



**Statement of Stephanie Martz
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On Behalf of United for Patent Reform**

before the

**Subcommittee on Intellectual Property
U.S. Senate Committee on the Judiciary
“The State of Patent Eligibility Law in America”
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United for Patent Reform (UFPR) is a broad coalition of diverse American businesses advocating for a patent system that enhances patent quality, advances meaningful innovation, and protects legitimate American businesses from abusive patent litigation. Our members are small and large—they range from Main Street retail shops, REALTORS®, hotels, grocers, convenience stores, and restaurants to national construction companies, automobile manufacturers, and technology businesses. Collectively, our members represent over 80 million U.S. employees, a figure that accounts for nearly two-thirds of private sector jobs in the U.S.

UFPR greatly appreciates the opportunity to provide input at the series of Roundtables that preceded this hearing and the invitation to testify today. In short, UFPR is concerned about the effort to amend Section 101 of the Patent Act, including the draft legislative language recently circulated to the public. The draft language and other public proposals to amend Section 101 would dramatically alter the law of patent subject matter eligibility and abrogate 150 years of Supreme Court case law, including the Court’s most recent unanimous decision in *Alice Corp. v. CLS Bank International* (“*Alice*”). In doing so, the proposal would reopen the floodgates for abusive patent litigation by non-practicing entities (NPEs, sometimes called patent trolls) against UFPR members and discourage job creation without incentivizing innovation.

The Impact of Alice on American Businesses

NPEs are firms that often buy vague, low-quality patents with no intention of putting the patents to use, and then sue legitimate businesses for violating those patents. Even if a patent is invalid on its face, a business will often be forced to settle rather than engage in the expensive and time-consuming litigation that is required to prove invalidity in court. The problem is real. Between 50 and 60 percent of patent infringement cases are brought by NPEs. The median cost of

fighting an NPE in court is \$1.7 million,¹ and last year, 40% of NPE lawsuits were filed against small- and medium-sized companies² for whom that bill can be disastrous. This kind of wasteful litigation drains resources from businesses that could have otherwise been used to create jobs and invest in research and development. UFPR members have provided numerous first-hand accounts in testimony before Congress of the harm that abusive patent litigation inflicts on struggling American businesses.³

The patent troll business model exploded and patent litigation rates reached historic highs from 2010 to 2015.⁴ Although passage of the America Invents Act in 2011 did eventually restore some balance to the patent system by introducing the option of Inter Partes Review at the Patent Office, the problem is far from solved. In 2018, NPE litigation rates were still nearly quadrupled compared to fifteen years ago when the increase began. In one recent example, Landmark Technology, an NPE, sued Oregon family farm Azure Standard,⁵ small Ohio-based retailer U.S. Safety Gear⁶ and many other Main Street companies from Dunkin' Donuts to Hawaiian coffee producer Kona for using common online payment systems.⁷

Insofar as the situation has improved in the past three years, it is due partly to the AIA. However, the decrease in NPE litigation rates is also due in very large part to the *Alice* decision.

¹ NPE Litigation: Costs by Key Events (March 2015) <https://www.rpxcorp.com/wp-content/uploads/2014/12/Final-NPE-Litigation-Costs-by-Key-Events.pdf>.

² Unified Patents: Patent Dispute Report (Sept. 2018) <https://www.unifiedpatents.com/news/2018/9/28/q3-2018-patent-dispute-report>.

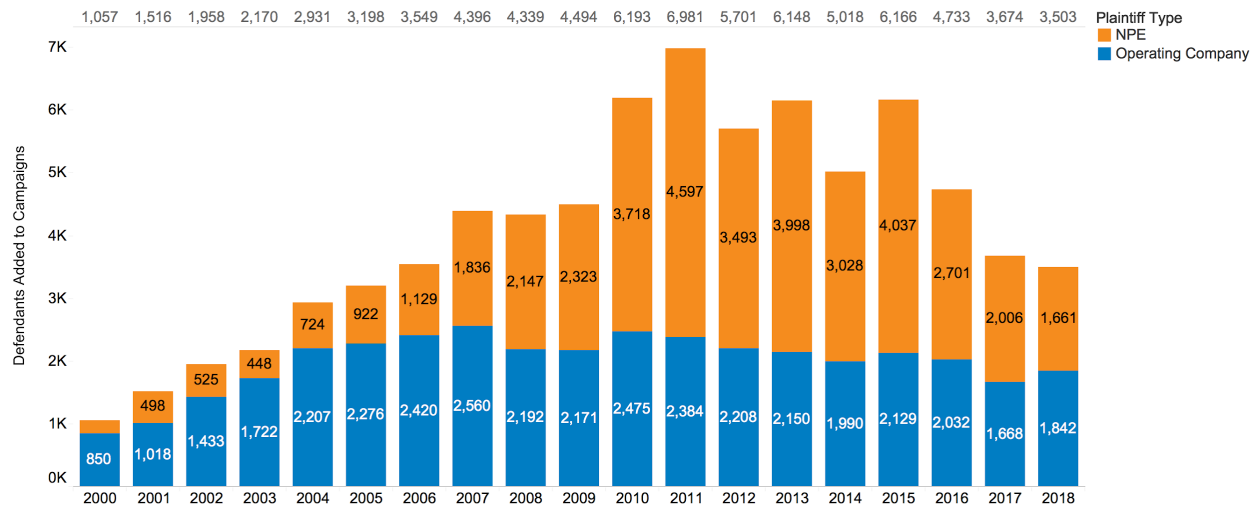
³ See, e.g., Diane Lettelleir of J.C. Penny Corporation, Inc. before the Senate Judiciary Committee (May 7, 2015) <https://www.judiciary.senate.gov/imo/media/doc/05-07-15%20Lettelleir%20Testimony.pdf>; Steven Anderson of Culver Franchising System, Inc. before the Senate Judiciary Committee (March 18, 2015) <https://www.judiciary.senate.gov/imo/media/doc/03-18-15%20Anderson%20Testimony.pdf>; Jamie Richardson of White Castle System, Inc., on behalf of the National Restaurant Association of America, before the House of Representatives Energy & Commerce Subcommittee on Oversight & Investigation (Nov. 14, 2013) <https://docs.house.gov/meetings/IF/IF02/20131114/101483/HHRG-113-IF02-Wstate-RichardsonJ-20131114.pdf>.

⁴ Data provided by RPx Corp., see e.g. Blog, <https://www.rpxcorp.com/intelligence/blog/>

⁵ “Farm Victim of Patent Troll Lawsuit,” Capital Press, (Sept. 12, 2018) https://www.capitalpress.com/ag_sectors/organic/farm-victim-of-patent-troll-lawsuit/article_08adb1cd-2683-51ac-8e9e-2d87e14013cb.html.

⁶ “Patent Troll Files Suit Against Small Business,” Tribune Chronicle (Feb. 11, 2019) <https://www.tribtoday.com/news/local-news/2019/02/patent-troll-files-suit-against-small-business/>.

⁷ Unified Portal, listing 66 cases filed by Landmark <https://portal.unifiedpatents.com/litigation/caselist?patents=6289319> (visited June 2, 2019).



Over 150 years of Supreme Court case law has held that Section 101 rightly promotes innovation by only allowing patents on advances in technology, not abstract ideas. In 2014, the Court unanimously confirmed in *Alice* what was already clear from its precedent: Section 101’s prohibition of patents on abstract ideas means that business methods and other abstract economic concepts are not eligible for patents merely because they are performed on a computer. The decision was significant in the fight against wasteful litigation because this is precisely the type of low-quality e-commerce patent favored by NPEs attacking a broad range of Main Street industries. In just a few examples of the many cases for which *Alice* has provided the winning defense:

- restaurants like Whataburger and Dairy Queen were sued for posting nutritional information and picture menus online in 66 cases;⁸
- over two hundred retailers like Sees Candy Shop, 1-800-FLOWERS.com and Men’s Wearhouse were sued for using online shopping carts;⁹
- realtors and home builders were sued for the use of online maps to identify available properties;¹⁰ and

⁸ “Patent Holder Sues Basically Anyone who Offers Recipes or Meal Planning Online,” Tech Dirt (June 15, 2012) <https://www.techdirt.com/articles/20120615/03122319332/patent-holder-sues-basically-anyone-who-offers-recipes-meal-planning-online.shtml>; Meal Planning Patent Invalidated under Supreme Court’s *Alice* Decision, Lexology (July 8, 2014) <https://www.lexology.com/library/detail.aspx?g=eda64394-e1eb-4ae5-998f-7e3c4fe2b4c4>.

⁹ “Biggest Patent Troll of 2014 Gives Up, Drops Appeal,” ars Technica (Mar. 4, 2016) <https://arstechnica.com/tech-policy/2016/03/biggest-patent-troll-of-2014-gives-up-drops-appeal/>.

¹⁰ *Move, Inc. et al v. Real Estate Alliance LTD.*, No. 2017-1463 (Fed. Cir. 2018) (invalidating patents under Section 101) <http://www.cafc.uscourts.gov/sites/default/files/opinions-orders/17-1463.Opinion.1-31-2018.1.PDF>.

- airlines were sued based on their frequent flier programs.¹¹

A business sued by a patent troll can now point to *Alice* and ask a court to knock out such clearly invalid patents that make no technological contribution to the public and dismiss the case before the start of costly discovery and without an expensive trial. That is what happened to Capstone, a small photography business in Connecticut that was sued by an NPE for selling event photographs online, which was able to fight back and win. The owner, Michael Skelps, explained, “without the *Alice* decision, it is unlikely that I could have afforded the long fight necessary to invalidate the patent on other grounds.”¹²

Alice has provided the successful defense against some of the most infamous non-practicing entities that have plagued Main Street businesses for the past decade. NPE Shipping & Transit, and its predecessor ArrivalStar, sued over 500 companies from 2009-2017, many of them small companies, like 15-person Michigan company Spice Jungle that sells spices online. Shipping & Transit accused Spice Jungle and many others like it of infringing its patents through the common practice of emailing a tracking number to customers. The large majority settled for less than the cost of litigation, and over the years Shipping & Transit collected more than \$15 million.¹³ In 2017, a district court finally ruled that Shipping & Transit’s patents were clearly invalid under Section 101 and the *Alice* case, and that the NPE should pay the attorney’s fees of its latest target.¹⁴ Only then did Shipping & Transit stop its attacks. In 2018, it filed for bankruptcy.¹⁵

Alice allows businesses to fight back and it makes the patent troll business model far less lucrative, which in turn frees up resources for innovation and job creation. Last year, NPEs filed less than half the number of lawsuits they filed in 2013, the year before the Supreme Court decided *Alice*. There is little doubt that overruling *Alice* will once again increase patent troll litigation levels.

¹¹ “Rewards Method Patent Invalidated Under *Alice*, *Bilski*,” IPLaw 360 (Sept. 3, 2014) <https://www.law360.com/articles/573288>.

¹² “Supreme Court’s *Alice* Decision Protected my Small Business from Patent Trolls,” The Hill (July 7, 2016) <https://thehill.com/blogs/congress-blog/judicial/286691-supreme-courts-alice-decision-protected-my-small-businesses-from>.

¹³ “America’s Biggest Filer of Patent Suits Wants You to Know it Invented Shipping Notification,” The Wall Street Journal (Oct. 27, 2016) <https://www.wsj.com/articles/americas-biggest-filer-of-patent-suits-wants-you-to-know-it-invented-shipping-notification-1477582521>.

¹⁴ District Court Awards Attorney’s Fees after Holding that Plaintiff had Repeatedly Sought to Avoid a Section 101 Ruling,” (July 27, 2017) <https://www.lexology.com/library/detail.aspx?g=0ee7f167-b6a7-403d-ab00-5bebd592d7c7>.

¹⁵ “Notorious Patent Enforcement Entity Values its Entire Portfolio at \$2, Folds,” ars Technica (Nov. 1, 2018) <https://arstechnica.com/tech-policy/2018/11/most-litigious-patent-enforcer-in-us-calls-it-quits-files-bankruptcy/>.

The Important Role of Section 101 in Supporting Innovation

The patents at issue in the examples discussed above were invalidated under *Alice* because they covered nothing more than the abstract idea of a business method or a concept for managing and conveying information run on conventional computer equipment using routine techniques. The courts evaluating those patents found they did not make an inventive, technical contribution to the public that merited a government-granted exclusive right.

That is the right analysis. The goal of the patent system set out by the Constitution is to “promote the progress of science and the useful arts.” Consistent with that goal, Section 101 defines patent-eligible subject matter as “any new and useful process, machine, manufacture, or composition of matter.” Over 150 years of Supreme Court case law has held that Section 101 blocks patents on abstract ideas and laws of nature because they should be free for all to use as “the building blocks” of innovation.¹⁶ Making those building blocks exclusive would slow, not speed innovation.

Alice only restated what was clear from the Supreme Court’s earlier cases. Inventions, including software, that solve a technological problem or improve the relevant technology are eligible for patenting, but section 101’s prohibition on patenting abstract ideas cannot be overcome by reciting the idea performed using routine, generic computer operations. Such patents do not “promote the progress of science and the useful arts.” As the cases described above demonstrate, when the purpose of Section 101 as a filter for technological advancement is ignored and non-technological patents flood the system, the result is wasteful litigation that drains valuable resources from job creation and investment.

The role of Section 101 governs the threshold issue of eligibility, and is therefore different than the requirements for patentability found elsewhere in the Patent Act, particularly the non-obviousness requirement of Section 103 and the definiteness, enablement and written description requirements of Section 112. Only Section 101 asks whether the subject matter sought to be patented is directed to an improvement in technology, as opposed to some other area of human endeavor. Improvements in non-technological areas are more appropriately protected through other forms of intellectual property or made accessible to the public when exclusivity is not needed to incentivize their creation. But in either situation, direct experience shows that patenting them does not serve the public interest.

¹⁶ *Gottschalk v. Benson*, 409 U.S. 63, 67 (1972) (“Phenomena of nature, though just discovered, mental processes, and abstract intellectual concepts are not patentable, as they are the basic tools of scientific and technological work.”); *Mayo Collaborative Servs. V. Prometheus Labs., Inc.*, 566 (2012) (“monopolization of those tools through the grant of a patent might tend to impede innovation more than it would tend to promote it.”); *O’Reilly v. Morse*, 15 How. 62, 113 (1854) (rejecting claims to the idea of printing at a distance by means of an electric current based on concern that future inventions would be preempted).

Concerns with Proposals to Amend Section 101

Calls for radical change to current law prohibiting the patenting of abstract ideas are not supported by evidence. Advances in software technology remain patentable under *Alice*, and innovation in the software industry has flourished since the Court's decision.¹⁷ A wide variety of patents have satisfied the Section 101 test in the courts and at the Patent Office, including patents covering software for a specific way of storing data in a database,¹⁸ automatically animating speech,¹⁹ and sending Internet users to a hybrid web page.²⁰

In an extreme departure from over a century of patent case law, the proposed draft language would allow patents on abstract ideas like business methods that have supported so much abusive patent litigation in the past. Any business method run on conventional computer equipment using routine techniques would likely satisfy the draft language's requirement in new Section 100(k) of "utility in any field of technology through human intervention." No other reading of this language is possible in light of the additional legislative provision abrogating nearly all existing case law on Section 101 while simultaneously placing a heavy thumb on the scale by requiring that Section 101 be construed in favor of eligibility. Moreover, the utility requirement of Section 100 traditionally presents a very low bar and is rarely evoked in rejecting patents, and nothing in the proposed language suggests that would change.

The proposed provisions that would abrogate nearly all existing Section 101 case law would undoubtedly lead to years of uncertainty and litigation. No other result is possible when wiping the slate clean in the current patent litigation environment. The stated goal for amendment of Section 101 was to create more certainty, but this proposal will do the opposite. UFPR members, *businesses representing nearly two thirds of jobs in the U.S.*, will bear the majority of the pain of such a rash action - not many of those pushing for this change, who are likely to profit from the creation of more patents and more litigation.

For these reasons, UFPR urges Congress to protect the current robust and balanced patent system that makes American innovation possible and reject the proposed draft language. The harm to innovation and job creation of sweeping change is clear. No clear and concrete evidence of harm that could justify the complete upending of decades of settled law has been offered, only

¹⁷ R&D spending in the Software and Internet industry has doubled since 2014, outpacing R&D spending over all industries. PWC 2018 Global Innovation Fact Pack, slide 28, <https://www.strategyand.pwc.com/media/file/2018-Global-Innovation-1000-Fact-Pack.pdf>.

¹⁸ *Enfish LLC v. Microsoft Corp.*, 822 F.3d 1327, 1335 (Fed. Cir. 2016) ("[W]e find it relevant to ask whether the claims are directed to an improvement to computer functionality versus being directed to an abstract idea, even at the first step of the *Alice* analysis.").

¹⁹ *McRO, Inc. v. Bandai Namco Games Am. Inc.*, 837 F.3d 1299, 1314 (Fed. Cir. 2016) (upholding claim at *Alice* Step 1, "we . . . look to whether the claims in these patents focus on a specific means or method that improves the relevant technology.").

²⁰ *DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245, 1257 (Fed. Cir. 2014).

anecdotal complaints. But even if a discrete problem were proven, the appropriate solution would be narrowly drafted and targeted to that problem, leaving intact as much of the current law as possible in order to preserve its benefits and support consistency and predictability. The proposed draft language does not comply with that sensible approach to legislating.