

# INVENTOR RIGHTS ACT

*The Inventor Rights Act restores patent protection for inventors by reversing a generation of laws, regulations, and court decisions that have discouraged innovation by failing to secure to inventors the exclusive rights to their discoveries.*

Individual inventors are vanishing from the U.S. patent system due to staggering costs and virtual unenforceability of the rights to their inventions. Causes include: extreme risk of patent revocation by the Patent Trial and Appeal Board; patent litigation that spans a decade and costs tens of millions of dollars; venue law requiring travel to each and every infringer's headquarters to file suit; court-ordered compulsory licensing; and damage recovery limited to a small fraction of the violator's profits.

These are largely unintended consequences of measures put in place to curtail abuses of the patent system committed by non-inventors. This bill preserves the status quo with respect to non-inventors while restoring reliable enforceable patent rights to true inventors with real inventions.

## SECTION BY SECTION

### **Section 1 & 2** – Title & Findings

### **Section 3** – Inventor Protections

#### **Section 3(a)** – Inventor-Owned Patent

This is defined as a patent in which the inventor of the claimed invention or an entity controlled by the inventor is the patentee and holds all substantial rights in the patent. Essentially this refers to a patent for which the inventor decides who gets to use the invention and has not sold, assigned, or granted that right to anyone else.

*What if unscrupulous inventors obtain unduly broad and vague patents?*

This proposal greatly diminishes, if not eliminates, the potential for abuse by limiting these protections to only the original inventor. Inventors in general don't have the resources, character, strategies, or acumen required to exploit the legal system for unfair gain. They simply want to pursue a dream of bringing their product to market. More importantly, there are vast numbers of genuine inventors that will be empowered and motivated to invent and this is an economically and politically expedient approach to put them back to work for the benefit of society.

*What about inventors who might be hired to act as proxies for abusive litigants?*

This scheme would fail under existing case law. The courts have held that a plaintiff must hold all substantial rights in the patent. If an inventor transfers control to another party the patent would be disqualified for these provisions. Any misrepresentations would be exposed in discovery and subject to sanctions under existing Federal Rules of Civil Procedure.

*Patent rights are property rights that should not vary depending on who owns them.*

In fact the Supreme Court ruled in *Oil States* that patents are not property rights but are public franchise rights. The pharmaceutical industry has enjoyed special patent rights since Hatch-Waxman, such as a 30 month extension of the patent term. Under the status quo only wealthy

corporations and investors can effectively defend and enforce patent rights. This bill restores rights to the one and only entity mandated by the Constitution and the Patent Act – the inventor. The alternate – overturning the *eBay*, *TC Heartland*, and *Oil States* decisions along with repealing the America Invents Act is not considered politically viable.

### **Section 3(b) – Inventor Protections**

#### **Protection from Post Issuance Proceedings**

Prohibits inventor-owned patents from being reviewed for validity by the USPTO without the consent of the inventor.

*What is the basis for this change?*

The procedures and outcomes at the PTAB are heavily biased against inventors. Inventors do not believe they are getting a fair shake at the PTAB. The PTAB has cancelled claims in 84% of the 2,500 patents it has reviewed, a rate that is two to three times higher than in district courts. A host of concerns have been raised about due process and inequities of the proceedings.

If the PTAB is a faster and cheaper alternative to district court proceedings, then inventors can be expected to participate voluntarily. In fact that is how our patent system worked for about 200 years. Inventors could file for a reissue to correct a mistake or a reexamination to address a substantial new question of patentability. This bill realigns the USPTO on their most fundamental charter – to encourage innovation by examining and granting patents for worthy inventions.

*What about inventors that obtain and assert bad patents?*

This is an purely speculative concern, that would have no significant impact on the economy even if it materialized. Inventors generally don't have the character or motivation to obtain and assert invalid patents. It would be very difficult, costly, and risky for an inventor to attempt to game the system. Inventors would first and foremost seek patents on real inventions. If a question arises with respect to an issued patent, the inventor would tend to seek a reexamination or continuation application to improve the patent or develop a new an improved invention. Importantly, existing law provides that patent invalidity is a defense to infringement under §282. Moreover, the 2014 *Halo* decision gave district court judges increased discretion to award attorney fees when a plaintiff asserts a spurious patent.

*What can inventors get in a district court that they cannot get at the PTAB?*

Faster, less costly resolution. Access to discovery for defending obviousness challenges. An independent and tenured judge. A jury to decide factual questions. A presumption of validity. The backing of the United States Government. Live testimony and cross-examination of hostile witnesses. The Federal Rules of Civil Procedure. A clear and convincing burden for proving invalidity. Contingency representation. It is so important for the USPTO to support inventors rather than threaten and harm them.

#### **Choice of Venue**

Expands venue to include a district where an inventor had an established business or conducted research, development, or manufacturing activities.

*What is the basis for this change?*

The 2017 *TC Heartland* drastically restricted venue by permitting inventors to file suit only in the place where the accused infringer is incorporated or has a regular and established place of business and has committed acts of infringement. This ruling has unfairly prevented inventors from filing suit in their home district and increased the cost to enforce patent rights in situations with multiple infringers located in different states.

*Will inventors be able to file suit in the Eastern District of Texas?*

Only if 1) the inventor did research, development, or manufacturing of the invention in the Eastern District of Texas, or 2) the defendant has a regular and established place of business and committed acts of infringement in the Eastern District of Texas. Moreover recent studies have shown that the Eastern District of Texas is not unfair as previously believed, as success rates for plaintiffs are on par with other districts.

### **Injunctions**

Requires courts to presume that infringement of a patent causes irreparable harm to the inventor, removing unreasonable criteria that have deprived inventors of injunctive relief under §283.

*What is the basis for this change?*

The 2006 *eBay* decision and subsequent rulings have effectively eliminated the inventor's "right to exclude others" promised in the Constitution and the Patent Act. Ownership of an invention must mean that the inventor decides who can use their invention and on what terms. Users of a patented invention must be required to obtain the permission of the inventor upon mutually agreed terms.

*Will inventors of minor components be able to stop sales of ubiquitous products like the iPhone?*

While this is theoretically possible, it is highly unlikely. Instead the large corporation will be motivated to work with the inventor to obtain a license, or else switch to a different technology. This approach has worked throughout history prior to the *eBay* decision. Then every once in a while an inventor will develop a truly disruptive technology and build a company that competes with and surpasses today's tech giants. The prospect of real exclusive rights with injunctive relief will incentivize inventors and private investors to drive innovation to new frontiers.

*Will inventors be able to hold market creators hostage for unreasonable settlements?*

No. This bill clarifies that unreasonable delay waiting while someone else commercializes the invention would be evidence of no irreparable harm and weigh against granting of an injunction. On the other hand an infringer that is timely notified of infringement bears responsibility for the consequences of any injunction that might issue.

### **Simplified Damages**

Provides for disgorgement of the profits of the infringer and recovery of attorneys fees in certain cases.

*What is the basis for this change?*

Damages law has become extremely complex, subjective, and hypothetical. In many cases it is difficult to determine with any certainty the “damages” caused to an inventor who never had the chance to commercialize the invention. Attorney and expert fees of millions of dollars can easily exceed the amount of damages they are trying to prove which means those inventors have no means to obtain relief. There must be a more predictable and cost effective approach to assessing damages.

*Will inventors be awarded billions of dollars for products they didn't make?*

A few inventions may indeed enable such huge markets. Infringers that fail to obtain permission to use an invention should not get to keep the profits enabled by that invention. As drafted, the infringer can disqualify profits by apportionment of profits between infringing and non-infringing sources. Of particular note, this provision would harmonize damages with copyright and trademark law which provide for profit disgorgement from the violator. It would restore respect for the patent rights of inventors, and revitalized investment, innovation, and licensing.