The Senate Committee on the Judiciary convened on September 11, 2019 with **Chairman Thom Tillis** (R- NC), presiding along with **Ranking Member Christopher A. Coons** (D-DE) and **Senator Mazie Hirono** (D-HI) present.

The panel was made up of the following witnesses: **Professor Tom Cotter**, Briggs And Morgan Professor of Law at the University of Minnesota School of Law, **Mr. Bradley N. Ditty**, Vice President and General Patent Counsel of InterDigital Holdings, Inc., **Mr. Dan Lang**, Vice President of Intellectual Property and Deputy of General Counsel at Cisco Systems, **Professor Adam Mossoff**, Professor of Law at Antonin Scalia Law School at George Mason University, **Mr. Josh Landau**, Patent Counsel at the Computer and Communications Industry Association, and **Mr. Early “Eb” Bright II**, President and General Counsel of ExploraMed.

**Chairman Tillis** began the hearing with his opening statement. He expressed the committee’s desire to focus on promoting innovation in America and restoring integrity in the patent system through the enactment of the ranking member’s patent reform legislation titled “The Support Technology and Research for our Nation’s Growth and Economic Resilience Act,” or “The STRONGER Patents Act of 2019.” The hope is that this act will restore much needed integrity, predictability, and certainty to our nation’s patent system. Chairman Tillis did, however, express his concern that this enactment may, in effect, overturn the decision made in the case of *eBay Inc. v. MercExchange, L.L.C.*, which held that there was no presumption of irreparable harm for purposes of injunctive relief in a patent infringement case and instead required lower courts to engage in a staple four-factor analysis before issuing an injunction. Chairman Tillis finds this decision to be correct both legally and from a practical perspective. Additionally, he also expressed his concern for the number of changes the bill would make to the inter-partes review, or IPR process. He believes this to be a valuable tool to challenge bad patents and noted that it is quicker and cheaper than litigation in federal court.

**Ranking Member Coons** hopes that the small, but meaningful areas of difference in this particular bill will help sharpen legislative policies. He has realized that patents are only meaningful if they can be enforced against infringement, and thus hopes that the bill would reestablish a lower standard of proof and a limit to the number of times a patent-owner should have to defend the same patent. He believes that the bill would thus help to restore a strong patent system that would incentivize innovation and lead to a robust economy for the success of our nation.
Questions:

**Ranking Member Coons** began the question and answer period by taking note of the impact of the *eBay Inc. v. MercExchange, L.L.C.* decision and, specifically, the way in which it has weakened a central part of the start-up system and led to efficient infringement. He then directed a question at **Mr. Landau** and **Mr. Bright** about whether the two gentlemen could try to see, understand, and agree with one another in some way. During their opening statements, **Mr. Landau** argued that there is no harm to the innovation economy, but **Mr. Bright** cited a persistent slow-down in startups. While **Mr. Landau** would not budge on his initial statement, **Mr. Bright** agreed that this is a banner year for venture capital, but that when you look at where this capital is going, it is not going to the early-stage companies, but rather the late-stage companies. **Ranking Member Coons** explained his hopes that they would recognize from this questioning that each individual is describing a segment as opposed to the entire economy.

**Ranking Member Coons** then directed a question at **Professor Mossoff** and **Professor Cotter** that asked whether the act overreaches by fundamentally reversing and invalidating the entire decision made in the *eBay Inc. v. MercExchange, L.L.C.* case, or merely changes two of the four factors and presumptions in that area to restore some of the tests. **Professor Mossoff** argued that, despite the claims made in the *eBay* case, there has never been a four-factor test in the issuing of injunctions in Anglo-American history and law. He explained that, previously, the doctrine for patent owners was the same as that of all property owners, which was (1) an establishment of the validity of the underlying title, and (2) the publication of the violation of that right, which together created a presumption for an injunction, but does not automatically guarantee one. Alternatively, **Professor Cotter** argued that this would create a period of prolonged uncertainty to what the effect will be, and thus a great deal of litigation as a result. He suggested that, if there were more details of the consideration, he would be more comfortable with it, but would want to know what those details are. **Professor Mossoff** responded by citing a significant drop in the issuance of patents across the board since the decision of *eBay*.

**Chairman Tillis** asked if any of the other witnesses would like to comment on any of the topics discussed up to that point before he began his questioning. **Mr. Ditty** stated that he does not believe that this would serve as a complete change from *eBay* in its entirety, as it addresses two of the four prongs in the *eBay* test. As a result, he believes that the act will change the negotiation dynamic in a way that is healthy for the system and will create a balance that has been lacking since *eBay*. **Mr. Lang** stated that injunctions are simply bargaining tools that can be used to extract even more money than the invention is worth. He recalled the *Blackberry* case and the anxiety that this caused, noting that a return to that kind of world again would not be desired. **Mr. Bright** noted that start-up companies with no branch recognition that are trying to bring their inventions to the marketplace will need to invest millions of dollars and many years just to establish themselves in the marketplace. However, after all of this, there is still the threat
of someone simply taking it from them since there is currently not a serious threat of injunction. Instead, he believes that a situation should be created in this country where people are encouraged to design new inventions and products. **Mr. Landau** questioned what would occur if the infringing company had come up with the invention on its own and could now not sell its products. **Mr. Bright** responded that you don’t only become aware of products by looking at other patents, but simply by being a part of the marketplace.

**Chairman Tillis** then addressed the certainty question by asking whether it would be worthwhile to see whether the changes are working and whether the positive trends that are currently being seen are a result of that. **Professor Cotter** said that it would make sense because it would allow people to have the flexibility to address these issues as they arrive. After all, a statutory mandate would be hard to change, and he thus thinks it would make sense to give the current reforms a chance and to see how they work. **Professor Mossoff** stated that companies will look at time-horizons and will need to know with certainty that the rules that are being applied to them now will be the same rules existing ten years from now when they are finally coming to market. Without that certainty, he does not believe that companies will make those investments now. Innovators want to know the long-term confidence level, but new administrators could just as easily come in and change everything. Instead, Professor Mossoff believes that companies need stability so that they are not left wondering. **Professor Cotter** believes that the body’s decision to not yet codify these recently instituted practices would be unlikely to have any material effect on incentives and whether to invest in a product.

**Chairman Tillis** followed up this question by referring to the downward spike in patent litigation in 2011-2015. He questioned what type of change will occur in patent litigation if the Stronger Act were to be enacted. **Mr. Landau** predicted that instituting the Stronger Patents Act would significantly increase patent litigation. **Professor Mossoff** predicted that there would be significant debates but does not believe that it would be a problem. **Mr. Lang** agreed with Mr. Landau’s prediction about litigation going up but believes that the impact would fall more so on smaller companies, which will then get passed onto customers and will be a huge distraction in many different sectors and on many levels, consequently taking the inventors from innovation. **Mr. Ditty** believes it would be hard to predict but guessed that it would be more efficient with current disputes that are already ongoing. He referred to bad actors with patent trolls, as well as companies engaging in patent holdout, and believes that provisions in the act would help address both issues. **Professor Cotter** believes that the passing of the Stronger Act in its current form would result in some increase in patent litigation because fewer potentially invalid patents would be screened out at an earlier stage. He agreed that instituting administrative hearings in 2011 has not worked perfectly. However, he thinks that it has largely been successful at weeding out patents that have in-fact been invalid at a relatively early stage and at a relatively low cost. He anticipated that, down the road, an increase in litigation will occur for other reasons as well and that bigger patent litigation will probably occur. **Mr. Bright** anticipated that there will be a lot of
settlement in existing litigation, a decrease in the new filings in litigation as people try to assess what will be the outcome of new things, and some years will be up, and some will be down. Most importantly, he believes that important improvements and more certainty will be seen. For example, he cited RPI as an important alternative to litigation.

Chairman Tillis asked the witnesses for some suggestions for congressional action and how members of Congress can try to do a better job at reducing the number of bad patents through the examination process. Mr. Bright, Mr. Landau, Mr. Lang, and Mr. Ditty all believed that there would need to be adequate funding, resources, and time spent on applications. Mr. Lang also noted the importance of shining a light on the move to clear and convincing evidence as a standard of proof. Mr. Ditty also added that technology is improving and is a big piece of the examining process. Additionally, in response to Mr. Lang’s comment about the standard of proof, Mr. Ditty said that he doesn’t see why a post-grant review would apply a lesser standard than any other granted patent in a district court. Professor Mossoff argued that no empirical study shows that there are more bad patents now than in the past. He stated that, at times, conventional wisdom can be right, but oftentimes is wrong, and thus he believes that policies and legislation should be put together based on data. He also noted that the standard for patent quality is constantly changing through several Supreme Court cases. Professor Cotter suggested the elimination of fee diversion so that examiner workloads can be reduced. He believes that examiners could use more time, as recent statistics show that they only have approximately nineteen hours for review. Additionally, since examiners are human, he acknowledged that they will miss some things and there will inevitably be some residual invalid patents. Thus, he believes that new mechanisms need to be created to screen these out as well.

Ranking Member Coons noted that one of the provisions of the Stronger Patents Act grants the FTC the authority to target abusive assertions of patent rights. He then asked if any of the witnesses think that this would be a bad idea. Professor Cotter stated that he does not think it would be a bad idea. However, he noted that the FTC has a limited budget and would have to choose its priorities. Thus, he believes that it might be a better idea to somehow strengthen the FTC authority if possible, or else leave this issue to the states. Ranking Member Coons also finds it to be a priority to strengthen FTC authority.

Ranking Member Coons directed a question at Mr. Ditty in asking how the post-eBay lack of injunctive relief and the risk of PTAB challenges effects business decisions in investing in new research and project development. Mr. Ditty responded that PTAB reviews create an inefficiency in delays in negotiating license agreements. Consequently, this delay affects the company’s ability to predict funding for their products. He believes that they need to have predictability to achieve a solid pipeline of innovation.
Lastly, **Ranking Member Coons** asked if it is efficient for PTAB to repeatedly evaluate patents that have already gone through the process. Furthermore, he asked if there should be a limit to the number of challenges for repeat PTAB reviews. **Professor Cotter** stated that the ability to raise different arguments is important because situations can change. Thus, he believes that there is a range of valid reasons for why taking away the ability of the PTAB to evaluate something that has previously been evaluated would not be desired. **Mr. Ditty** believes the Stronger Patents Act strikes the right balance. He noted that there is a difference in claim construction standards that needs to be harmonized through the act. **Mr. Lang** thinks that this is a complex issue that calls for discretion and flexibility on the part of the patent office to use its practical experience and expertise to decide if several petitions can occur, as this may be valid and necessary in some cases. **Professor Mossoff** believes that the act will achieve the proper balance in ensuring the rule of law, and particularly due process rights of owners of legal property rights, which have served as foundational interests in driving venture capital and investment. Like Mr. Lang, he believes that the issue would need to be addressed by using discretionary abilities. **Mr. Landau** thought that codifying that now, before knowing what new changes will be, doesn’t give companies time to see how they might need to adapt the existing regulations and standards. Finally, **Mr. Bright** believes that this would serve as an efficient form of alternative litigation, and that the Stronger Patents Act makes this clear. Specifically, he expressed his concern for start-ups, and noted that this could help encourage the ability of universities to license to small companies.

**Chairman Tillis** wrapped up the hearing by focusing on the importance of openness to discussion so that they can achieve an outcome that addresses the issue at hand. He thanked the witnesses and the hearing was adjourned.

*(Senator Mazie Hirono, while present at times of the hearing, did not pose any questions at the hearing.)*
Senate Committee on the Judiciary Hearing
- Full video: https://www.judiciary.senate.gov/meetings/innovation-in-america-how-congress-can-make-our-patent-system-stronger

Ranking Member Coons