 85.2%.³⁷ Examining predictive factors for when an injunction is granted, one study found that the single most predictive factor—and one of only two statistically significant independent variables—is whether the infringer is a competitor of the patent owner.³⁸ Competitors are granted injunctions at a significantly higher rate than non-competing companies.³⁹ There is no need to change the law in order to enable injunctions in these circumstances. The few instances in which competitor injunctions are not granted are generally cases where only a small component of a complex product was found to infringe or cases where an injunction is denied due to public health considerations. Further, empirical evidence suggests that, at least in the Internet, communication, and technology industries, the return to the historical equitable injunction test has allowed companies to shift investment away from legal costs and defensive patenting towards more advanced and more economically productive and socially desirable research and development.⁴⁰

A return to the automatic injunction rule would primarily benefit non-practicing entities and entities with patents on minor features incorporated into complex products. The *in terrorem* threat of injunctions, based on the risk the entire product will be enjoined, allows patent owners to extract a reward far in

³⁴ See, e.g., *Campbell v. Acuff-Rose*, 510 U.S. 569, 578 n. 10 (1994) (the “goals of copyright law ... are not always best served by automatically granting injunctive relief”).

³⁵ See, e.g., *Mechanics Foundry v. Ryall*, 62 Cal. 416 (Cal. 1882) (“even repeated trespasses are not of themselves sufficient to justify the interference of a court of equity by injunction ... annoying it may be, but [a case], nevertheless, for which the ordinary remedies of the law are ample.”).

³⁶ See Joshua Landau, “Much Ado About Injunctions”, *Patent Progress* (Aug. 1, 2019) (comparing pre- and post-*eBay* permanent injunction grant rates after merits wins, finding that the grant rates have not dropped significantly).

³⁷ *Id.*

³⁸ Seaman, *supra* n. 14 at 1998.

³⁹ *Id.* at 1990.

⁴⁰ Mezzanotti, *Roadblock*, *supra* n. 10; cf. Feldman & Lemley, *Do Patent Licensing Demands Mean Innovation?*, 101 Iowa L. Rev. 137 (2015) (providing evidence that most non-practicing entity litigation does not appear to result in innovation).

excess of the value of their patents, even in the majority of cases where the defendant infringed innocently and without knowledge of the patent.⁴¹ Particularly in complex, multi-component products such as semiconductors, smartphones, computers, and other high-tech products, a patent will typically only cover a small portion of the product. However, an injunction allows the patent owner to block the entire product from the market. Given the choice between an injunction that takes its product off the market or over-paying the patent owner for a license, a product manufacturer will be willing to significantly over-pay for even a minor feature, allowing the patent owner to confiscate value that the product manufacturer created independently of the patent. Manufacturers do so in order to avoid the complete loss of value that would ensue from an injunction. These windfall settlements, where a patent owner obtains far more than its contribution, in turn incentivize additional patent litigation, particularly from non-practicing entities.

The *eBay* decision also does not incentivize product manufacturers to launch infringing products on the basis that the worst-case outcome is allegedly a reasonable royalty—so-called “efficient infringement”. Given the lack of clarity of many patents, particularly in the Internet, communications, and technology sector, it can be difficult to determine the scope of a patent. This difficulty is exacerbated by the number of patents that are presently active, with more than 3 million active patents in the U.S. alone.⁴² Because of this, even the most diligent pre-launch clearance search will inevitably fail to identify some set of vague, unclear patents that may later be asserted.

When faced with a request to license, companies review the patents and react appropriately based on a good-faith evaluation of infringement and validity. When bad-faith refusals to license or negotiate occur, or when the product manufacturer knowingly and intentionally utilized the patent, there are other avenues available to compensate a patent owner for the additional expenses incurred in obtaining the fair value of their contribution, such as *Octane Fitness*⁴³ motions for attorney’s fees or enhanced damages for willful infringement.⁴⁴ The use of injunctions as a punitive measure, to permit patent owners to obtain royalties higher than the contribution of their technology, is not compatible with the principles of equity and is unnecessary given existing punitive measures.

⁴¹ It is generally considered impossible in the high-tech industry to be aware of the full scope of potentially relevant patents due to the number of patents involved and the relative lack of clarity of the scope of those patents.

⁴² See WIPO, *World Intellectual Property Indicators 2018* at 31 (2018), available at https://www.wipo.int/edocs/pubdocs/en/wipo_pub_941_2018.pdf (estimating 3 million patents in force at end of 2017); USPTO Performance and Accountability Report FY2018 at 178 (over 300,000 additional patents allowed in 2018).

⁴³ *Octane Fitness, LLC v. ICON Health & Fitness, LLC*, 572 U.S. 545 (2014).

⁴⁴ 35 U.S.C. § 284 ¶ 2 (“the court may increase the damages up to three times the amount found or assessed.”).

The difficulty in identifying relevant patents *ex ante* in turn illustrates a key economic point. An innocent infringer (one who was not aware of the patent before creating their product) is also an inventor of the patented technology. If the patent owner had not made their invention, the product manufacturer would still have done so. In such a circumstance, providing a reward to the patent owner in excess of the technical value of the shared invention is particularly inappropriate. If the invention would have occurred regardless of the availability of an injunction—which, definitionally, it will have, as the infringing product exists—then the propriety of an injunction is questionable at best, as Congress’s power to grant a patent right is limited by the mandate to “promote the progress of the useful arts.”⁴⁵

The STRONGER Patents Act would return the U.S. patent system to an automatic injunction rule that risks creating serious incentives for non-practicing entities to ramp up their assertion of weak patents. It also invites situations in which so-called “diagonal NPEs”⁴⁶—practicing entities asserting patents against competitors despite not practicing those patents themselves—can utilize patents to suppress new competitors. Fundamentally, a system in which a patent on a seat warmer can prevent the sale of the car is a system which harms innovative activity, not one which promotes progress.

IV. Conclusion

The STRONGER Patents Act would cause serious harm to the United States patent system and the innovation economy. These changes would likely result in increases in the amount and cost of patent litigation, reduce the ability of meritorious defendants to access the fair and cost-effective *inter partes* review system created by Congress, and incentivize settlements which transfer money away from productive uses.

While a majority of the changes proposed in the STRONGER Patents Act would likely harm the patent system, there are some beneficial proposals. In particular, CCIA supports the proposals to develop pilot programs to help aid individuals and small businesses who are the subject of patent lawsuits and to conduct a study of the negative impacts of patent assertions on small businesses.

CCIA appreciates the opportunity to discuss the proposed legislation and shares the Subcommittee’s goal of ensuring that American innovators continue to lead the world in a variety of technologies. We look forward to working with the Subcommittee towards that end.

⁴⁵ U.S. Const., Article I, Section 8, Clause 8.

⁴⁶ Erik Hovenkamp & Thomas Cotter, *Anticompetitive Patent Injunctions*, 100 Minn. L. Rev. 871 (2016).