

NSBA Patent Phone Call

September 29, 2015

Final

Welcome

Jere Glover

Jere introduces himself
Welcomes everyone
Who NSBA and SBTC are
Importance of Patents
Discussion of history of patent problems in 1990s (GM, Ford, GE)
Introduces Bob

Patent Background

Bob Schmidt

Constitutional Right (Art. I Section 8, Cl. 8)¹ Only Right in Constitution, all other rights came 3 years later with Bill of Rights
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;
Ups and Downs of Patent Strength²

Legislative Effect on Small Business

Small Businesses **employ 37% of scientists and engineers.**³ SBIR firms have received about 121,000 patents,⁴ and small businesses create **16.5 times** more patents per employee than large firms.⁵ And SBIR firms employ 7% of all of America's STEM workers.⁶ While ostensibly aimed at curbing 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.⁷ 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.

SBIR firms receive a quarter of America's R&D 100 awards (the world's most valuable patents) and create 58% more patents than all universities combined.⁸ The Fortune 500 firms' share in generating key innovations has dropped from over 40% in the 1970s and early 1980s to just 6%. Large firms can and do survive without strong patent rights. Small businesses cannot. Weakening patent rights will threaten the very interests of universities and small businesses that Congress sought to protect in appropriating R&D funds, thereby undermining the taxpayers' important investment in research

commercialization and domestic job creation. **Without strong patents, foreign interests will usurp American R&D and commercialize our efforts overseas.**⁹

Ask Companies to announce themselves (A-E, F-M, N-S, T-Z) (ten seconds each)

Company name, city and state

Participants name, title

Number of SBIRs

Number of Patents and Applications

H.R. 3309

Weakens Rights of patent holders

Passed House, 325-91¹⁰ (Search engine, Vote on H.R. 3309 Patent,

<https://www.govtrack.us/congress/bills/113/hr3309>); you can see, it was introduced on Oct. 23 and passed the House on December 5, 2013.¹¹

Died in Senate, Harry Reid and the Trial Lawyers

Pushed by large IT firms:¹² Google,¹³ Cisco, Microsoft, Yahoo¹⁴,

Always major industries, they don't want to be sued

Major Proponents in House: Goodlatte (VA-R) and Issa (CA-R)

Support of Retailers: Walmart,

The Big Lie, small businesses want this.

Our supporters in House (Rohrabacher, Kaptur, Conyers, Masse, Clawson,)

H.R. 9

It is back again. This time with more power, it received one of the 1st 10 numbers, supported by the Speaker.

Passed the House Judiciary Committee (see Govtrack.gov, search for HR 9)¹⁵ by a vote of 24-8.

Problems with H.R. 9

What H.R. 9 doesn't do:

- It does not fix the "Integrity Loophole." During Post Grant Reviews and Inter-parties Reviews, the third-party requester can commit fraud with no financial penalty due to a recent court decision. So the door is wide open for unscrupulous parties around the world to abuse our system knowing that it will take the patent owner years of effort and hundreds of thousands of dollars to defend their patent in the Patent and Trademark Office.
- It does not correct the \$1.7 Billion dollar "invention tax" which has been levied on inventors by diverting patent office fees to the general government fund. Ending fee

diversion and using fees for sufficient examination is critical to improving the patent system.

What H.R. 9 does do:

H.R. 9 has an insidious effect on small businesses. This proposed legislation will deprive small inventors of opportunities to get the best inventions to market because it will deter investors from making what would constitute much riskier investments. By imposing: Fee Shifting Joinder, Loser Pays, Pay to Play, Covered Business Methods (CBM), Elimination of Post Grant Review Estoppel, Disclosure of All Plaintiff Interested Parties, Enhanced Pleadings and Limiting Discovery, and Customer Stay provisions that are so onerous, only large corporations will be able to commercialize inventions. **The provisions will make small inventing companies “Toxic Assets” to investors.** H.R. 9’s provisions micromanage procedures and adjudication in patent cases. It takes much discretion away from the judiciary in case-management based on their expertise and judgment for the particular case at hand. Only a few of the concerns will be discussed here for brevity. For example some manifestly one-sided provisions are:

- **Enhanced Pleadings:** Section 3(a) is unduly burdensome and raises pleading standards only on patent owners, requiring detailed particularities in alleging infringement, but has no similar requirements that defendants making counterclaims or filing declaratory actions show with particularity why they do not infringe or why the patent is invalid.
- **Loser Pays:** Section 3(b)(1) effectively requires the loser of a patent suit to pay the prevailing party legal fees and costs. This is the most onerous provision of the bill for small business litigants as this significantly raises the risk, where the small company owner risks losing everything. It will have severe chilling effects on small entities’ ability to access the courts to seek redress.
- **Interested Parties: Disclosing investors and piercing the corporate veil:** Section 3(d) provides that if the losing party is unable to pay, the court may make recoverable such awards against a joined “Interested Party” (investor or licensee of patentee) but no such joinder of an “Interested Party” in a non-prevailing insolvent alleged infringer is provided in the section. This provision removes corporate protections for tangential players and imposes mandatory disclosures on licensees, or investors, revealing strategic information to their rivals. This will discourage investment in patenting companies and perversely increase incentives to invest in infringers.
- **Continual Cloud on Patent Title:** Section, 9(a) undoes the hard-fought balance in the AIA by removing the “reasonably could have raised” estoppel that now prevents alleged infringers from having multiple “bites at the apple” and prolonging court proceedings, increasing cost to the patent holder, and making it more difficult for small patent holders to raise money.

The details of these and many more legislative “potholes” were previously described in my five part series in IP WatchDog. (See References^{16,17,18,19,20}) SBTC and the NSBA have also made our strong opposition to the Innovation Act known to Congress and the Administration.^{21,22,23,24,25} Many concerns similar to ours have also been expressed to the Senate Small Business and Entrepreneurship Committee by the SBA Office of Advocacy.²⁶

One of the more disturbing “sales techniques” for H.R. 9 is the use of highly disputed ‘facts’ and flawed studies cited by proponents regarding the \$29 billion direct costs,^{27,28} and the \$80 billion per year social cost.²⁹ These and other flawed “scholarship” have been debunked by 40 economists and law professors, and their letter³⁰ expresses serious concern that Congress will restructure the U.S. patent system based on flawed, unreliable, and unrepresentative studies of patent litigation, and it urges Congress to proceed with caution to ensure balanced, targeted, legislation.

What we would like you to do:

1. Learn more about the patent legislation issue.
 - a. (See SBTC.org, Click on H.R. 9) [learn more by clicking on Resources at the top.]
 - b. www.InnovationAlliance.net and <http://innovationalliance.net/patent-news/>
 - c. www.ipwatchdog.com and search on H.R. 9 (<http://www.ipwatchdog.com/?s=H.R.+9>)
2. Sign onto the letter at <http://sbtc.org/wp-content/uploads/2015/08/HR-9-Sign-on-Letter.pdf> by emailing your company name, city, and state to Matthew S. Shapanka, MShapanka@cov.com, with copies to Holly Fechner, hfechner@cov.com, and Alec Orban, Alec@sbtc.org.
3. Write and call your Congressman and Senators. (See also, www.NSBA.biz, do a search at the upper right “Patent”; then click on Continue Reading on House Vote on Patent Bill Expected Soon; then click on “contact your lawmakers today”. Go to <http://capwiz.com/nsbaonline/issues/alert/?alertid=66094626>)
4. Visit your Congressman and Senators personally when they do visits to your area or see them at their district/state offices or in Washington. Tell them personally how damaging H.R. 9 in the House and S.1137 in the Senate are. Tell them to support the TROL act (H.R. 2045) and the STRONG Patent Act (S. 632) instead.

Joining NSBA and SBTC

Pat Post

Questions and Answers

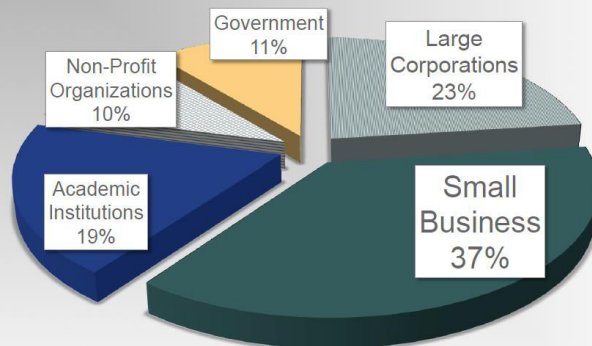
¹ <https://www.law.cornell.edu/constitution/articlei>

² <http://www.ipwatchdog.com/2015/09/15/fixing-the-patent-system-requires-a-return-to-strong-patent-rights/id=61684/>

³ 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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⁴ www.Inknovation.com

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

⁶ 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

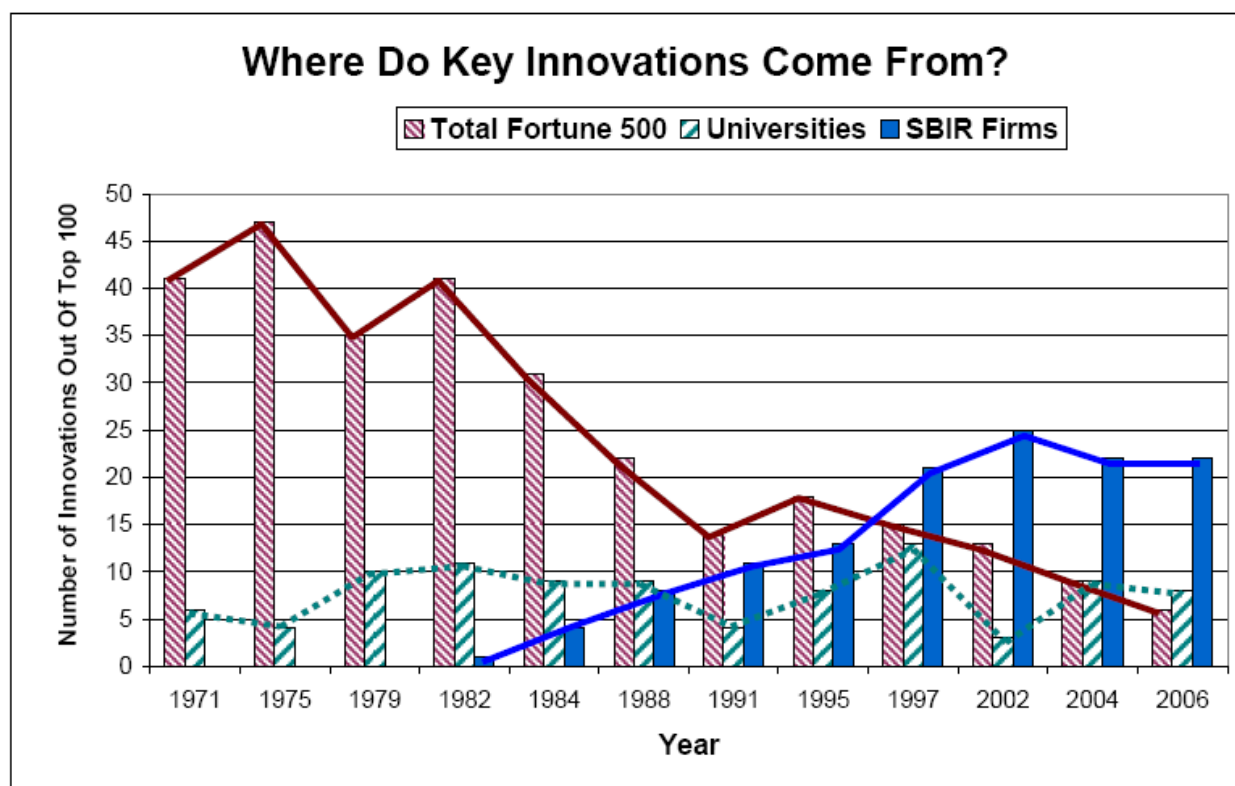
State	Number of SBIR-STTR Awardees	Calculated SBIR-STTR employment	STEM Jobs (2011 data)	% STEM employment being SBIR connected	STEM jobs as percentage of total employment	Percentage of all US STEM jobs
		Notes 1	Notes 2		Notes 3	
AK	28	488	19,902	2.45%	8.01%	0.29%
AL	281	11,592	79,700	14.54%	5.43%	1.16%
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%
Totals	22,108	499,104	6,855,732	7.28%	6.20%	100%

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%
Totals	22,108	499,104	6,855,732	7.28%	6.20%	100%

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.

⁷ 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.

⁸ http://www.itif.org/files/Where_do_innovations_come_from.pdf



SBIR firms receive about three to four times as many R&D 100 awards as Fortune 500 Companies, on a tiny fraction of the budget.

⁹ <https://www.govtrack.us/congress/votes/113-2013/h629>

¹¹ <https://www.govtrack.us/congress/bills/113/hr3309>

¹² <http://www.unitedforpatentreform.com/patent-reform>

¹³ <http://www.wired.com/2015/07/google-facebook-amazon-lobbying/>

¹⁴ Yahoo spent \$2.23 million on lobbying last year — the second highest amount for the company in the last decade. During the first six months of 2011, Yahoo spent \$1.22 million on lobbying, targeting patent reform issues, privacy issues and trade issues, among other topics.

<http://www.opensecrets.org/news/2011/09/koch-brothers-allies-unveiled/>

¹⁵ <https://www.govtrack.us/congress/bills/114/hr9>

¹⁶ Robert N. Schmidt, Heidi Jacobus, Jere Glover, Why ‘Patent Reform’ Harms Innovative Small Businesses, Part I of V, April 25, 2014, IP WatchDog, <http://www.ipwatchdog.com/2014/04/25/why-patent-reform-harms-innovative-small-businesses/id=49260/>.

¹⁷ Robert N. Schmidt, Heidi Jacobus, Jere Glover, [Raising the Cost of Enforcing Patents: ‘Patent Reform’ Prices Small Businesses Out of the Inventing Business](http://www.ipwatchdog.com/2014/04/27/raising-the-cost-of-enforcing-patents/id=49268/), Part II of V, April 27, 2014, IP WatchDog, <http://www.ipwatchdog.com/2014/04/27/raising-the-cost-of-enforcing-patents/id=49268/>

¹⁸ Robert N. Schmidt, Heidi Jacobus, Jere Glover, ‘Patent Reform’ Will Keep Small Business Inventions From Being Commercialized, Part III of V, April 28, 2014, IP WatchDog, <http://www.ipwatchdog.com/2014/04/28/patent-reform-harms-innovative-small-businesses-3/id=49276/>

¹⁹ Robert N. Schmidt, Heidi Jacobus, Jere Glover, ‘Patent Reform’ Tips Power in Favor of Infringers and Against Small Businesses, Part IV of V, April 29, 2014, IP WatchDog, <http://www.ipwatchdog.com/2014/04/29/patent-reform-harms-innovative-small-businesses-4/id=49278/>

²⁰ Robert N. Schmidt, Heidi Jacobus, Jere Glover, [Why ‘Patent Reform’ Harms Innovative Small Businesses – Summary](http://www.ipwatchdog.com/2014/04/30/patent-reform-harms-innovative-small-businesses-5/id=49281/), Part V of V, April 30, 2014, IP WatchDog, <http://www.ipwatchdog.com/2014/04/30/patent-reform-harms-innovative-small-businesses-5/id=49281/>

²¹ <http://sbtc.org/wp-content/uploads/2015/02/SBTC-Request-to-Reject-Anti-Patent-Legislation-Feb-4-2015-1.pdf>

²² <http://sbtc.org/wp-content/uploads/2014/07/SBTC-Letter-to-Speaker-Boehner-Supporting-TROL-ACT-7-22-14.pdf>

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- ²³ http://sbtc.org/wp-content/uploads/2014/05/R.-Schmidt-written_testimony_HSBC.pdf
- ²⁴ <http://sbtc.org/wp-content/uploads/2015/01/SBTCPatentletter2pagecondensedversion.pdf>
- ²⁵ <http://sbtc.org/wp-content/uploads/2014/02/Letter-to-Office-of-Advocacy-regarding-Patent-Reform-2-13-2014-final.pdf>
- ²⁶ http://sbtc.org/wp-content/uploads/2014/04/Advocacy-Letter-to-Senator-Landrieu-3_12_14.pdf
- ²⁷ Adam Mosseff, <http://truthonthemarket.com/2013/03/15/the-shield-act-when-bad-studies-make-bad-laws/>
- ²⁸ Adam Schwartz and Jay Kesan, Analyzing the Role of Non-Practicing Entities in the Patent System, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2117421.
- ²⁹ Ron D. Katznelson, “Questionable Science Will Misguide Patent Policy – The \$83 billion per year fallacy,” (February 1, 2014). Available at <http://ssrn.com/abstract=2502777>.
- ³⁰ The letter can be seen at: <<http://cpip.gmu.edu/wp-content/uploads/2015/03/Economists-Law-Profes-Letter-re-Patent-Reform.pdf>>.