

Statement of Bryan Pate, Co-Founder and CEO, ElliptiGO, Inc.
Subcommittee on the Courts, Intellectual Property, and the Internet
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Chairman Issa, Ranking Member Nadler, and Members of the Subcommittee, thank you for inviting me to appear today to discuss the importance of American innovation and how we can protect it. My name is Bryan Pate. In my career I have served as an officer in the United States Marine Corps, developed new products for a semiconductor equipment company, clerked for a federal judge and worked with a number of Fortune 500 companies as a consultant for McKinsey & Co. I left McKinsey to start the company I now lead and I have been working tirelessly for the past ten years to create and build a new industry right here in the United States.

ElliptiGO

Like many American inventions, ElliptiGO began in a garage as a solution to a problem. In 2005, a lifetime of contact sports and endurance athletics caught up with me and I lost the ability to run for fitness because of hip and knee injuries. I considered cycling, but my experience in triathlon convinced me that bicycle saddles are uncomfortable and that cycling workouts simply take too much time. I started using the elliptical trainer, but found I hated being caged indoors at the gym. It hit me that what I really wanted was a low-impact running device that I could use on the street. I decided to purchase one, only to find that no such device existed.

Surprised and frustrated by that fact, I began to look into running injuries and the size of the potential market for a product like this. Convinced that an outdoor elliptical bicycle would appeal to a large number of people, I called up my friend Brent Teal, a mechanical engineer and fellow Ironman triathlete, to see if he would be interested in developing this kind of a product. A few weeks later we met in a Solana Beach, California coffee shop and drew some rough sketches of the concept on a newspaper. He liked the concept and agreed to do all of the engineering work for free. I agreed to pay for everything we needed to buy. We shook hands and formed a partnership to create the world's first elliptical bicycle.

Brent was already a named inventor on some patents and I was familiar with intellectual property rights, so our first step was to determine whether the idea was

already patented. While nobody had ever built or sold an elliptical bicycle before, it turned out that Larry Miller, the man who invented the indoor elliptical trainer back in 1994, already held issued patents in the U.S. and Taiwan on the idea of an outdoor elliptical bicycle. Fortunately, we were able to secure a license to Miller's patents, which enabled us to continue pursuing the project and bring an elliptical bicycle to market.

Over the course of the next few years we raised money from a number of investors, hired our first employees, and partnered with a manufacturer. Then, in 2010, ElliptiGO introduced the world to the first elliptical bicycle.¹ Since then we have sold more than ten thousand ElliptiGO cycles and generated more than \$20 million in revenue. We now employ fifteen people at our headquarters in Solana Beach, California, with additional employees in Virginia, Illinois, and New York and we are continuing to grow.

As an entrepreneur, I am by definition a risk taker and an optimist. Few things scare me. However, I am here today because broad changes to the patent system proposed by this committee scare me. Since I learned about the provisions contained in H.R. 9, I have spent a considerable amount time trying to understand how they will impact my business. I am afraid that if H.R. 9 is enacted as written it will have the unintended consequence of hurting American innovators and companies like mine, while perversely protecting unscrupulous foreign competitors.

A strong patent system is vitally important to small businesses and entrepreneurs. Intellectual property-intensive industries alone support \$8.1 trillion of the U.S. gross domestic product, generate 27 million jobs, and pay employees over thirty percent more than other industries. Entrepreneurial startups alone are responsible for over twenty percent of gross job creation in the United States. Sweeping changes to the patent system will have major repercussions in these industries, and threaten the innovative ideas and job growth they generate. I will discuss each of my concerns in detail, but the bottom line is this: If H.R. 9 was the law in 2005 then ElliptiGO would not exist today, and I'm sure that many other small job creating businesses like ours would not be here either.

¹ A photo of an ElliptiGO bicycle is attached to this testimony as Appendix A.

As you will see below, my objections to the Innovation Act arise from the impact it will have to the entire start-up ecosystem. It is not just the entrepreneur that is needed to start companies and create jobs. He must be supported by a large group of other people, all of whom are acting in their own best interests. Start-ups are extremely risky endeavors and there aren't many investors, workers, partners and inventors willing to get involved with them because of these risks. My fear is that this bill will shift the risk/reward calculus for these groups to the point where it simply won't make sense to support a start-up that relies on patented innovations. Without enough support from every element of this ecosystem, start-ups cannot get off the ground. Because patent-based technology start-ups are a significant engine of growth for our innovation economy, if they go away then it will have serious repercussions for the country.

I believe any efforts to stop abusive patent litigation must take into account the impacts they could have on the start-up ecosystem. I implore you to avoid instituting solutions that end up doing more harm than good. I fear that H.R. 9 as written will have that result.

Stay Provision

The "customer stay" provision of H.R. 9 is one of the most alarming parts of the bill. First, the provision is mislabeled. It should be called the "manufacturer, supplier, seller and end-user stay" because every "party accused of infringing a patent or patents in dispute based on a covered product" is entitled to it equally. This means every foreign manufacturer, every foreign trading company, every domestic manufacturer, and every seller of unauthorized copies of our patented product can stay a litigation that has been filed against them. All they need to do is show that there is a separate litigation underway involving a different party accused of infringing the same patent and that other party "makes or supplies" the infringing product at issue. All of these parties have at least 120 days after the initial pleadings are filed to file their stay motion and the court must grant it if they meet the conditions set forth in the bill, all of which appear to be easy to meet. I believe that the stay begs to be abused by infringers and will have the unintended result of crippling the ability of American businesses to fight manufacturers that copy their patented products and flood U.S. markets with cheap, poor quality knock-offs.

The threat of knock-offs being sold in the U.S. is a serious issue for ElliptiGO. We know of a number of Chinese manufacturers who have replicated our product and are currently advertising it for sale on Alibaba.com and other websites.² These knock-offs have not yet made their way to the United States, but it is only a matter of time. When these fake ElliptiGO bikes do make it here, the only defense we will have are our nine issued U.S. patents.

If the stay provision is in effect when these knock-offs hit our shores, then we will be in real trouble. For our product, there could easily be more than a dozen different trading companies sourcing from Chinese factories and feeding that supply into the U.S. through a number of sales channels. As discussed, each of the suppliers in China and the sellers in the U.S. would be entitled to take advantage of the stay provision. Nor is the manufacture of infringing products limited to foreign companies. Companies right here in the United States could easily copy our product as well. So, if the stay is enacted into law, I believe it will expose us to an abuse of the patent system that will prevent us from defending our business against unfair infringement by foreign and domestic actors alike.

Once copies of our patented products hit the market, the sellers will likely ignore our cease and desist letters and force us to undertake the significant time and expense of filing a patent infringement action. In response, a Chinese trading company or U.S. manufacturer will likely file a declaratory judgment action against us, requiring the federal court in our infringement action to stay our case against the seller until the suit against the supplier is resolved. This cycle will likely be repeated multiple times by other parties entitled to a stay, causing an endless delay in our ability to get relief through the courts.

Meanwhile, fake ElliptiGO cycles will continue flooding the market unabated, attracting additional sellers of these products and causing our sales to plummet while our legal expenses continue to mount. Because we cannot compete with cheap knock-offs, at some point we will likely be forced to decide whether to sell our business, cease

² Photographs of knock-off ElliptiGO bicycles in unlicensed Chinese factories and examples of unauthorized sales listings on Alibaba.com are attached to this testimony as Appendix B.

operations or continue to pursue even more litigation because it is the only means we have available to stop these illegal sales.

Perversely, the stay provision will likely be used to insulate all of these subsequent sellers as well from any suits we file against them, effectively making patent enforcement through the district courts fruitless. While we could file a complaint with the International Trade Commission (ITC) to block the import of infringing cycles, this action will neither prevent the sale of existing cycles in the U.S., nor will it have any impact on domestic suppliers of knock-off ElliptiGOs. So long as there is a stay of litigation against the sellers of infringing products, and manufacturers continue to pop up and sell to retailers, we would likely never get the injunction necessary to stop the sale of infringing knock-offs. This will not only destroy our business and undermine the viability of this industry, but this will also put the public at risk if these products start to fail in the field.

Since we started this company, no one affiliated with it ever expected that we would be left unable to defend it from competitors selling knock-offs of our product. None of us would have gotten involved if we thought that this would end up being the case. Myself, Brent, Larry, all of our investors and all of our employees chose to invest our time, resources, money and skills into making ElliptiGO successful based on the fundamental assumption that we would be able to use the venerable U.S. patent system to defend our company against competitors making and selling products that infringe on our patents. I believe that the customer stay provision will have the perverse result of facilitating the sale of knock-off products here in the U.S and put American innovators at a severe disadvantage in the marketplace.

This is incredibly unfair and I think it will have devastating effects for these innovative American companies, especially small ones. Even if I am wrong about how the situation above will actually play out, I believe that introducing the potential for such abuse by potent and unscrupulous competitors will have a chilling effect on future founders, investors and employees of patent-based start-ups. In any case, there is one thing that I can say for certain: if the customer stay provision was law in 2005 and I knew about it, I would not have started ElliptiGO.

When I headed down this path ten years ago I knew that any mechanical bicycle-like device would be easy to copy and distribute. There's no way I would have left my

lucrative career path to take on the risk of starting a company if I didn't believe that I could use patents to stop companies from making and selling copies of my product here in the U.S. For the reasons outlined above, the stay provision would have eliminated this belief and ElliptiGO would not exist today.

Fee Shifting and Joinder

The fee shifting provision obligates the losing party in a patent infringement suit to prove that its "position and conduct" was "reasonably justified in law and fact or that special circumstances (such as severe economic hardship to a named inventor) make an award unjust." While on its face this provision sounds balanced, in practice, I believe that it will disproportionately and adversely impact small companies like mine.

Patent litigation is complicated and the difference between winning and losing can hinge on a variety of factors, many of which are unpredictable at the outset. Something that appears novel to one trier of fact could be completely obvious to another. Patent enforcement actions can turn on the meaning of one word in a claim and how it is applied to the item at issue. At the time we elect to enforce our intellectual property, we won't have the luxury of being absolutely certain about the validity of our patents, sure of how the courts will construe some of the terminology, or know that we are definitely going to win the case. One thing we will know is that if we lose our case, it will be devastating for our business. That's because we don't have much cash and we aren't profitable. The litigation will be long, very expensive and if we lose, our industry will become much more competitive. The passage of this provision will increase the already high risk litigation poses for us by making patent enforcement actions more expensive if we lose but not changing the reward calculation much if we win.

If we lose, then we will almost certainly have to pay for a mini-trial to determine whether or not our position was reasonable. The provision puts the burden of proof on us, so it is going to cost us much more to prove our case than it will for our competitor to counter our arguments. Moreover, any patent litigation we file will likely be against a large player who will welcome the opportunity to bleed a small competitor of their cash when they have everything to gain and very little to lose. So, the cost of losing a case will go up under this provision even if we prove our case was reasonable. If we fail to meet the burden of proving reasonableness, then our litigation costs will at least double and

we will almost certainly have to shut down our company. The provision creates a large shift in the risk of losing a patent litigation and will cost us money at the outset just assessing this new risk when contemplating whether or not to file suit.

If we win, then we'll have the option of seeking fees. However, we're likely only going to sue large players where there is an opportunity to win a huge award in damages. So, if we win, we will likely win big. Whether or not we get to collect attorneys' fees if we win won't meaningfully change the outcome of the case for us. So, this provision makes a very slight change in the reward side of the litigation equation.

In sum, for a small company, this provision creates a large increase in the risk of defending ourselves and only a small increase in the rewards of doing so. As a result, it's going to cause small companies like us to be less willing to enforce their patents. That devalues investments in innovation and makes small companies less likely to succeed. This chills the motivation for starting the company in the first place.

The joinder provision layers on top of the fee shifting provision and creates an even worse situation for start-ups. When attorneys' fees are awarded and the loser doesn't have the resources to pay them, H.R. 9 gives the winning party the right to collect from an "interested party." These interested parties will likely include the founders, senior employees, the licensor of the patent at issue, and any investor with the "ability to influence" the litigation. I believe that this provision will have devastating consequences for technology start-ups. If the joinder and fee shifting rules of H.R. 9 were law in 2005, I am certain we would not have been able to start ElliptiGO.

Small technology companies like ours can't get off the ground without participation from several types of stakeholders: founders, investors, employees, and in our case, a licensor. The joinder provisions are both so broad and so vague that I believe they will expose members from each of these groups to *personal liability* for unpaid legal fees in the event the start-up they support loses a patent lawsuit and is unable to convince the judge that its position was justified.

From 2005 through 2010, when ElliptiGO was in its nascent stages, it simply did not have the cash on hand to pay an opposing party's legal fees if we lost an infringement lawsuit. That is not unusual for a start-up. If our licensor, Larry Miller, thought that there was the slightest chance that he would be held personally liable for these fees if we enforced his patent, there is no way he would have licensed it to us. At

the time, we were two guys working out of a garage with no real assets other than a pending patent and a prototype. It would have been too risky to put the potential loss of his house into our hands.

Similarly, many of our early investors helped the company with advice and support. All had the ability to influence something as important as the decision to enforce our patent. If they knew that there was a possibility that they would be on the hook for hundreds of thousands of dollars or even millions of dollars in fees, they would have seriously reconsidered investing in our company. It's one thing to lose \$50,000 in an investment. It's another thing to be on the hook personally for over a million dollars in legal fees. That's a huge shift in the risk profile of an already risky investment. There are many safer places to put that money and I doubt we would have landed our initial investors under those conditions.

Finally, one of the first employees we hired had recently earned her MBA from Stanford's Graduate School of Business. She could have worked for any number of great companies. If she knew that one of the many risks of working for ElliptiGO included the potential loss of her house from a failed patent enforcement action, I doubt she would have come onboard.

The bottom line is that without the license from Larry Miller, our initial investor group, or our initial set of employees, ElliptiGO would not have been able to get off the ground. I believe that the joinder provision would have made the already challenging process of finding and convincing these people to support us virtually impossible. The fee shifting and joinder provisions introduce a new, incalculable, and very real risk to each segment of the start-up ecosystem. I fear that if it is made law, then even fewer people will be willing to invest their time, money, skills or ideas into bringing new patentable innovations to market.

Heightened Pleading and Discovery

I will touch briefly on two other provisions of the bill that I think will disproportionately impact small businesses: heightened pleadings and discovery sequencing. H.R. 9 requires patent owners to plead a large amount of specific information in their complaint. This includes, but is not limited to: the specific claims allegedly infringed, an identification of the accused process or product that infringes

each claim, the name or model number of every allegedly infringing product or process, or a detailed description thereof, a statement of where each element of each patent claim is contained within the allegedly infringing product or process, and a detailed statement of the nature of the alleged infringer's business. Collecting this information and then paying attorneys to translate it into a detailed complaint will take much more time and cost much more than filing a complaint does now. In fact, it would make filing a complaint to enforce a patent right significantly more onerous than filing a complaint in *any* other type of lawsuit.

More importantly, these added burdens disproportionately impact small companies because they delay the filing process, make enforcing patents more complicated and expensive, and force these companies to incur higher expenses at the beginning of the lawsuit. Moving the cash burden earlier in the process makes it particularly painful for a small company that might have a meritorious case but needs to raise funds in order to pursue a patent litigation. Larger companies with more cash can better handle this added complexity and acceleration of costs, so the adverse impacts of these changes will be felt more by smaller companies.

Finally, limiting initial discovery to matters necessary for claim construction also puts patent holders at a disadvantage against infringing companies. The infringer is in the best position to provide the information about the details of their products so the patent holder can assess to what extent they infringe. In many cases, the patent owner *requires* discovery to learn the details of the infringer's product and business necessary to enforce the patent. Delaying that part of discovery will likely lengthen the overall litigation and make patent enforcement more expensive, riskier and less effective for a patent holder.

The Totality of the Provisions

As you have seen, I have a series of concerns with this bill. I've presented each one individually and I believe each one has a different level of impact on ElliptiGO and companies like it. However, it is particularly concerning that they could all be introduced simultaneously if H.R. 9 passes. Acting together, these provisions will be worse for patent holders than the sum of each individually. For example, the heightened pleading standard will make the customer stay provision even more devastating because

it will lengthen the time between the introduction of knock-off products and the filing of the first lawsuit and it will cost more up front to file that lawsuit. Fee shifting adds complexity to the decision to file a lawsuit. Combining it with the joinder provision dramatically raises the stakes for nearly everyone involved in the company. Adding a delayed discovery process on top of that means that it could take a patent holder much longer to realize that his case is a loser and expose him to even more costs if the fees ended up being shifted. So it's not only that each provision is concerning in isolation - they compound on each other to make each one even more concerning.

At the end of the day, I fear that introducing these five new and complex constraints to patent enforcement will scare off the people who make patent-protectable innovation happen. Folks like myself who are risk-taking optimistic innovators with the capability and willingness to take on the challenge of starting a company to introduce a new innovation to the world. Folks like our investors who are willing to invest \$25,000 - \$100,000 into a "flier" and get behind a passionate team. Folks like our employees who made a bet on us because they want to be a part of changing the world. And folks like Larry Miller - the American tinkerers who spend years working in their garages for no pay but end up conceiving of things like the indoor elliptical trainer that not only become multi-billion dollar industries of their own, but inspire other tinkerers like me to improve upon their ideas with innovations like the elliptical bicycle.

All of us in this ecosystem make a conscious choice to drive these innovations forward. To do so we forego other opportunities. We assess the risks, scope the potential rewards, and make our best decision based primarily on those two factors. A strong patent system lowers our risk and increases our potential reward. Provisions that weaken our patents increase our risk and decrease the reward. Once the rewards no longer outweigh the risks, investors will invest elsewhere, employees will work elsewhere, tinkerers will tinker but take it no further, and entrepreneurs will keep their jobs at large companies instead of breaking out on their own. When that happens, the results will be devastating for innovation in this country.

Solutions

As discussed above, I support efforts to curb abusive patent litigation. I believe this is a problem Congress and the courts can address together. The Targeting Rogue

and Opaque Letters Act (TROL Act) pending in the Energy & Commerce Committee would give the Federal Trade Commission and state attorneys general wider latitude to address abusive demand letters as an unfair trade practice. That action alone would help provide relief to thousands of small businesses like mine who may be forced to submit to the unfair and unfounded demands of patent trolls in order to avoid the costs and risks of going to court.

I also support the Supporting Technology and Research for Our Nation's Growth Patents Act (STRONG Patents Act), introduced this month in the Senate by Senators Coons, Durbin, and Hirono. This legislation achieves the goal of addressing abuses of the patent system by curbing demand letters, bringing pleading requirements in line with other federal cases, ensuring the U.S. Patent and Trademark Office (USPTO) has the resources necessary to issue robust patents and ensuring balance in patent post-grant and *inter partes* review procedures at the USPTO.

While addressing the most abusive behaviors in our patent system, I believe that the STRONG Patents Act does *not* pose a threat to small businesses the way H.R. 9 does. If the STRONG Act were law in 2005, I still would have founded ElliptiGO and I would be confident in our ability to defend against foreign knock-offs and unfair competition today. I hope that both of these bills become law.

Conclusion

I appreciate the effort this committee has put forth to address the problem of abusive patent litigation. I hope my testimony will be helpful in developing legislation that will do that without adversely impacting the precious and unique innovation ecosystem we have managed to develop here in America. Please encourage innovators and entrepreneurs to bring new innovations to market by doing what you can to reduce the risks and increase the rewards for innovation. Conversely, please avoid passing legislation that makes it riskier and less rewarding to innovate in this country. Because I believe that the provisions of H.R. 9 will do more harm than good to our economy, I strongly urge you not to pass it.

Thank you for providing me the opportunity to testify before you. I very much look forward to answering your questions.