Our members, most of whom are patent owners, appreciate the important role the U.S. patent system plays in supporting innovation. We have also experienced the harm that patent litigation abuse and poor-quality patents can cause. Much of that abuse is perpetrated by nonpracticing entities (NPEs), sometimes called patent assertion entities or patent trolls. NPEs buy up patents for the purpose of extracting "hold up" settlements. From 2005 to 2015 the number of NPE suits quadrupled, placing a crushing burden on U.S. businesses that create jobs across all sectors of the economy.

NPEs have sued pizza shops for adding a location finder to their website, and they have sued photographers for uploading their own work for sale. Startups developing and patenting their own technology were forced to cut jobs or shut down when targeted by NPEs. That is not surprising since it can cost a small company half a million dollars to defend itself in patent litigation.

The problem continues. Recently, Landmark Technology, an NPE, sued Oregon family farm farm Azure Standard and small Ohio-based retailer U.S. Gear for using common online payment systems. But the torrent of patent litigation has at least stabilized from the intolerable peak of just a couple years ago because of two patent law developments: Inter Partes Review (IPR) and the Supreme Court Alice decision.
IPR

Congress passed the America Invents Act (AIA) in 2011 because of serious concerns that low-quality patents were placing a drag on innovation and eroding public confidence in the patent system. The AIA created the Inter Partes Review (IPR) program at the Patent and Trademark Office (PTO). IPR allows the public to ask the PTO to take a second look at questionable patents in a procedure that is faster and cheaper than litigation. Since 2012, IPR has been working fairly and successfully to improve patent quality. It has allowed the targets of baseless litigation to fight back and made patent trolling a less lucrative business model. By one estimate, IPR has saved litigants $2 billion in legal fees.

To comply with Congress’ intent for IPR, and to prevent another surge in NPE litigation, the PTO’s procedures for implementing IPR must remain robust. In the past year, the PTO has done the opposite and taken multiple steps to weaken IPR, and the number of cases that it agrees to hear has been dropping. Congress should protect this valuable tool from further erosion.

Alice v. CLS Bank

In 2014, in Alice v. CLS Bank, a unanimous Supreme Court restated what had long been the law under Section 101 of the Patent Act: abstract ideas, like business methods, cannot be patented. The Court confirmed that computer software inventions could be the proper subject of patents, but that simply running an abstract idea on a generic computer, without any improvements in technology or computer performance, should not be. Alice’s patent, invalidated by the Court, claimed little more than escrow on a computer.

Although the holding of this case did not represent a change in the law of Section 101, some lower courts were now more willing to assess patents early in a case, before the accumulation of huge legal fees, and invalidate the non-technological e-commerce patents that NPEs commonly wielded against Main Street business. Under Alice, courts easily struck down patents like those covering scavenger hunts, picture menus, and delivery notifications. Like IPR, Alice made the NPE business model of buying and suing on low quality patents less lucrative and decreased the attacks.

Where We Are Now

Since these changes, innovation and the economy has surged. Patent application filings, patent issuances, R&D spending, and venture capital investment in start-ups are all higher in 2018 than they were in 2012, when IPR began, or in 2014, when Alice issued. No evidence supports calls to further weaken IPR or legislatively overturn Alice. Doing so would only increase the burden of abusive patent litigation—even as it continues to threaten job-creating companies all over the U.S. Instead, the U.S. economy needs concrete changes at the PTO to improve patent quality and stop the issuance of invalid patents that block and tax true innovation.