Statement of the Application Developers Alliance on Patent Reform

U.S. Senate Committee on Small Business & Entrepreneurship on Patent Reform: Protecting Innovation and Entrepreneurship

March 19, 2015

The Application Developers Alliance (the "Alliance") urges the Small Business Committee to champion the cause of small businesses across the United States and support robust patent abuse reform legislation. This Committee should play an important role in helping the Senate swiftly enact comprehensive patent reform legislation that will provide real alternatives to litigation, address the imbalance in litigation burdens, and ensure transparency and specificity in demand letters and judicial complaints. Specifically, strong patent reform legislation should:

- Increase transparency by requiring patent trolls to specify in demand letters which patent and what claims are infringed, specify how the product or technology infringes, and identify all persons or entities that own significant interests in the patent(s), including those that substantially influence licensing and litigation decisions.
- Limit the scope of expensive litigation discovery.
- Expand U.S. Patent and Trademark Office ("PTO") post-grant review process.
- Create a customer stay, protecting individuals and small businesses from being sued for infringements.

The Application Developers Alliance was founded in January 2012 to support app developers as entrepreneurs, innovators and creators. The Alliance membership includes more than 200 companies and 36,000 individual developers nationwide. The overwhelming majority of our corporate membership is made up of small startups that are innovating, growing our economy, and playing by the patent rules. Unfortunately, many of these same companies are also the victims of bad actors who are exploiting loopholes in our broken and outdated patent system to prey on our nation's jobs engines. Small businesses around the country are facing a constant – and growing – threat from non-practicing entities ("NPEs"), or patent trolls, who are not innovators, job creators, or engines of growth, but rather shell companies that seek to extort legitimate businesses to turn a profit. Since our inception, the Alliance has been a vocal proponent of comprehensive patent reform to combat patent trolls. We believe that Congress should level the playing field to force patent trolls to consider carefully whether it is worth their time to threaten small businesses or engage in frivolous litigation.

As the Senate moves forward in addressing patent reform, any legislation must provide for meaningful demand letter reform. Nearly one-third of our nation's startups report receiving a demand letter.

Frivolous demands cost American companies as much as $29 billion annually.[1] This is money that is not spent on innovation or growing our economy. Legislation should meaningfully deter demand letter abuse and reduce the growing financial burden on small businesses. In particular, the Alliance supports requiring demand letters to identify (1) the allegedly infringed patent, (2) the allegedly infringing functionality in the defendant's products or services, and (3) all parties that have financial interests in the patent. Demand letter provisions should also clarify existing Federal Trade Commission authority to act against senders of demand letters that do not meet the specificity requirements or that are otherwise intentionally misleading. Finally, legislation should require that all demand letters be posted on a publicly accessible and searchable website, so that victims of demand letter abuse can identify one another and work together to efficiently fight back.

Strong patent reform legislation should also modify discovery rules, by limiting free discovery to core technology documents that prove whether a patent is valid and infringed. Reducing unlimited free discovery will rob trolls of an important weapon – the crushing cost of one-side discovery – while still providing all materials necessary to prove the necessary predicates of whether a patent is valid and infringed.

The explosion in abusive patent litigation based on poor-quality software and business method patents justifies faster, less expensive post-grant review processes at the U.S. PTO. Reform opponents claim that patent litigation decreased in 2014 due to recent Supreme Court decisions. However, these claims are misleading, as patent litigation by non-practicing entities (NPEs) actually increased in January[2] and February[3] 2015 when compared to 2014. Litigation by NPEs also continues to grow as a percentage of overall patent litigation. According to a study by Unified Patents, 61 percent of all 2014 patent cases were initiated by NPEs. Moreover, small and medium-size companies were targeted in 24 percent of all 2014 NPE cases.[4] PTO steps to improve patent quality, including initiatives to crowdsource prior art, are helpful forward-looking actions. But enhancing post-grant review options is the only way to assist startups victimized by previously never-should-have-been-issued patents that are now in the hands of trolls.

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[1] Robin Feldman, Patent Demands & Startup Companies: The View from the Venture Capital Community,
[2] UnifiedPatents. (2015). January 2015 Patent Dispute Report. Los Altos: UnifiedPatents. *Available at* http://unifiedpatents.com/january-2015-patent-dispute-report-static/.
[3] UnifiedPatents. (2015). February 2015 Patent Dispute Report. Los Altos: UnifiedPatents. *Available at* http://unifiedpatents.com/february-2015-patent-dispute-report/.
[4] UnifiedPatents. (2014). 2014 Patent Litigation Report. Los Altos: UnifiedPatents. *Available at* http://unifiedpatents.com/unified-patents-2014-litigation-report/.

Finally, strong patent legislation must protect end user customers that have no input into the planning, production or development of a product. End user liability means thousands of small app developers are not winning business in their communities because potential clients are forced by liability fears to contract instead with large deep-pocketed agencies that can indemnify against multi-million dollar patent infringement risk. End users protected by reform legislation should include app developers (e.g., of API code provided by platforms to ensure smooth integration of the app and the platform) and developers' customers (e.g., businesses that contract with app developers). The Small Business Committee should ensure that America's small businesses can become more efficient and profitable by having the freedom to purchase or license technologies without fear that they will be exposed to expensive infringement liability or abusive patent trolls.

As the Senate moves forward in crafting strong patent reform legislation, the Small Business Committee should tackle dishonest practices of patent trolls that exploit the cost of litigation to extort easy settlements from small businesses and startups across America. On behalf of America's innovative app developers and many thousands of end user customers, the Alliance urges Congress to swiftly enact meaningful patent reform that will protect startups, promote legitimate inventions and true inventors, and restore trust in our patent system.

We appreciate the opportunity to share our thoughts and look forward to working with the Committee on this very important issue.

Respectfully submitted,

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