Vote “No” on any Amendment to Expand the Transitional Program for Covered Business Method Patents (“CBM” or “Sec. 18”)

Overview

There is broad support across industry and among public interest groups for measures contained in the Innovation Act (HR 3309), as reported, that reduce the financial incentive for bad actors to bring predatory patent suits — measures such as curbing the excessive cost of litigation and discovery abuse, making patent cases more efficient, and requiring plaintiffs to be precise in their claims of infringement.

No such consensus exists, however, with regard to expansion of the “Transitional Program for Covered Business Method (CBM) Patents,” and any proposed amendment to expand the CBM program should be defeated. Expanding the CBM program would disrupt the patent system itself, undermining incentives to innovate in highly competitive areas of technology that involve data processing.

Key Reasons to Vote “No” on CBM Expansion

- **CBM expansion is the third rail of patent reform.** There is near-universal recognition that abusive patent litigation is an urgent problem that demands legislative action — and there is broad support for measures contained in HR 3309 that reduce the financial incentive for “patent trolls” to engage in predatory litigation. But that support falls apart when it comes to CBM expansion. Upon introduction, the Innovation Act included a provision that would have expanded the CBM program. Recognizing the broad cross-sectoral opposition to CBM expansion, Chairman Goodlatte determined to eliminate the provision from his Manager’s Amendment, and the Judiciary Committee voted to approve the measure by a vote of 33-5.

- **The CBM program has no track record to warrant expansion.** As its name makes clear, the “transitional covered business method” program is a pilot program, and one that has been in effect for barely a year. Administrative law judges at the USPTO have decided only one case under the program so far, which the Federal Circuit has yet to review. A study of the program and its effectiveness is due to be submitted to Congress in 2015. It is premature to expand the program, and lawmakers should wait to for the study’s assessment.

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- **The CBM program is inherently discriminatory.** Expanding the CBM program would subject inventions that involve data-processing elements to a special review process under terms favorable to the challenger. "Data processing" encompasses much more than business methods. It also includes cutting-edge technologies, such as life-saving methods for identifying and treating cancers using data analytics. Data processing is at the core of our rapidly evolving information economy, and prejudicing innovations in this area threatens America's global technology leadership and the jobs that rely on it.

- **Discrimination causes uncertainty.** The prospect of having a data-processing patent revoked at any point in the patent's lifetime through a special challenge process would create a "cloud" over the patent, pose undue risk for patent holders, and make investors more hesitant to back new technologies and new entrants in the field.

- **Discrimination causes delays in enforcement.** Expanding the CBM program would create an avenue for infringers to delay enforcement of valid patent claims and encourage gaming of the review process. When a CBM proceeding is initiated to challenge a patent — a process that can take more than a year to complete — any concurrently pending District Court litigation involving the patent is almost always stayed. This gives the competitor an opportunity to gain market share by continuing to utilize the patentee's technology during the pendency of the review, irrespective of the eventual outcome. In the rapidly evolving technology marketplace, at the end of the day, money damages may not be sufficient to compensate the harm to the patent holder in such circumstances, particularly where the patentee is a small company or individual inventor.

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