



May 15, 2015

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The Honorable John Boehner  
Speaker  
United States House of Representatives  
H-232, The Capitol  
Washington, D.C. 20515

Subject: Support of the *Targeting Rogue and Opaque Letters (TROL) Act of 2015, H.R.2045;*  
and Tabling of the *Innovation Act, H.R. 9*

Dear Speaker Boehner:

The Small Business Technology Council ([SBTC](#)) is the nation's largest organization of small, technology-based companies in diverse fields. Our mission is to protect the Small Business Innovation Research ([SBIR](#))<sup>1</sup> and Small Business Technology Transfer ([STTR](#))<sup>2</sup> programs to help grow the American economy, create jobs, and facilitate the public/private partnerships to develop the next generation of new technologies. SBTC is the largest organization representing SBIR/STTR award winners working across government agencies. SBTC serves as the high-tech arm of the National Small Business Association (NSBA), the nation's first small business organization. With more than 65,000 small-business members in every state and every industry, NSBA is a uniquely member-driven organization, operating on a staunchly nonpartisan basis.

On behalf of the 5,000 firms who participate in the SBIR and STTR programs, I am writing to support the TROL Act and to raise our concerns regarding the detrimental effects that other "Patent Reform" bills such as H.R. 9, the so-called "Innovation Act," will have on small inventing companies. We would like to add small business to the list of universities, venture capitalists, technology startups, small inventor entrepreneurs, former patent commissioners, conservatives, liberals, and Patent Court judges that oppose H.R. 9 and support the TROL Act.

Small Businesses employ 37% of the nation's scientists and engineers.<sup>3</sup> SBIR firms have received about 121,000 patents,<sup>4</sup> and small businesses create **16.5 times** more patents per employee than large firms.<sup>5</sup> And SBIR firms employ 7% of all of America's STEM workers.<sup>6</sup>

While ostensibly aimed at curbing trolls (what is actually a small number and anecdotal instances of abusive patent litigation), the overbroad and sweeping proposed legislation in H.R. 9 will have the effect of suppressing patent rights of *all* patentees, and in particular, will hurt the small high-tech, job-creating SBIR businesses, and thus the economy.<sup>7</sup> Simply stated, patents are far more important to small businesses' survival than to large businesses. And licensed patents are the only way universities can commercialize their research.

On the contrary, the TROL Act has no such negative consequences; hence, we can strongly support it. SBTC, like many others, appreciates your thoughtful approach to this legislation to curb abusive patent litigation practices while maintaining and strengthening important patent-holder rights and protections. We also strongly support the state law pre-emption provision, which would allow the legislation's standards to apply uniformly in all 50 states.



As H.R. 9 moves through the Judiciary Committee, we ask you to speak up for America's small inventing businesses and independent inventors. We suggest that you ask for more small business inventor, angel, VC, and university witnesses to testify; people who actually have patents and those who fund them. This will provide the information to table H.R. 9, and prevent it from being passed in the House.

We have previously expressed this concern on H.R. 9 and on its predecessor in the last Congress, H.R. 3309, as well as on previous bills such as the American Invents Act (AIA). **The AIA has cost the US economy over \$500 Billion.** The latest analysis that shows that the value of patents from 2012 to 2014 decreased by 61%. The average value has dropped from \$422,286 to \$164,232.<sup>8</sup> Our most serious concern is that the expected further drop in patent value, due to the greater barriers and increased cost of enforcing patents resulting from H.R. 9, will drive the price of a patent below the cost of obtaining the patent (in the \$20,000 to \$50,000 range). When one adds the cost of R&D, the expected return from inventing and patenting is likely already negative.

A negative return for inventing will have the expected result of shutting down the flow of new inventions from America's most prolific and valuable inventors: small businesses and independent inventors. This will stifle new births of inventing small businesses, having a dramatic negative effect on the entire American economy, not just small business.

We therefore ask you to use all of your powers as the Speaker of the House to keep H.R. 9 from becoming law. Our analysis of problems that H.R. 9 will befall on small business is shown on the attached two-page summary. We will support efforts to pass the Troll Act, H.R. 2045.

Thank you for your efforts. Should you have any questions, please feel free to contact Alec Orban at [alec@sbtc.org](mailto:alec@sbtc.org) or by phone at (202) 662-9700.

Sincerely,

A handwritten signature in black ink that reads "Jere W. Glover".

Jere W Glover  
Executive Director  
Small Business Technology Council

A handwritten signature in black ink that reads "Robert N. Schmidt".

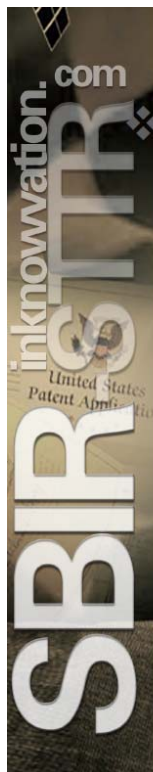
Robert N. Schmidt  
Co-Chair  
Small Business Technology Council

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<sup>1</sup> <https://www.sba.gov/offices/headquarters/oca/resources/6827>

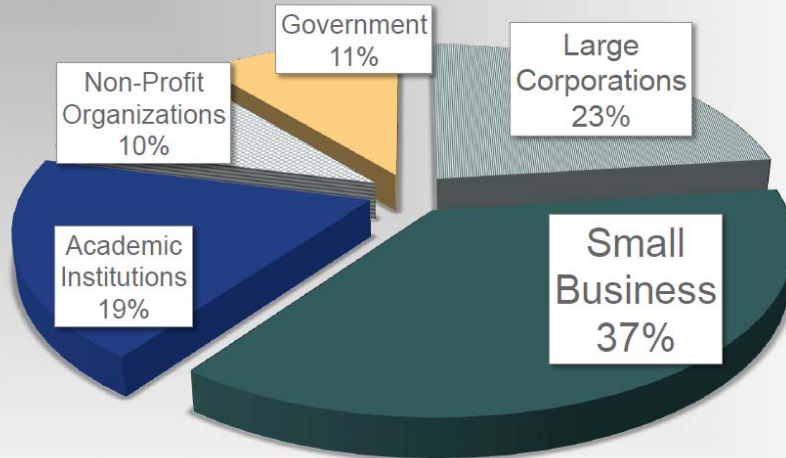
<sup>2</sup> <https://www.sba.gov/offices/headquarters/oca/resources/6828>

<sup>3</sup> Source: Ann Eskesen of Innovation Development Corporation



# Who works for whom?

Employment of Engineers and Scientists in the United States



Source: Adapted from most current National Science Board data

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<sup>4</sup> www.Inknowvation.com

<sup>5</sup> <https://www.sba.gov/sites/default/files/sbfaq.pdf>

<sup>6</sup> Source: Ann Eskesen of Innovation Development Corporation

Analysis of extent to which SBIR-STTR Awardees by State and overall are a factor in US STEM employment

State	Number of SBIR-STTR Awardees	Calculated SBIR-STTR employment	STEM Jobs (2011 data)	% STEM employment being SBIR connected	STEM jobs as percentage of total employment	Percentage of all US STEM jobs
AK	28	488	19,902	2.45%	8.01%	0.29%
AL	281	11,592	79,700	14.54%	5.43%	1.16%
AR	71	388	40,087	0.97%	4.24%	0.58%
AZ	378	6,990	123,994	5.64%	6.06%	1.81%
CA	4,514	110,067	895,461	12.29%	7.06%	13.06%
CO	742	12,200	167,347	7.29%	8.85%	2.44%
CT	334	7,612	88,996	8.55%	6.39%	1.30%
DC	88	1,156	72,143	1.60%	15.26%	1.05%
DE	63	1,601	24,847	6.44%	7.20%	0.36%
FL	707	13,637	294,372	4.63%	4.66%	4.29%
GA	347	5,164	171,747	3.01%	5.38%	2.51%
HI	95	1,316	22,186	5.93%	4.59%	0.32%
IA	122	2,069	57,066	3.63%	4.60%	0.83%
ID	86	1,628	34,725	4.69%	6.89%	0.51%
IL	563	7,279	260,730	2.79%	5.38%	3.80%
IN	246	3,941	106,432	3.70%	4.40%	1.55%
KS	93	979	64,069	1.53%	5.95%	0.93%
KY	130	1,306	60,908	2.14%	4.18%	0.89%
LA	84	1,531	59,848	2.56%	3.89%	0.87%
MA	1,797	53,214	249,900	21.29%	8.84%	3.65%
MD	1,061	22,529	202,100	11.15%	9.98%	2.95%
ME	105	1,671	22,397	7.46%	4.60%	0.33%
MI	567	10,291	231,148	4.45%	6.85%	3.37%
MN	308	8,056	157,681	5.11%	6.93%	2.30%
MO	206	3,941	118,544	3.32%	5.42%	1.73%
MS	58	705	31,658	2.23%	3.74%	0.46%
MT	102	1,125	19,447	5.78%	5.59%	0.28%
NC	515	7,859	184,958	4.25%	5.73%	2.70%
ND	36	1,160	12,893	9.00%	3.74%	0.19%
NE	58	1,115	38,768	2.88%	5.08%	0.57%
NH	169	4,578	35,069	13.05%	3.55%	0.51%
NJ	674	16,762	225,629	7.43%	42.79%	3.29%
NM	312	6,075	45,908	13.23%	1.44%	0.67%
NV	85	1,399	32,548	4.30%	5.40%	0.47%

NY	1,090	20,848	392,267	5.31%	5.46%	5.72%
OH	740	14,332	242,913	5.90%	5.60%	3.54%
OK	108	2,275	57,176	3.98%	4.68%	0.83%
OR	302	6,486	87,500	7.41%	6.38%	1.28%
PA	948	22,723	273,038	8.32%	5.59%	3.98%
RI	97	3,402	20,750	16.40%	5.29%	0.30%
SC	113	1,449	73,464	1.97%	4.97%	1.07%
SD	49	456	13,825	3.30%	4.20%	0.20%
TN	229	4,726	84,300	5.61%	3.76%	1.23%
TX	954	21,282	579,264	3.67%	6.46%	8.45%
UT	301	6,757	66,055	10.23%	6.56%	0.96%
VA	1,064	38,928	302,219	12.88%	10.32%	4.41%
VT	69	1,319	15,991	8.25%	6.47%	0.23%
WA	615	13,336	238,417	5.59%	10.02%	3.48%
WI	311	8,043	120,704	6.66%	5.21%	1.76%
WV	44	696	23,021	3.02%	4.06%	0.34%
WY	49	622	11,620	5.35%	5.48%	0.17%
<b>Totals</b>	<b>22,108</b>	<b>499,104</b>	<b>6,855,732</b>	<b>7.28%</b>	<b>6.20%</b>	<b>100%</b>

Notes:

Tracking by Innovation Development Institute of employment in SBIR-STTR involved firms is by 12 ranges: small for lower ranges (1-4; 5-9 etc) to large for limited number of larger firms (250-499). Firms having exceeded SBIR Size

Note 1 standards (500 employees) are designated 500+ (not small) Except for those Awardees only recently SBIR-STTR graduated and then only for those employment numbers at time of last award, latter not factored into estimated employment numbers used in this analysis

Note 2 Source data: EMSI | Economic Modeling Specialists International.

<sup>7</sup> Patents are critical to the success of SBIR Program participants. The Innovation Act makes patents harder to get and to keep, which will likely retard some companies from commercializing, thus causing them to be removed from the program. This is another way the Innovation Act will decrease company success and employment in the US.

<sup>8</sup> Richard Baker, New England Intellectual Property, LLC, New England Intellectual Property, LLC, Macroeconomic Impact of the America Invents Act on the US Economy.

## IPOfferings Patent Value

Year	Dollar Sales	Patents Sold	Average Price
2012	\$2,949,666,000	6,985	\$422,286
2103	\$1,007,902,750	3,731	\$270,143
2014	\$467,731,502	2,848	\$164,232
<b>2012-2013</b>	<b>-66%</b>	<b>-47%</b>	<b>-36%</b>
<b>2013-2014</b>	<b>-54%</b>	<b>-24%</b>	<b>-39%</b>
<b>2012-2014</b>	<b>-84%</b>	<b>-59%</b>	<b>-61%</b>



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**Small Business Technology Council  
of the National Small Business Association  
1156 15th Street NW, Suite 1100, Washington, DC 20005  
May 14, 2015**

## **STOP HR 9 Patent Reform Threatens Small Business Innovation**

Patents are an indispensable part of American innovation and commerce, so much so that the basic concept of patents and the right of inventors to defend them were included in the US Constitution as an essential power of government. Article I, Section 8, Clause 8 of the Constitution grants Congress the power to: “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;”

Patent protections are particularly important for innovative small businesses, which operate on much smaller margins, and often rely much more heavily on their intellectual property for revenue than large firms. According to the SBA: “Of high patenting firms (15 or more in a four-year period), small businesses produced 16 times more patents per employee than large patenting firms. Research also shows that increasing the number of employees correlates with increased innovation while increasing sales does not.”<sup>8</sup>

The Small Business Technology Council (SBTC) believes that HR 9 and another “patent reform” bill in the Senate (S. 1137) will cloud patent titles, making them weaker. For small business, patents will become mostly unenforceable due to the proposed much higher upfront cost of litigation, thus making small business patents significantly less valuable. This effect will be even worse than **the America Invents Act (AIA) which reduced the value of patents by about 61%**<sup>8</sup>. Passage of this bill may lead to a negative value for patents for small businesses. That would retard or end small business inventing in America.

Loss of patent value constricts new company formation, chilling new investments, and choking job formation. Purporting to attack predatory trolls, the bills instead attack all small companies with legitimate patent suits to protect the interests of large infringers at the expense of new business job creation. All these changes to the patent system have the collective effect of raising the cost of business for small firms, particularly those in innovative, high-tech areas. Furthermore, these bills do not specifically define or address “trolls” or “non-practicing entities,” but instead lump all patent holders together.

The America Invents Act requires a study be conducted by the SBA on the impacts of the new law on small business. So far, more than three years after it was due, that study has not been produced. It is important that a new round of patent reform legislation is not rushed through before careful consideration of the effects the changes AIA has already made to the patent system. To do otherwise could compound any burden felt by small businesses due to the proposed changes.

There are many changes proposed by the new patent reform legislation that we believe will negatively affect small business. The following is a list of just some of these changes:

- **Loser Pays:** American laws do not apply “loser pays” provisions to consumers, corporations, protected groups, or any other class of private litigants. This would induce these groups to tend to decline to enforce their legal rights. Why should inventors be singled out as the only class that should bear this burden? The result will be that small inventors will be deterred from exercising their rights and that invention and resulting jobs will dwindle. More perniciously, the smaller firms will be further deterred from investing to develop such rights, as they will need a \$5-10 million legal war-chest before they try to exercise any patents. The large multi-national companies know that smaller companies cannot afford to pay the larger business’s legal costs if they lose, and so small businesses will not take the chance.



- **Pay to Play** provisions require the inventor plaintiff certify that they can pay the alleged infringers legal fees should they not prevail. This puts enforcing a patent beyond the financial capability of all but the largest and wealthiest of small businesses. Pay to Play would result in most of the over 5,000 active SBIR companies being unable to enforce their patents unless they give up the majority of their equity to a larger company (which would then put them out of the SBIR program).
- **Fee Shifting “Joinder”** makes investors, licensees, and others personally liable for the legal fees of the alleged infringer if the plaintiff does not prevail (possibly on each and every claim). This provision eliminates a basic tenant of corporate law, protecting investors from personal liability, thereby making patents and small inventing businesses a “toxic” asset. This provision is antagonistic to investment in new technologies as inventing companies will have their corporate veil pierced.
- **Elimination of Post Grant Review Estoppel** – Under the AIA, a Post Grant Review prohibits the petitioner from later arguing “any ground that the petitioner raised or reasonably could have raised during that post-grant review.” The proposed legislation deletes “or reasonably could have raised.” This will allow a defendant to bring multiple sequential Post Grant Reviews in an effort to defeat the patent holder by burning the inventor’s financial resources and time with effectively perpetual litigation. It would also now allow the infringing petitioner to assert in a civil action or at the International Trade Commission (ITC) “that the claim is invalid on any ground” even though the petitioner could have “reasonably raised the issue” during that post-grant review. This will add additional expenses to the patent holder.
- **Disclosure of All Plaintiff Interested Parties** requires both investors and licensors to be disclosed. This will discourage commerce in two ways. First, in the early stages of company formation, it will require Angel investors to break one of their major priorities: anonymity. This provision will discourage Angels from investing in the smallest companies, when outside funding is hardest to obtain. Secondly, it will dampen licensing activities. When a licensee needs time to incorporate the licensed invention into their product, they normally do not want to alert their competition as to where they are moving in the market. This will disclose the fact that the licensee is adding a new feature or an entirely new product line.
- **Enhanced Pleadings and Limiting Discovery** – H.R. 9 and other bills (S. 1137) have a provision that dictates enhanced pleadings requiring that the plaintiff produce substantially more information, and a provision limiting discovery prior to claim construction. Patent suits are among the most complicated and detailed, with many variables. The trial judge is the closest to the case and legislating how that judge manages the case will damage the trial judge’s ability to bring a fair solution to both parties. What’s more, both of these changes affect the inventor negatively and the infringer positively, thus stacking the deck even further against the inventor. In an already expensive and complicated process, these two elements require the patent holder to spend more money up front and operate with less information than is needed. These are particularly onerous to small business inventors as they curtail the patent holder’s ability to enforce a patent and reduce the ability of the judge to manage the case effectively.
- **Customer Stays** present a problem for patents that focus on “use” rather than manufacture. The inventor is left with no way to enforce her patent when she can’t sue a manufacturer as the manufacturer is not violating any claims of the patent, and they can’t sue the end users (“Customers”) until she prevails against the manufacturer. This may put the inventors in a Catch-22, where they will have no remedy. It also encourages foreign manufactures to collude to receive a “get out of jail card” and infringe with impunity.

The purpose of the U.S. patent system has always been to encourage and promote innovation. The cumulative effect of the “Patent Reform” bills will in fact retard innovation and cost America jobs. They are contrary to the Founding Fathers’ intent in Article 1, Section 8, Clause 8 of the Constitution, contrary to the policies of over 220 years of patent law, and contrary to stated intention of the President and Congress to stimulate innovation. We urge the SBA and the White House to oppose these potentially damaging changes, and to encourage the House and Senate Judiciary Committees to hold additional hearings with small business inventors to be able to review the concerns expressed in this paper.

<sup>8</sup> Source: Advocacy-funded research, An Analysis of Small Business Patents by Industry and Firm Size, <http://archive.sba.gov/advo/research/rs335tot.pdf>; Innovation in Small Businesses: Drivers of Change and Value Use, [www.sba.gov/sites/default/files/rs342tot\\_0.pdf](http://www.sba.gov/sites/default/files/rs342tot_0.pdf)

<sup>8</sup> Richard Baker, New England Intellectual Property, LLC, New England Intellectual Property, LLC, Macroeconomic Impact of the America Invents Act on the US Economy.