

# THE COALITION FOR 21<sup>ST</sup> CENTURY PATENT REFORM

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## **H.R. 3309 ADVANCES PATENT REFORM, BUT NEEDS IMPROVEMENTS TO PROTECT AMERICAN MANUFACTURERS**

The Coalition for 21<sup>st</sup> Century Patent Reform (21C+) believes that H.R. 3309, as reported, contains several provisions that conceptually should help curb certain abusive patent litigation practices. In particular, it would discourage the bringing of frivolous suits for the purpose of leveraging nuisance settlements by authorizing the award of attorney's fees to prevailing parties, allow for the stay of cases brought against customers and end users instead of manufacturers or suppliers, and make a number of important technical corrections to the America Invents Act to ensure that it works as intended. Unfortunately, some of its provisions are written too broadly and will adversely impact American business far beyond their intended purpose of curbing certain abusive patent litigation practices. Because of these provisions, it will now become far more difficult and expensive for American manufacturers and other American innovators to prevent infringing knock offs from threatening their businesses.

As reported, H.R. 3309 would make it more difficult for manufacturers to bring patent infringement actions against infringing products and, once they are begun, would make them more expensive and time consuming by imposing a mandatory delay of a year or more before the evidence necessary to prove the case can begin to be gathered. In particular, proposed Section 3(d) would bring almost every newly filed patent case to a virtual standstill while the parties wrangle over the semantics of the terms used in the asserted patent claims and the court issues its so-called *Markman* ruling stating what those claims mean. Instead of allowing discovery into the evidence of the infringement to proceed in the meantime, as it does now, proposed Section 3(d) would foreclose any opportunity for speedy resolution of the case, as the court will not be in a position to decide any case-dispositive motions in the absence of the discovery that would be foreclosed. In the meantime, American businesses will suffer, as infringing knock-offs would continue to be sold, market shares and profits would continue to be lost, and American jobs would continue to be threatened, if not lost.

While Chairman Goodlatte's proposed amendment #26 to the reported bill recognizes that there should be an exception to proposed Section 3(d) for *Actions Seeking Relief Based on Competitive Harm*, the amendment would only exempt cases where a preliminary injunction is sought. This is much too narrow to protect American manufacturers. Preliminary injunctions are extremely difficult and expensive to obtain in patent cases, and are often beyond the financial reach of small businesses because a pre-condition to their grant is the posting of a large bond. For these and other reasons, fewer than 1% of all patent infringement actions between competitors involve preliminary injunctions. This leaves manufacturers facing infringing competition to seek expedited resolutions of their claims in the hope of securing permanent injunctions, lost profits, and other more conventional forms of relief.

Fortunately, this can be fixed by simply deleting the words *preliminary injunction* from page 2, line 2 of proposed amendment #26. With this change, American manufacturers, and the jobs they provide, would be protected without sacrificing any protection the stay of discovery provides to those accused of infringement by non-practicing entities. The exception would then be appropriately directed to all competitor cases involving manufacturer patent owners, so there should be no reasoned objection by those who believe stays of discovery pending claim

construction should be automatic in patent troll cases. This exception would not impact those cases in the slightest.

Regarding other proposed amendments, the 21C continues to oppose a bonding requirement such as that proposed in amendment # 25 offered by Congressman Marino. Amendment #25 would only allow discovery beyond certain core documentary evidence if the party seeking discovery posts a bond sufficient to cover the estimated costs of providing such discovery. This proposal would make it difficult, if not impossible, for an independent inventor, start up, small business or university to enforce their rights. Bonds are expensive to obtain, may require the posting or freezing of substantial assets, and incur interest payments while in effect. Requiring such parties to post a bond during the several-year period a patent case lasts would impose a financial burden that will render enforcement of their patent simply unaffordable. Moreover, the proposed amendment's motion-based approach to bonding will lead to costly collateral disputes over the need for, and amount of, any bond at the outset of almost every case. Indeed, it is entirely foreseeable that motions for bonding will be brought for improper tactical purposes, as a way to slow down litigation on the merits of an action and as a way to increase the burdens on litigation opponents.

In addition, while 21C appreciates that H.R. 3309 as reported properly requires the USPTO when construing patent claims in the AIA's new PGR and IPR proceedings to use the same standards applied by the courts, we remain concerned that this requirement is not also applied in CBM transitional program reviews. Accordingly, the special exemption for CMB proceedings should be removed.

As this important reform effort moves through the legislative process, 21C looks forward to continuing its work with Members of the House and the Senate to address these concerns in order to achieve measured, targeted legislative reforms that will curb litigation abuse without imposing unnecessary limitations on the ability of manufacturing firms, universities, and independent inventors to enforce their patents.

The Coalition has approximately 50 members from 18 diverse industry sectors and includes many of the nation's leading manufacturers and researchers. The coalition's steering committee includes 3M, Caterpillar, General Electric, Johnson & Johnson, Eli Lilly and Procter & Gamble. Visit <http://www.patentsmatter.com> for more information.