



February 19, 2015

Rep. Darrell Issa (R-CA)
Chairman, Subcommittee on Courts, Intellectual Property and the Internet
U.S House of Representatives
2269 Rayburn House Office Building
Washington, DC 20515

Dear Mr. Chairman,

Thank you once again for allowing the National Venture Capital Association's (NVCA) outside counsel to testify before the Subcommittee on Courts, Intellectual Property and the Internet to share NVCA's views on patent litigation reform. We ask that the following comments be submitted into the hearing record from the hearing on Thursday, February 12, 2015 at which Robert Taylor, Esq. testified on behalf of NVCA.

During the hearing, several members of the subcommittee asked Mr. Taylor a series of questions related to NVCA's membership and the positions of individual members on specific patent reform legislative measures. To be clear, Mr. Taylor was present at the hearing to testify as NVCA's outside counsel on behalf of the broader industry, not as a representative of individual NVCA member firms. I believe it's important to clarify that point for the record under the belief that this line of questioning may have led some to mistakenly believe that NVCA's membership is not fully aligned with NVCA's position on patent litigation reform.

As you know, it is not uncommon for large companies to belong to multiple trade associations, especially those that are active across multiple industries. Trade associations typically do not operate by unanimous consent but rather a general consensus approach when determining the appropriate position the organization will present to policymakers on behalf of its membership and broader industry. As the voice of the venture capital community, NVCA advocates for public policies that encourage innovation and reward long-term investment. With a diverse cross-section of nearly 400 member firms, ranging from small traditional venture capital firms to large corporate venture groups that invest across multiple industries and sectors, NVCA balances the views of its entire membership when deciding on a policy position.

Because venture capitalists have differing investment focuses—and as a result differing opinions of the right balance between the protection of plaintiffs and defendants in patent cases—reaching our position as an organization on the issue of patent reform was a long and judicious process. Our guiding principle throughout was based on the fact that venture capital

investing, at its core, is driven by a risk-reward assessment. That is, the greater the perceived risk of an investment, the greater must be the projected return to justify moving forward.

With that in mind, NVCA's overarching position on patent litigation reform is that any changes need to be considered carefully and approached in a measured manner, because almost any change is likely to alter the risk-reward equation in ways that affect individual companies and industries differently. That's been our position since reaching a consensus amongst our members last year and was the position Mr. Taylor accurately presented to the committee when he testified on behalf of NVCA last week.

While we may have some members who disagree in some respects with the positions of the organization, as President and CEO of NVCA, I can assure you that the views expressed by Mr. Taylor are consistent with NVCA's position on the issue of patent litigation reform generally, and more specifically, related to H.R. 9, the Innovation Act.

UC Hastings-NVCA Survey on Patent Assertion

During the hearing, several members of the subcommittee cited a survey conducted by UC Hastings and NVCA on patent assertion, and attempted to use the survey results to draw an inaccurate conclusion that NVCA's position on patent litigation reform is not a reflection of the views of its membership.

To clarify, on October 28, 2013, NVCA and Robin Feldman, Professor of Law and Director of the Institute for Innovation Law at University of California Hastings, released the findings of the survey, "Patent Demands & Startup Companies: The View from the Venture Capital Community." Among the many findings, the survey found that patent assertions impact various industry sectors unevenly, defending against patent assertions is costly, patent demands often impact business operations significantly and most VCs surveyed do not perceive patent assertion as a positive influence in the startup community.

In an October 28, 2013 press release announcing the survey results, then NVCA Senior Vice President of Federal Policy and Political Advocacy Jennifer Dowling said, "This study confirms what we've been hearing anecdotally from our members: the current patent system is working well for some portfolio companies, but not for others. The trend line, however, is not heading in the right direction. As more startups are targeted, more resources are devoted to litigation rather than to innovation. Balancing the need for reform with the need to maintain strong protection for patent-dependent start-ups will be a critical challenge."

As was the case then and remains the case now, the survey findings do not indicate a difference of opinion between NVCA's position on patent litigation reform and the issue of patent assertions. NVCA believes that abuses with patent assertions is a problem in need of attention; however, we also believe that any attempt to reform the system must maintain strong patent enforcement mechanisms for small startups that depend on them for their survival.

The Path Forward on Patent Litigation Reform

As was the case with H.R. 3309, which passed the House during the 113th Congress, NVCA is concerned that H.R. 9, if enacted as written, will have a chilling effect on investment in patent-intensive companies and it will make it far more difficult, risky and expensive for emerging companies to enforce their patents, an essential part of the patent right. Further, H.R. 9 will also raise the cost and risk confronting smaller companies trying to defend against patent litigation brought by their larger competitors.

Any congressional effort to address abusive patent litigation practices that has the effect of making patent enforcement more risky, difficult, and expensive will have a dramatic impact on small businesses and startups. Universities, medical device manufacturers, technology companies, and businesses of all shapes and sizes, from startups to Fortune 500 companies, are critically dependent on patents to protect investments of time, money, and other resources from both competition and imitation here and abroad. Especially for the thousands of venture-backed startup companies across a broad spectrum of industries, preservation of their ability to obtain and enforce patents is fundamental to survival.

It is critical for Congress to take a measured and targeted approach in determining what steps need to be taken to curb abusive patent enforcement and improve the patent system for the innovation ecosystem without undermining the legitimate assertion of the rights of patent owners. We believe consensus can be achieved on a range of issues, including enhancing transparency of patent ownership and enforcement, curtailing unfair or deceptive practices in the indiscriminate sending of patent licensing or settlement demand letters, and proper funding of the Patent Office to improve the overall quality of patents.

As a result of recent Supreme Court decisions and the Leahy-Smith America Invents Act passed in 2011, the patent landscape looks far different today than it did five years ago or even last year. New patent filings in 2014 dropped 18 percent from 2013, as the full impact of judicial decisions and administrative developments have only begun to be felt. We believe it is important for Congress to consider this changing landscape and target reforms that address issues that are not already being addressed, including providing the Federal Trade Commission (FTC) the legal authority to challenge bad faith or deceitful demand letters sent out on a mass scale as well as providing full protection of user fees paid to the U.S. Patent and Trademark Office.

Conclusion

In spite of our concerns with H.R. 9, we strongly support the intent and stated purpose of patent litigation reform. We look forward to working with you and your colleagues to improve H.R. 9 as the process moves forward so that it protects and America's small startups and preserves the broader entrepreneurial ecosystem.

Bobby Franklin



President & CEO