

**THE IMPACT OF ABUSIVE PATENT LITIGATION  
PRACTICES ON THE AMERICAN ECONOMY**

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**HEARING**  
BEFORE THE  
**COMMITTEE ON THE JUDICIARY**  
**UNITED STATES SENATE**  
ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

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MARCH 18, 2015

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# **THE IMPACT OF ABUSIVE PATENT LITIGATION PRACTICES ON THE AMERICAN ECONOMY**

**WEDNESDAY, MARCH 18, 2015**

UNITED STATES SENATE,  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The Committee met, pursuant to notice, at 10:02 a.m., in Room 226, Dirksen Senate Office Building, Hon. Charles E. Grassley, Chairman of the Committee, presiding.

Present: Senators Grassley, Hatch, Cornyn, Lee, Flake, Perdue, Tillis, Leahy, Feinstein, Schumer, Durbin, Whitehouse, Klobuchar, Franken, Coons, and Blumenthal.

## **OPENING STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA**

Chairman GRASSLEY. We're here today to discuss the topic of patent litigation abuse, and in particular, the destructive tactics of so-called "patent trolls." This practice of patent trolling has hit businesses both big and small across all industries and is having a harmful effect on the economy.

Patent litigation abuse imposes high costs on American businesses. It wastes resources that could instead be utilized for research, development, job creation and economic growth. It undermines the innovation and creativity that patents are supposed to protect.

Patent assertion entities focus on buying and asserting patents rather than on developing or commercializing patented inventions.

Now, I want to make clear that licensing one's patents is not itself a bad thing. Inventors and patent owners, including universities, often are not in a position to commercialize their patented inventions, but they certainly have the right to protect their intellectual property against infringers.

Patent trolls, however, are entities that engage in abusive and deceptive tactics to assert poor-quality patents against businesses already utilizing technologies as common as wireless email, digital video, and internet. They use overly broad patents to allege infringement against companies that are simply engaging in normal business activities or have bought a technology, product or service from a vendor, many times buying that right off the shelf.

They send out intentionally evasive and misleading blanket demand letters and employ overly aggressive litigation practices to extort settlements. They frequently hide behind patent-holding

subsidiaries, affiliates, and shells of operating companies in order to escape scrutiny.

Frivolous patent lawsuit filings have increased over the years and they rarely have merit. But the extent of the problem is actually much worse because most cases do not reach merit judgment stage. Patent trolls strategically set their royalty demands below litigation costs to entice companies to settle rather than run the risk of expensive and risky patent litigation.

Many companies do not have that expertise or even the resources to litigate these cases. So, most of the time they have no choice but to submit to this patent extortion.

This, in turn, drives up the costs many times; then those costs are passed on to the consumer.

We will be hearing from three witnesses today about their experiences with, and the impact of, abusive patent litigation tactics. These witnesses represent businesses from different industries. Two of these companies have patent portfolios, while one company doesn't own patents.

Yet, their conclusion is the same—patent troll abuse is counterproductive to our Nation's economic growth.

The United States should remain at the forefront of technology, innovation, creativity. Patents and the U.S. patent system are a significant component of the American tradition of opportunity, invention and innovation. But we should not allow bad actors to bring the entire system down.

I have heard many Iowans express concerns about this problem and the need for Congress to take action. One example is a letter I just received coming from industry groups, representing a diverse mix of Iowa businesses, letters from the Iowa Gaming Association, the Iowa Bankers, Homebuilders of Iowa, Restaurant Association, Retail Federation, Communications Alliance, Grocery Industry Association, Lodging Association, Iowa Credit Union League and Iowa Realtors Association.

They urge Congress to address these abuses, stressing that—and I have a long quote—“meaningful reforms that make it difficult for patent trolls to continue their destructive business models by improving patent quality, streamlining litigation, enhancing discovery protections and pleading requirements, as well as increasing transparency will drastically reduce costs for Iowa businesses and entrepreneurs,” end of quote.

I would put these letters and several others, without objection, in the record.

[The information appears as submissions for the record.]

Chairman GRASSLEY. In the last Congress, the House passed an overwhelming vote on the Innovation Act, which the White House supported. And although we started working on a product here in the Senate Judiciary Committee, we were not able to proceed last year.

Almost everyone agrees this is a problem and a drag on our economy, but there are those concerned that certain proposals could undermine the ability of legitimate patent holders to enforce patent rights.

They maintain that recent Supreme Court decisions on pleading standards, fee shifting, and patent quality, as well as actions by

the Federal Trade Commission and the U.S. Patent and Trademark Office have largely taken care of all these issues, and comprehensive legislation, then, is unnecessary.

We will be hearing from representatives of two different stakeholder communities that believe certain proposals under consideration by Congress will harm legitimate patent holders.

I do not dispute that we should preserve patent rights and valid patent enforcement rules. We do need to strike the right balance, but Congress should act decisively if we want to alleviate the problems that are harming businesses both big and small. This will strengthen our patent system, benefit inventors, businesses and consumers. So, here we are, back at it again in this Congress.

Chairman Goodlatte of the House has reintroduced the Innovation Act. It has 9 Republican and 11 Democratic cosponsors. I look forward to working with Ranking Member Leahy, Senators Cornyn and Schumer, as well as with any other Judiciary Committee colleagues that want my attention on this issue, on passing meaningful legislation that will provide a strong deterrent to those who prey on innocent businesses.

I thank my witnesses who are here today to provide us with their valuable insights on patent litigation abuse and how they think Congress should address the issue.

[The prepared statement of Chairman Grassley appears as a submission for the record.]

Chairman GRASSLEY. Now it is my privilege to turn our attention to the Ranking Member, former Chairman of the Committee, Pat Leahy.

**OPENING STATEMENT OF HON. PATRICK J. LEAHY,  
A U.S. SENATOR FROM THE STATE OF VERMONT**

Senator LEAHY. Thank you very much, Mr. Chairman.

I am glad we are having this hearing and you have got an impressive group here.

It goes without saying that our patent system fuels our Nation's greatest innovations. It is one of the reasons I have worked so hard over the years to finally be able to pass the Leahy-Smith bill, one of the great bipartisan efforts of both the Senate and the House.

But we have seen some bad actors who have used the patent system in ways that detract from its purpose.

I am home several times a month and I talk to small businesses in Vermont who tell me they have been threatened with patent suits simply for using office equipment that they purchased off the shelf and it is a case of, do we fight it or we just pay a nuisance settlement. But the nuisance settlements are sometimes 3 months' to 4 months' profits.

Website owners have faced costly litigation for using basic software in e-commerce. So, what happens, instead of using patents to drive new creation, bad actors have held up Main Street businesses and innovative companies to extort financial settlements.

Last Congress, the Senate Judiciary Committee dedicated months of work to develop a bipartisan solution to such behavior. We wanted to promote transparency that holds the bad actors accountable. We wanted to curb misleading demand letters. We want-

ed to protect customers who are targeted simply for using a product when the manufacturer itself should defend the suit.

We also considered measures relating to patent litigation to address concerns. It is usually difficult to defend against frivolous patent suits, the extreme cost of discovery and the fact that today a patent holder can file a lawsuit with only minimal information. So, a defendant cannot even assess whether they are liable.

Many have raised concerns that, if taken too far, litigation reforms like those in the House-passed Innovation Act would harm legitimate patent holders when they enforce their rights in court.

I agree we must find a balance. Everybody knows the story of the man who developed a windshield wiper delay and had to fight for it until he was actually on his death bed before he was finally given the rights and the royalties for that, I think it amounted to just \$.02 or \$.03 a windshield wiper.

Now, the Committee was not able to complete its work, but we made significant progress and I hope we can build on that. I think we can look at what we did with the Leahy-Smith act. We did that because Senators and stakeholders, Senators of both parties, House Members of both parties, and stakeholders joined together to find solutions.

Abusive practices by bad actors are a discredit to our strong patent system. It is in no one's interest they continue.

So, the real world accounts we have heard from the New England Federal Credit Union, the Printing Industries of America, some of the businesses who will testify today illustrate the impact of abusive practices.

Mr. Chairman, I will put my whole statement in the record, but I think this is—Senator Cornyn and I worked on—I want Senator Cornyn to know I am talking about him.

Chairman GRASSLEY. Senator Cornyn.

Senator LEAHY. Senator Cornyn and I worked on—I was complimenting you, I was complimenting you. There will probably be a recall petition in Texas for you now because—

Senator CORNYN. You have my full attention.

Senator LEAHY. But Senator Cornyn and I worked hard on this—a number of us did.

I think we can find—and it is not going to be easy—we can find a solution, but the stakeholders themselves are going to have to work. Nobody is going to get everything they want, but we can get a better situation than what we have today.

Thank you, Mr. Chairman.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Chairman GRASSLEY. Thank you.

To accomplish something in the Senate, we have to have bipartisan support and I think the fact that the leadership of Senator Schumer—

Senator SCHUMER. Thank you for mentioning me.

Senator LEAHY. I was about to mention you next, but I was trying to be bipartisan, because, I mean, everybody hears about you every single day, every single hour.

[Laughter.]

Senator LEAHY. If I had half the fame the Senator from New York has.

Chairman GRASSLEY. You see what happens when you say one word, "Schumer."

[Laughter.]

Chairman GRASSLEY. Anyway, Senator Schumer and Senator Leahy do not always agree with Senator Cornyn and me and Senator Lee, but there is a good-faith effort to work on legislation that can be bipartisan. Senator Coons is involved in it, as well, because he has a bill of his own in, and maybe there are other bills in, as well.

Now, I would like to introduce the panel. We start with Brad Powers, general counsel, KINZE Manufacturing, Williamsburg, Iowa, and that is a leading manufacturer of agricultural machinery in the United States. KINZE happens to be quite a success story.

Jon Kinzenbaw, where the word KINZE comes from, started the company in 1956 with a few dollars in his pocket, a small bank loan and a knack for fixing farm machinery. Since then, Mr. Kinzenbaw has been named inventor of 19 patents for KINZE and the company itself owns many others. Today KINZE employs nearly 1,000 people in Iowa.

Prior to joining KINZE, Mr. Powers worked on IP litigation, licensing and portfolio management at the law firm of McKee, Voorhees and Sease. I understand your family is with you and I welcome them, assuming they get here.

I would like to introduce everybody before you testify.

We have Hans Sauer, deputy general counsel for intellectual property of the Biotechnology Industry Organization, a trade association representing over 1,100 biotechnology companies and research institutions. At BIO, Mr. Sauer advises boards of directors and various departments on patent and other IP matters. He has 20 years' professional in-house experience in that industry.

Steven Anderson is vice president and general counsel for Culver's Franchising System located in Prairie du Sac, Wisconsin, famous for its butter burgers and frozen custard. But I can suggest to you that I like the pork tenderloin better. Culver's has 538 restaurants, 22 of them in States—including over 30 locations in my home State of Iowa, and employs 20,000 people. Mr. Anderson at Culver's is responsible for overseeing all legal matters involving the corporation, including its intellectual property. Prior to Culver's, Mr. Anderson worked as a lawyer at Murphy Desmond.

Then, Dr. Michael Crum, vice president for—I did not mean to skip you. We will get to you in just a minute.

Dr. Crum, vice president for economic development and business engagement at Iowa State University. Dr. Crum has been a faculty member, College of Business, ISU, since 1980. He led the initiative to create the Office of Economic Development and Industry Relations, which helps organizations connect with research, technical, and business expertise of the university.

I suppose I have got to mention that you know Iowa State is in the big dance.

Senator LEAHY. Is that right?

Chairman GRASSLEY. Yes, that is right. And also the University of Northern Iowa and also the University of Iowa. So, let us get them all in.

We have Krish Gupta, senior vice president and deputy general counsel at EMC Corporation, located in Hopkinton, Massachusetts. EMC is the world's leading developer and provider of information infrastructure technology.

Mr. Gupta has 20 years' experience working in patent law. At EMC, he has worldwide responsibility for intellectual property law and technology licensing matters.

He oversees EMC's IT portfolio of over 5,100 U.S. patents, a portfolio that has earned that company recognition by the Wall Street Journal as the eighth most innovative IT company.

Mr. Powers, would you start out, please?

**STATEMENT OF BRAD POWERS, GENERAL COUNSEL,  
KINZE MANUFACTURING, INC., WILLIAMSBURG, IOWA**

Mr. POWERS. Thank you, Chairman. Chairman Grassley, Ranking Member Leahy, and Members of the Judiciary Committee, I am Brad Powers, general counsel of KINZE Manufacturing. On behalf of Jon and Marcia Kinzenbaw, KINZE Manufacturing, we are honored to have the opportunity to present testimony today about the profound negative impacts of abusive patent assertions on our company, innovation, and our economy.

KINZE Manufacturing is a leading manufacturer of planters in the United States. But it did not start that way. In 1956, Jon Kinzenbaw was 21 years old. With \$5 in his pocket, a small bank loan and a gift for fixing farm equipment, he opened a one-man welding shop in Victor, Iowa.

Jon has been named the inventor for 19 patents and our company holds many more. Jon's first patented invention was a plow that the farmer could adjust from the comfort of his tractor. Shortly thereafter, Jon invented a single-axle grain cart. Probably most notable was the rear-folding planter that Jon invented in 1975.

After that, the company grew quickly. KINZE today impacts Iowa factory workers, as well as farmers and small business owners throughout the country. KINZE is still privately held by the Kinzenbaw family and has employed up to 1,000 people in the State of Iowa, manufacturing high-quality agricultural equipment, providing farmers with the tools they need to help feed the world.

Our products are distributed through a network of independently owned dealers located in agricultural States throughout the country.

Now, KINZE is built on innovation and relies upon a strong and healthy patent system to continue to deliver that innovation to our farmers. KINZE has asserted its patents against our competitors. We have defended ourselves from allegations by competitors and we have taken three patent cases to trial.

Litigation is a part of the process and when that litigation is with merit, we accept this. Unfortunately, patent assertion entities take unfair advantage of the patent system and today threaten its health.

In 2012, KINZE experienced the impact of a patent assertion entity firsthand when Clear With Computers sued KINZE, alleging infringement of two of its patents.

Now, unlike KINZE, Clear With Computers does not employ any factory workers, it does not help American farmers, and it makes no products. What it does do is it makes lawsuits. It has filed over 60 patent cases since 2008.

Clear With Computers argued that KINZE's website violated the company's patents for an electronic proposal preparation system and an electronic proposal preparation system for selling computer equipment and copy machines.

In short, the complaint alleged that KINZE infringed these patents by allowing users to search for products and filter search results. This suit cost us many hours of time and significant legal fees before we were ultimately able to resolve the dispute.

Now, that experience has had a lasting impact on KINZE. Farmers rely on access to the latest technology to help them get more out of every acre while reducing their costs and protecting their soil. But KINZE's contract negotiations with suppliers and service providers now routinely include discussions of allocations of liability in the event of patent assertion.

These additional negotiations require resources and delay research, development and production of new products, slowing farmers' access to key technology. We are spending more time and effort developing contracts and have less time and effort to spend on developing the new inventions that will make farming more productive and efficient.

This allocation of IT liability also limits KINZE's ability to work with small companies. Smaller companies, because of their limited resources, are hesitant to provide indemnification for IT liability.

As a result, many smaller companies must decide whether to sign an agreement and accept the risk of defending baseless suits or not accept the work at all.

Now, in the beginning, patent assertion entities seemed to focus on web-based software. This is what KINZE saw with Clear With Computers. But unfortunately, the problem seems to be spreading beyond this limited domain.

By way of example, companies like Cisco Systems have seen this type of issue in areas such as electronic equipment. Now, as you can imagine, the planters used today have come a long way since Jon's first folding planter back in 1975. New technology lets farmers precisely target inputs, such as fertilizer and insecticide, reducing their costs and also benefiting our environment. This technology includes high-tech electronics, GPS location, and cutting-edge software.

As this technology moves to the field, it is no stretch of the imagination to believe the assertion entities will follow. The patent system, which was designed to foster innovation and bring the fruits of American creativity to everyone, has been thrown off balance by a few bad actors taking advantage of the high cost and uncertainty of litigation. Congress must step in to restore this balance and KINZE is ready and eager to be part of that effort.

Thank you, once again, for giving the Kinzenbaws and KINZE the opportunity to talk on this critical issue. As you consider the

legislation to address the very real threat posed by these patent assertion entities, we strongly encourage you to consult representatives from all industries, including agricultural manufacturing.

Improving our patent system is a vital and ongoing process and we thank you for your commitment to seeking the right balance between providing incentives for innovation and protecting American businesses from the high cost of illegitimate patent litigation.

Thank you.

[The prepared statement of Mr. Powers appears as a submission for the record.]

Chairman GRASSLEY. Thank you, Mr. Powers.

Mr. Sauer?

**STATEMENT OF HANS SAUER, PH.D., DEPUTY GENERAL COUNSEL FOR INTELLECTUAL PROPERTY, BIOTECHNOLOGY INDUSTRY ORGANIZATION, WASHINGTON, DC**

Mr. SAUER. Chairman Grassley, Ranking Member Leahy, and Members of the Committee, thank you, again, for the opportunity to testify here today. I am deputy general counsel for intellectual property at the Biotechnology Industry Organization, on whose behalf I testify today.

In my previous experience before BIO, I worked in a number of drug development programs at several biotech companies over the course of 20 years, first as a scientist and later as a patent lawyer. As is common in the biotech industry, the companies where I worked are now gone and the stroke and Parkinson's disease drug programs on which I worked failed after tens of millions of dollars of investment.

The majority of today's biotech companies face serious similar odds. Approximately 80 percent of BIO's member companies are small and have yet to bring a product to the market, and thus their research and development work is funded through massive private sector high-risk investment which, on average, amounts to more than \$2 billion, fully capitalized, for a new biotech medicine. This investment must be sustained over many years, sometimes decades.

Without strong, predictable and enforceable patents, rational investors would stop investing in these possible new therapies and take their money elsewhere. Patents are thus critical to the biotech business model, not to use them for litigation, but to secure the partnerships and investment which our companies need to develop new therapies, new crops, and new biofuels.

As Congress considers legislation to curb misuses of the patent system, it must ensure that innovative companies remain able to protect their own businesses against patent infringement by others. And in scrutinizing dubious practices by some patent holders, Congress should not overlook abuses by others who seek to undermine the patent system for similarly illegitimate reasons.

Unfortunately, misuse of the patent system against patent holders or licensees is also a real and growing problem. In particular, the PTO's inter partes review, IPR system, of administrative patent challenges is undermining the value of predictability of patent rights and long-held, investment-backed expectations. This is because this new system stacks the deck against patent owners in

ways Congress did not intend, leading to patent invalidation rates far exceeding those seen in district court litigation involving similar types of patents and similar grounds for challenges. These disproportionate kill rates invite unintended abuses and predatory practices.

For example, questionable entities are approaching biotech companies with threats of dragging their key patents into IPR proceedings in the patent office unless substantial payments are made. And recently, The New York Times reported on an investment scheme in which a hedge fund first takes a short position in the stock offer by a pharmaceutical company and then files an IPR challenge against that company's key patents to drive down the company's stock.

Biotech companies are vulnerable to such manipulation because they tend to be small, derive most of their revenue from only one or two products, and have just a handful of very valuable patents protecting these products.

The first company to be targeted by this hedge fund strategy was a small biotech company whose main product is an innovative treatment that helps patients with multiple sclerosis walk better. On the day that the IPR challenge was filed, this company lost more than \$150 million of market capitalization during the course of a single afternoon.

Such cynical strategies not only damage the value of companies working on cures, but hurt those who are eagerly waiting for such cures.

To prevent such abuse, Senators Coons, Durbin and Hirono have introduced S. 632, the STRONG Patents Act, which BIO supports, as a complement to other ongoing legislative considerations.

BIO encourages this Committee to develop a legislative package that will curb abusive patent practices, including the abuse of the IPR system, and to do so through a balanced and targeted approach.

We believe consensus can be achieved on a big range of issues, such as enhancing transparency of patent ownership and enforcement, curtailing unfair practices in the sending of demand letters, addressing how patents can be enforced against blameless end users and consumers of infringing products that were sold by others, and making the IPR system a more balanced one.

We remain concerned, however, that proposals for more systemic patent litigation changes presently sometimes lack this requisite balance.

Concepts such as enhanced pleading requirements, mandatory stays of merits discovery, and joinder of third parties for the purpose of collecting attorney fee awards are one-sided and go too far in restricting the ability of patent owners to enforce the patents.

The reintroduction of the Innovation Act in the House of Representatives relies on a dramatically shifted landscape, this debate over the right balance. Court decisions, conference changes in the judicial conference, PTO actions, and legislative and enforcement activities over the past few years have changed the dynamics and the result has been a substantial decline in such suits since this Committee last considered broad patent litigation reforms.

These changes reinforce the need to ensure that any additional changes do not swing the pendulum too far. We are optimistic that targeted and balanced solutions that address the practices of entities who unfairly enforce and who unfairly attack patents can be achieved.

Thank you for your attention and this opportunity. I look forward to answering your questions.

[The prepared statement of Mr. Sauer appears as a submission for the record.]

Chairman GRASSLEY. Thank you, Mr. Sauer.  
Mr. Anderson?

**STATEMENT OF STEVEN E. ANDERSON, VICE PRESIDENT AND  
GENERAL COUNSEL, CULVER FRANCHISING SYSTEM, INC.,  
PRAIRIE DU SAC, WISCONSIN**

Mr. ANDERSON. Chairman Grassley, Ranking Member Leahy, and Members of the Judiciary Committee, I am Steve Anderson, vice president and general counsel of Culver Franchising System, Inc.

Thank you for the opportunity to testify about the impact of abusive patent litigation practices on Culver's restaurants. Culver's has been a family business from the very beginning, opening its first restaurant in Sauk City, Wisconsin, in 1984, offering cooked-to-order butter burger hamburgers, with fresh frozen custard, that remain the hallmark to this day.

We currently have 538 restaurants, all but seven of which are franchised, serving our customers in 22 States, and those restaurants employ more than 20,000 people. We are experts in delivering great food with warm hospitality to guests. We are not experts in the fields of technology or patent law.

Restaurants in the U.S. account for an estimated \$709 billion in annual sales and serve 130 million hungry customers every day. Restaurants create meals and restaurants create jobs. However, most restaurants are small businesses, like our franchisees, and operate on very thin margins. We simply cannot afford to litigate patent infringement lawsuits and we lack the technical expertise to evaluate the merits of technology patent claims. This makes restaurants prime targets for patent trolls.

In the past few years, Culver's has been the recipient of two demand letters and one lawsuit from patent trolls. Each entity claimed to own the rights to basic technology used by many restaurants. In the lawsuit, it was a nutritional calculator on our website and in one demand letter it was the use of shortened lengths and time content in text messages. The third instance, another demand letter, I cannot address since the resolution of this demand included a confidentiality agreement that forbids further public discussion.

As general counsel for Culver's, there is nothing that I dread more than receiving a patent demand letter. They are broadly drafted form letters that offer nothing on the validity of the patent, exactly what the alleged violation may be, and whether or not we were actually infringing upon that patent. These trolls are happy to tell us that we are welcome to test their claims in litigation, knowing that a trial is cost prohibitive, with typical attorney's fees

of well over \$1 million, and too much of a burden for our business to undertake.

These trolls strategically offer an alternative of the licensing fee that is a mere \$250,000 to \$500,000. This demand amount has nothing to do with the value of the technology, but is instead offered as a less-expensive alternative to litigating. And although we do not know if the patent is valid, let alone whether we were indeed infringing upon it, this form of extortion is very effective and, in most cases, the recipient of this type of demand letter pays the demand.

Moreover, the money we spend dealing with these demands has to come from somewhere. We must divert it from other places in our business that might be productive and profitable and instead use it to placate trolls.

Patent trolls strategically target their demands against the end user, who is a customer of the technology and has limited knowledge of the technology or patents around it, rather than the producers and sellers of the technology. We cannot insure against such claims and we cannot rely on technology providers to indemnify us for the cost of these risks.

As a result, we have resorted to avoiding the use of technology wherever possible or only purchasing from large enough companies to protect us against patent claims.

Other small businesses suffer as we are not buying the services from them because we cannot afford to risk another patent demand letter.

When Culver's receives a troll demand letter, we have lost, because by simply receiving that letter, it will cost us a minimum of \$100,000 in legal fees and licensing payments. I know this from my own experiences, as well as from speaking to many other companies.

I urge you to consider every useful change that could increase transparency and shift the economic incentives away from trolls making baseless claims. In particular, we at Culver's urge you to consider three improvements.

First, we believe that increased demand letter transparency would be very effective. Second, clear and complete pleading standards for suits that are filed would have a positive effect in the same way that the transparent demand letters would. Third, it is crucial that the suits against the customer are stayed while suits against the manufacturer proceed.

With these changes, patent assertion entities would be required to be more open and target the appropriate parties first, which would put everybody on the same level playing field in terms of information and resources.

Thank you, once again. We urge Congress to pass meaningful reforms so that Culver's and other restaurants can spend more funds on jobs and services that benefit the American economy and less on payments to patent trolls.

[The prepared statement of Mr. Anderson appears as a submission for the record.]

Chairman GRASSLEY. Thank you, Mr. Anderson.  
Dr. Crum?

**STATEMENT OF MICHAEL R. CRUM, D.B.A., VICE PRESIDENT  
FOR ECONOMIC DEVELOPMENT AND BUSINESS ENGAGE-  
MENT, IOWA STATE UNIVERSITY, AMES, IOWA**

Dr. CRUM. Thank you, Chairman Grassley, Ranking Member Leahy, and Members of the Judiciary Committee, for this opportunity to testify on such an important topic.

I am Mike Crum and I serve as vice president for economic development and business engagement at Iowa State University.

On behalf of Iowa State, I am pleased to offer this testimony, which is endorsed by the six major higher education associations and councils that collectively represent the majority of our Nation's research universities.

Universities depend on the U.S. patent system to protect the legitimate intellectual property rights of individual university inventors and large companies alike. Patents provide universities with the means to ensure that the many discoveries resulting from our research are transferred to the private sector where those discoveries can be turned into innovative products and processes that power our economy, create jobs, and improve our quality of life.

At my home institution of Iowa State University, technology transfer has led to numerous and diverse technologies that have had a major impact locally, nationally, and globally.

A few of the more prominent examples include a critical algorithm for the fax machine, the vaccine for the PED virus that has really threatened our State's hog industry, the patented lead-free solder that has been licensed by some 60 companies globally, with roughly 70 percent of the electronics worldwide containing this solder, and hybrid corn which just this year was named by the Association of University Technology Managers as one of the 40 most important inventions by a university.

Iowa State pulls in over \$300 million annually in external funding to support the research that is conducted by our students and faculty. University economic development units provide business and technical assistance to more than 4,000 Iowa companies each year. One of our centers alone generated an impact totaling over \$1.7 billion, with more than 25,000 jobs added or retained over the last 5 years.

Between 2010 and 2014, the three State of Iowa regent universities, the University of Northern Iowa, Iowa State and University of Iowa, demonstrated that they do more than just being good at basketball, as the Chairman noted.

During that 5-year period, we generated more than 1,000 invention disclosures, 767 patent applications, and we were responsible for the execution of 472 licenses and options, including 183 to companies in Iowa.

Additionally, our faculty and students launched 190 start-ups supported by over \$24 million in outside funding.

The ability of our university's technology transfer operations to achieve the types and magnitudes of societal benefits that I just described is critically dependent on a strong patent system. Without robust patent protections, licensees and venture capitalists will not take on the significant risks associated with investing in and developing our inventions. Strong patents are particularly essential for

the small, often undercapitalized start-up companies built upon university discoveries.

Indeed, patents are often the most critical assets of these start-ups and small businesses. To be able to gain a foothold in often well-developed markets, such companies must be able to assert their patent rights effectively.

It is also crucially important for universities and their licensees to be protected from potentially crippling abusive patent litigation practices. We recognize that abuse of patent litigation practices are a corrosive assault on the Nation's patent system and must be forcefully countered.

We also believe strongly, however, that any changes to the patent system should be scrutinized carefully for their unintended and undesirable consequences.

Many of the proposed changes do have an adverse impact on the ability of patent holders to protect their intellectual property rights. For instance, mandatory fee shifting and involuntary joinders are especially troubling to the university community. These provisions would make the legitimate defense of patent rights excessively expensive and risky. They would impede the ability of universities to forge mutually beneficial agreements with potential licensees and venture capitalists.

Proposals for heightened pleading, discovery limitations and increased disclosure would also, in our opinion, do more harm than good. Heightened pleading would add unnecessarily to the burden of filing infringement cases. Discovery limitations would preclude cases where broader discovery would lead to more efficient resolution of those cases, and new disclosure requirements would require information that could violate confidentiality agreements, thereby chilling venture capital investments.

In closing, universities recognize that abusive patent practices are real and they are harmful. We contend that an approach involving carefully targeted legislation developed in the context of the changing landscape created by recent judicial and administrative actions can effectively combat abusive patent practices while maintaining the capacity of our robust patent system.

Again, we appreciate this opportunity today to present our perspective and we sincerely want to continue to work with the Committee and Congress in constructing legislation that supports the innovation and economic competitiveness for the benefit of the Nation and its citizens.

Thank you.

[The prepared statement of Dr. Crum appears as a submission for the record.]

Chairman GRASSLEY. Thank you, Dr. Crum.

Mr. Gupta?

**STATEMENT OF KRISH GUPTA, SENIOR VICE PRESIDENT AND DEPUTY GENERAL COUNSEL, EMC CORPORATION, HOPKINTON, MASSACHUSETTS**

Mr. GUPTA. Chairman Grassley, Ranking Member Leahy, and Members of the Committee, I am Krish Gupta, senior vice president and deputy general counsel for EMC Corporation. I am hon-

ored to testify today on the critical need for patent litigation reform.

EMC is a global leader in cloud computing and has a keen interest in a strong and balanced patent system that protects and promotes innovation and one that cannot be exploited by abusive litigation tactics.

We look to the U.S. patent system to protect our innovations and the jobs that result from them. EMC and its affiliates hold more than 9,000 issued U.S. patents and patent applications.

At EMC, I have worldwide responsibility for IP law, including patent litigation. In my 20 years in this field, I have witnessed firsthand how our patent system has undergone transformation, but not always for the better.

Abusive patent litigation has swept our country, diverting billions of dollars from economic growth and innovation to battling frivolous suits filed by abusive litigants.

Since 2005, EMC has been sued by patent assertion entities, or PAEs, more than 35 times and has never been found to have infringed. A typical PAE suit involves a shell company with secret backers created solely to file suits. The complaint is often vague and provides little information about the specific infringement allegations.

Shortly thereafter, PAEs try to pressure us into settlement by demanding thousands of documents and emails during discovery, most of which are irrelevant to the suit and costly to produce.

As a matter of principle, we do not settle frivolous suits. Yet, defending those suits has been extremely expensive, costing over \$10 million in 2014 alone, and this does not include the substantial disruption to our business, requiring our employees to shift their attention from designing new products and growing the business to sitting in depositions or going to court. And EMC is not alone in this regard.

Most impartial observers agree abusive patent litigation harms innovation and the economy as a whole. In 2014, more than 5,000 new patent lawsuits were filed, the third highest count ever.

Some have suggested that recent Supreme Court decisions and administrative processes at the PTO either reduce or negate the need for Congress to act.

As a practitioner who spends most of his time on patent litigation matters, I disagree. Only Congress can comprehensively address abusive patent litigation practices.

In *Highmark* and *Octane*, the Supreme Court loosened the standard by which district courts have valued what qualifies as an exceptional case for the award of attorney's fees while granting them greater discretion to make this determination. However, *Highmark* and *Octane* have had no meaningful impact.

In the first 9 months since these decisions, motions for fees have been granted only 4 percent more often than they were in the 2 years before these cases and at least one highly experienced and respected judge with a large patent caseload has stated that he does not see *Octane* changing what he would have determined was appropriate for an award of attorney's fees.

We, therefore, support legislation that includes a balanced fee-shifting provision with meaningful fee recovery. These provisions

would discourage the filing of frivolous suits and the use of abusive litigation tactics by imposing financial accountability.

In *Iqbal* and *Twombly*, the Supreme Court addressed the level of specificity required in a complaint. With the Judicial Conference recommending the elimination of Form 18, it is expected that *Iqbal* and *Twombly* will apply to patent pleadings, as well. However, these cases do not set forth bright-line rules for patent litigation, which is a specialized area of the law.

Without clear standards in patent cases, many courts will undoubtedly continue to allow vague pleadings. Furthermore, uniform and clear pleading standards would impose no new burden on good-faith plaintiffs who will have already conducted proper due diligence.

We also support legislation that would reasonably limit discovery before claim construction to ensure that it is focused on issues that actually matter. Further, requiring the requesting party to cover the cost of unnecessary discovery would limit the extent to which it can be used as a bargaining chip to extort a settlement.

These three areas, fee shifting with accountability, pleading specificity and discovery, require legislative intervention. The Judiciary cannot bring about the prompt solution that Congress can structure to ensure consistency and predictability.

EMC believes legislation must be enacted to restore accountability and balance back into the world's premier patent system and to alleviate the unfair burdens that PAEs are able to put on hardworking companies that are the lifeblood of our economy.

Thank you and I look forward to your questions.

[The prepared statement of Mr. Gupta appears as a submission for the record.]

Chairman GRASSLEY. Thank you, Mr. Gupta.

We will have 5-minute rounds for questions. I would like to first start with you, Mr. Gupta and Mr. Powers. I will not repeat the number of patents that you have said your company has.

You have just heard two of the witnesses express concerns about legislative proposals to strengthen pleading, discovery and allow for more fee shifting.

Do you believe that these provisions will diminish the value of patents and harm the ability of patent holders to enforce their patent rights and get investment backing and are these concerns justified?

I will start with you, Mr. Gupta.

Mr. GUPTA. Thank you for the question, Senator. No, I do not believe that these concerns are justified. Patent holders who bring meritorious actions should not be concerned with these provisions. The real effect will be felt by those shell companies who buy patents with secret backers and file vague complaints and then attempt to use the unbalanced and asymmetric discovery burdens to extort settlements.

Pleading specificity, for an example, can only help focus a case early on and with, at least, some clear understanding of what is being accused of infringement and why. In fact, I think specific pleadings will actually help plaintiffs in that we will eliminate a lot of motion practice in terms of specificity of complaints as to whether they satisfy *Iqbal* and *Twombly*.

In discovery, I believe that focused discovery helps both plaintiffs and defendants. Defendants also, if they—if there are some well-heeled defendants who might try to bury plaintiffs with unnecessary and burdensome discovery, some sort of rational discovery, phased discovery proposition is beneficial to both. And the proposals that I have seen also include judicial flexibility, so the judges have discretion.

And last, without some financial accountability, where the risk is not entirely shifted onto defendants, we cannot target or reduce the abuses that we feel in the system and we need accountability in the form of fee shifting for the prevailing party, with an ability to collect those fees.

Chairman GRASSLEY. For your answer, Mr. Powers, do not be repetitive of him, but anything you want to add.

Mr. POWERS. Thank you, Chairman Grassley. No, it would not impact our ability to assert our patents and we largely echo what Mr. Gupta with EMC said.

What I would add is that having done these types of investigations myself both in my capacity at KINZE and as a patent litigator, this is just part of your normal homework. If you are filing a patent lawsuit, you should have done everything you can to obtain the accused infringing product, look at it, develop the claim charts and figure out what really is the case.

So, this should be Patents 101.

Chairman GRASSLEY. For Mr. Gupta, critics of patent reform argue that recent Supreme Court decisions on pleadings of patent fee awards and patent quality have substantially reduced the need for congressional action on abusive patents.

Do you believe the Supreme Court decisions are adequate in terms of deterring abusive and deceptive patent litigation tactics?

Mr. GUPTA. I do not. But I do believe that these Supreme Court decisions have helped clarify certain areas of patent law. None of these decisions go to the core issues of patent litigation abuse. None of these decisions require disclosure of claims that are being asserted, what products are being accused of infringement.

They do not require that the theory of infringement be explained in any way to the defendant. There is nothing in these decisions that reduces the burden and expense of discovery. And these decisions do not make fee shifting the default and certainly there is no mechanism provided by these decisions to ensure that fees can be collected.

Chairman GRASSLEY. And then my last question will have to be for Mr. Anderson and Mr. Powers. I would like to explore in more detail the cost of patent troll abuse.

Can you provide some perspective as to the amount of resources your companies have had to devote to fighting off frivolous patent infringement? Has it changed the way you do business? Has there been an impact on the innovative research or development or expansion? Is there a downstream impact, particularly, obviously, on consumers?

Start with you, Mr. Anderson and probably ask for short answers because my time is about up. Go ahead.

Mr. ANDERSON. In terms of the financial impact, we spend hundreds of thousands of dollars and for us that is a big number. I am

hearing some big numbers at the table here, but for us that is a large number.

But what is more troubling is the fact that it really affects the way in which we do business.

Our business as a franchiser is there to support the franchisees, drive business to their businesses and help them succeed.

We are shying away from technology because we cannot afford to play in that world. So, we are not engaging in the technology that our guests want, our franchisees want. When we do look at technology, we are only looking at that from larger companies.

We would love to give the business to the small entrepreneur, but those small entrepreneurs cannot fight the fight. So, we really have backed off the technology and when we do, it has gone to the larger provider.

Chairman GRASSLEY. Mr. Powers?

Mr. POWERS. Thank you, Chairman. With KINZE, there has been a financial cost, but probably the more disturbing cost is, like Mr. Anderson said, the cost on small businesses, their inability to go ahead and play in the big space and be able to bring their technology to market through manufacturers like KINZE.

As a result, the small business suffers, the farmers suffer, and ultimately we all suffer.

Thank you.

Chairman GRASSLEY. Now, I go to Senator Leahy and then after Senator Leahy will be Senator Hatch. I am going to step out just for a minute.

Senator LEAHY. Thank you, Mr. Chairman.

Mr. Anderson, listening to what you are saying, you sound almost exactly like what I have heard from a lot of businesses and people in my own State of Vermont, people's opinion I respect greatly.

There is one bipartisan solution that Senator Lee and I worked on and that made clear that it is a deceptive trade practice to send misleading demand letters.

We have also authored a customer stay provision. It helps customers who are targeted simply for using a product they purchased off the shelf. And we got broad bipartisan consensus, Senator Lee and I did, for those two provisions.

I think they are essential components of a comprehensive patent troll bill.

Would these solutions be important in what work you do, the customer stay provision and the deceptive trade practice provision?

Mr. ANDERSON. Absolutely. They would be a step in the right direction.

Senator LEAHY. Mr. Powers, I was looking over—preparing for this. There is a KINZE tractor dealership in St. Albans, Vermont. That is up in the northwest corner of our State. It is a heavy agriculture area. But I also know that they are susceptible to being targeted by patent trolls.

Do you agree with Mr. Anderson that the provisions, just to begin with, there will be other provisions, of course, but the ones that Senator Lee and I worked on, would be helpful?

Mr. POWERS. Thank you for the question, Senator. KINZE believes that all measures taken to help stop trolls are good and we welcome them.

Specifically regarding the customer stay provision, I believe is what you asked.

Senator LEAHY. Yes.

Mr. POWERS. We also support the customer stay provision.

Senator LEAHY. Thank you. I am thinking of the restaurants and all. We have not just franchises, but small operations, coffee shops, sandwich stores, and one of the things to get people in is to provide Wi-Fi and stuff like that, and then suddenly they get a demand letter, well, there is this component of it, they get a demand letter. And the question is do they just turn it off or pay the demand letter?

I think some of the people making these demands do not realize you are dealing with individuals—not huge corporations, you are dealing with individuals who work every day to try to make a living.

Mr. Sauer, you raised concerns about abuses of the post-grant review programs that were in the America Invents Act. Those were created to improve patent quality.

I am troubled by some of the behavior you have described, and I was reading your testimony earlier. But we have to have AIA programs as a strong tool for patents to be reviewed by experts.

What do you see as most important of the things you suggested? And can you reassure us it would not undermine the efficacy of the AIA programs?

Mr. SAUER. Yes, Senator. Thank you for that question. The AIA programs, as you rightly point out, were intended as a tool for patent quality enhancement and as a faster and more affordable alternative to district court litigation.

So, as such, these proceedings were created as something that the Patent Office had never done before. Before, they had always examined patents and now they are adjudicating disputes where two parties come in, present their case, and the administrative patent judges, just like judges in district court, are supposed to decide who is right and who is wrong.

And because it is such a trial-like proceeding, we feel strongly that these trials in the Patent Office should have some of the same procedural protections and have the same legal standards that otherwise apply in district court.

So, for example, our particular concerns relate to the way patent claims are interpreted in these proceedings, that patent claims should be interpreted the same way whether it is in district court or in the Patent Office.

The ability to amend claims, which was granted by the AIA, should be more meaningful, and the Patent Office, just as a matter of course, does not allow them really. In two and a half thousand proceedings that have been requested, the Patent Office permitted amendments maybe three times.

So, there are a couple of ways in which we think these proceedings could be calibrated for some of the protections that are available in district court, because they are like litigation, and that will encourage much more confidence in these proceedings.

Senator LEAHY. Thank you.

Mr. Gupta, do you agree?

Mr. GUPTA. I believe that the IPR proceedings and the post-grant proceedings in general have been very successful. We have filed 19 IPR petitions ourselves and seven of our patents have been challenged using these petitions, and we think that this mechanism has been a very successful mechanism.

People have questioned the high success rate, but what is not typically apparent is that a petitioner makes a very careful decision before they choose to file an IPR petition because of the collateral estoppel effect. And unless there is slam-dunk prior art, people usually do not file petitions.

And it is no surprise that with that strength of prior art, when it goes before the board, that the success rate is high.

Senator LEAHY. Thank you very much. Thank you, Mr. Chairman.

Chairman GRASSLEY. Thank you, Senator Leahy.

Senator Hatch.

Senator HATCH. Thank you, Mr. Chairman.

I believe everyone here agrees it is way past time to do something about patent trolls and to combat them. Last Congress, we began the legislative process to fix this mess and I am optimistic that we will pass patent troll legislation this year.

I have been talking about the problem of patent trolls since 2005 when Senator Leahy and I first began work on the now America Invents Act.

Patent trolls are an unnecessary drain on our economy and our Nation's innovation. An effective legislative approach will include many elements, but in my mind, two are absolutely essential.

First, mandatory fee shifting is the best way to discourage patent litigation and abusive cases which should never have been brought, or defended in the first instance. Fee shifting should not be left primarily to the judge's discretion.

Second, any viable legislation must ensure that those who successfully defend against abusive patent litigation and are awarded fees actually will get paid.

There must be a mechanism to ensure the recovery of fees will be possible even against judgment-proof shell corporations or companies.

Mr. Chairman, whatever we do, it must work and we must not support a bill that fails to provide an effective deterrent against patent trolls at all stages of the litigation.

Now, let me just ask you, Mr. Gupta, a question. Do you agree the Supreme Court's decision in *Highmark* and *Octane Fitness* did nothing to ensure the recovery of fee awards from insolvent shell corporations?

Mr. GUPTA. Yes, Senator. Thank you for the question. I do agree. *Highmark* and *Octane* provide no remedy in terms of recovery of fees.

Senator HATCH. When I introduced the Patent Litigation Integrity Act in October 2013, the general counsel of your company wrote to me and said, quote, "By requiring a party to demonstrate that they or a third party have the ability to pay potential fees or explain why they wouldn't, a bonding or similar accountability pro-

vision ensures that the fee-shifting provision has the intended effect of curbing frivolous and baseless patent litigation,” unquote.

Now, I am sure you agree with me that we need to curb frivolous and baseless patent litigation, but do you also agree with me that having an effective recovery-of-award mechanism is critical to achieving this goal?

Mr. GUPTA. Yes, Senator. I absolutely agree with that. And I think it is necessary because, as we found out, these shell companies are very creative about how they game the system and we absolutely need a recovery mechanism to ensure that when fees are shifted they can be recovered.

Senator HATCH. Yes. They sue and then run.

Mr. GUPTA. Yes.

Senator HATCH. And leave you holding the bag after countless expenses.

I am concerned about patent quality. I want to ensure that the U.S. Patent and Trademark Office issues the highest quality patents possible. Now, do you believe that allowing the USPTO to apply the broadest reasonable interpretation to patent claims allows them the greatest ability to get rid of bad patents?

Mr. GUPTA. I do agree with that, Senator. And the standard was recently reviewed by the Federal circuit in *Kaz USA* and the Federal circuit agreed that that was the proper standard. It is the standard that the Patent Office has been using for hundreds of years. That has been used for re-examinations and reissues and is indeed the standard that ought to be applied.

And this is the agency that we think has the highest competence when it comes to granting of patents. If they want to revisit or re-examine their work, it is only fair that they be able to do it with the same standard that they used in the first place.

Senator HATCH. Thank you, sir.

Now, Mr. Sauer, you said there has been significant judicial developments in fee shifting that will impact fee awards. Yet Judge Rodney Gilstrap of the Eastern District of Texas, the judge who oversees the most patent cases in the country, said last week that the Supreme Court’s ruling in *Octane Fitness* would not significantly alter the standard he uses for deciding whether to grant fees under Section 285 of the Patent Act.

Why should we expect significant changes in the application of Section 285 when the judge who oversees the most patent cases in the country has said that *Octane Fitness* will not change the calculus for him or his colleagues?

Mr. SAUER. Senator, yes. Far be it for me to comment on Judge Gilstrap’s pronouncement. What we are aware of is, and it is very early in the process, right? So preliminary numbers did show that there was, after the *Octane Fitness* case, an uptick both in motions that were brought for key fee recovery and for the months following what seemed like an increased grant rate, actually, a significantly higher grant rate of these motions.

Whether or not that is currently tapering off, I think, is subject to debate. Everybody in the community is closely watching this. So, whether or not it will lead to more fee awards I think is a little bit up in the air, but we do see a leveling off, I think at this point that should, at least be taken into account by this Committee.

These cases are widely viewed as very significant and I am kind of surprised that now that they have been done and decided after so much briefing, their significance is being downplayed by those who ask for more mandatory fee shifting and less judicial discretion.

Senator HATCH. The Chairman has allowed me to ask one further question, Mr. Sauer. You mentioned in your written testimony that the joinder provision in the House's Innovation Act would create additional encumbrances for patent-owning innovators. How would it do this?

Mr. SAUER. We are very concerned about the joinder provisions. Senator, yes, it would create encumbrances as introduced in the House in the sense that that provision works by first sending out notices, menacing notices, if you will, at least, so they will be perceived by those business partners of the patentee who could potentially be put on the hook after the litigation is over for their fee award.

So, that is a big concern that is of particular concern to biotech because we work in an ecosystem of licensors, licensees, small businesses, universities. There is a lot of concern about provisions that work after the fact, if you will, but that are premised on notice that is being sent out at the beginning of the lawsuit.

People are very worried about interference with ongoing business relationships that will come from that. And if the target is to target shell companies, we do not think everybody should be put through the process.

Senator HATCH. Thank you. Thank you, Mr. Chairman.

Chairman GRASSLEY. Senator Feinstein.

Senator FEINSTEIN. Thank you very much, Mr. Chairman.

Mr. Anderson, I thought, well stated the problem with demand letters. Mr. Anderson, I just quickly want to read your written statement: "These types of settlement demands can be crippling to small business, but the attorney's fees required to fight the lawsuit might be 10 times as much. So, in most cases, defendants will choose to settle regardless of the extent of their use or the merits of the patent claim."

That is a bingo moment. I found that out firsthand with the ADA—the Disabilities Act, the Americans with Disabilities.

I am in Riverside County and I talked to a group of the Chamber of Commerce, which is a lot of small businesses and many minority businesses, and a group came up to me and said there were these attorneys that sent them demand letters if their "No Parking" sign was in the wrong place, if a trash barrel obstructed part of an entry, whatever it was, and it said that for \$10,000, we will not sue.

A lot of them were struggling to pay that. Well, we took a good look at it and the result was that the State legislature passed a bill, Senate Bill 1186, Governor Brown signed it, and essentially it required demand letters to contain specificity as to the wrong alleged.

It prohibited such letters from containing a request to demand money or an offer or agreement to accept money, and, third, prohibiting such letters from stating any specific potential monetary liability.

Do you believe something like that should be in a Federal law?  
 Mr. ANDERSON. Thank you, Senator. I certainly do, and we have had similar experiences to what you expressed and the first demand letter that we received we brought to our ad agency, who is responsible for the technology.

The demand letter was written so broadly that they did not know what to do with it and the quote was, "This is an amazingly broad letter and we have no idea what they are asserting."

So, it is a problem and it needs to be fixed.

Senator FEINSTEIN. Thank you.

Does any witness disagree with Mr. Anderson's statement?

[No response.]

Senator FEINSTEIN. There being none, for the record. So, I thank you. I would like to move on.

I am sympathetic to the plight of businesses who suffer from abusive discovery requests from patent trolls and recognize that this often creates a one-sided situation and a pressure to settle a case.

As we all know, sometimes discovery is necessary in a legitimate lawsuit. But, does any witness disagree that discovery can be needed for a purpose, such as establishing that the court has jurisdiction over the case and the parties? Does anyone disagree with that?

[No response.]

Senator FEINSTEIN. Good. How would witnesses, you, propose to structure appropriate discovery limitations that make sure the need for legitimate actors to enforce lawful patents is protected? Who would like to begin?

Mr. Gupta?

Mr. GUPTA. Thank you, Senator, for that question. Clearly, in patent litigation there is a sequence to how certain things happen.

A very important aspect of patent litigation is the Markman hearing. And in a Markman hearing, a plaintiff and the defendant will submit their proposals around what an invention actually means and the judge will construe those claims.

What that does is early on you get to focus the case, if the Markman is done early. So, the plaintiffs know what claims they want to proceed with. The defendants then know what type of prior art they need to look for, and often the defendants also then know and the plaintiffs know what products can potentially be accused of infringement.

Focusing discovery, for example, in a way, before Markman, to eliminate any unnecessary and burdensome discovery on things such as sales to customers or licensing agreements with customers or the number of customers, documents and product specifications for pretty much every product that a particular company can offer.

It is wasteful and can be addressed in ways by phasing discovery and also by shifting some of the discovery burden so that core discovery can be paid for by the party that is required to respond, but non-core discovery is paid by the party requesting such discovery.

Senator FEINSTEIN. That is actually very helpful.

Does anyone have a comment to make on that? Mr. Sauer, you raised your hand.

Mr. SAUER. Thank you, Senator. Yes. I actually agree with a lot of what Mr. Gupta says. Our concern really is that the bill, at least

the one that we see introduced in the House, H.R. 9, does not do that.

The bill, H.R. 9, would require in some way to prospectively limit discovery to only what is necessary for claim construction at a time when the parties do not know what is going to be necessary for claim construction.

Senator FEINSTEIN. You like what Mr. Gupta said.

Mr. SAUER. I like what Mr. Gupta said, that there should be a nationally uniform process indeed for the development of information on both sides of the case to make clear what the party's theory of the case is, what evidence backs up the party's theory of the case, and that should lead to a Markman hearing.

I encourage the Committee to look through local patent rules that are in use in a number of district courts that are actually able to get to this claim construction hearing with a bilateral process where parties disclose to each other the information that backs up their contentions and get to a Markman hearing with 9 to 12 months uniformly in this court.

I think that would really help and it would curb the unfocused discovery that is a problem in a number of district courts.

Senator FEINSTEIN. Does anybody disagree with what Mr. Gupta or Mr. Sauer have just said?

[No response.]

Senator FEINSTEIN. Good. I will move on to universities. In the last patent bill—

Chairman GRASSLEY. This will have to be the last question.

Senator FEINSTEIN. I will be fast. Thank you, Mr. Chairman.

The problem always comes in patent revision between universities and small inventors being on one side and the others—the bio, pharma, tech on the other side. It is very hard for me.

I come from a State with a very large and well-known public university system. It leads universities nationwide in the number of patents each year and a substantial part of its revenue is derived from patents. And we graduate thousands of engineers every year.

How would you prevent that from happening? And what is the importance of strong patent protection for universities and small inventors? Mr. Crum?

Dr. CRUM. Yes. I am not sure I have an answer for that. That is part of the balance that needs to be struck.

Senator FEINSTEIN. Right.

Dr. CRUM. And as I hear the conversation around the table, as we talk to small companies that are licensing our technology, just the uncertainty, the risk that they may incur in the loser paying, for example, even if they are convinced that they have a strong case, one loss like that can be devastating to them financially and we are just concerned that it may curb and present a significant barrier to their access to judicial review of those.

Senator FEINSTEIN. I think my time is up. Thank you very much.

Chairman GRASSLEY. I have been kind of liberal on the time. I think we are going to have to stick to 5 minutes, if it does not irritate anybody. Otherwise, we will not get done today.

Senator Cornyn.

Senator CORNYN. Thank you, Mr. Chairman. I never thought of you as liberal.

[Laughter.]

Senator CORNYN. But thank you for your generosity. Thank you for having this hearing. This is an important part of the table setting, I think, for consideration of patent reform legislation.

We got close last year, but it did not happen. So, I am optimistic that we will be able to make progress this year and if there is one word that I guess I have heard all of you use, it is balance.

We need to recognize there are certainly legitimate rights that should be litigated and decided in court, but on the other hand, there is also legal extortion, shaking down people who cannot defend themselves and using that money then to file other frivolous litigation.

Last Congress, I introduced the Patent Abuse Reduction Act, which has several core components, many of which you have talked about already. It requires plaintiffs to plead the substance of their claim; puts lawsuit beneficiaries on the hook for abusive patent litigation from which they profit; and brings fairness to the discovery process; and, finally, shifts responsibility for litigation abuse to the abuser.

I personally am of the view that unless we have an adequate fee-shifting mechanism in the legislation, it is not worth doing. So, I feel very strongly about that.

Mr. Sauer, I think you mentioned some concern about the fee-shifting provision. Perhaps you are referring to the House legislation which has a presumption, and I wonder if you would have any kinder remarks to make about a system that was not presumptive.

Mr. SAUER. I believe I would. And so, to clarify for the Committee, our concern, as it was expressed by our smaller members, because we also have larger members who are more accepting of a fee-shifting provision, our concern was that the House bill would establish what, in the view of our smaller members, would be a true loser pays system, where under the normal American system, ordinarily each pays their own and it is up to the winner to explain why the loser should have to pay.

The House bill would flip that burden and the burden would be on the loser to explain why they should not have to pay.

As we see it, your bill, Senator Cornyn, especially after it went through negotiations in this Committee with staff during the last Congress, that work product we understand was trending away from these concerns that we have expressed in our testimony and we would be interested to see how it develops further, if we had had an opportunity. Maybe we will have one to take it back up.

Senator CORNYN. Well, that remains a work in progress here on this Committee and we are working closely with the Chairman and the Ranking Member and Senator Schumer, in particular, but really all Members of the Committee, to try to address that.

I know there have been some—we have not talked very much about the importance of a pleading requirement. Mr. Gupta, maybe you can address this. The legislation that we have filed requires that the claimant or the plaintiff actually explain in the lawsuit what their patent is and how it got infringed.

Do you think that is an unreasonable thing to ask and what is the problem of the status quo?

Mr. GUPTA. Thank you, Senator. I certainly do not think that is a problem. In fact, in meritorious actions that are initiated by patent holders, there is enough diligence that is done prior to the action being filed where that information should be available to the patent holder in the first place.

Businesses, lawyers, reputable businesses, they go through a review process before any patent action is filed to ensure that they have complied with the Rule 11 obligations, their obligations to ensure that they are not asserting frivolous claims.

And so requiring a basic amount of information about the claims that are allegedly infringed, how the infringement occurs and the claims that are being asserted is a very low burden on good faith plaintiffs.

Senator CORNYN. Thank you. I was struck—and this was something Mr. Sauer said about the post-grant review process, but a case in particular where a hedge fund shorted that company's stock before filing a claim.

I guess if the claim is successful, then the patent should have never been issued. Then they would be vindicated. But I just wonder if the same potential for abuse exists in the litigation context. I would imagine it does.

So, what would happen, for example, Mr. Powers, to your company if a hedge fund decided to file a patent infringement lawsuit and then shorted your stock? How would you see that and what would that do to your ability to function?

Mr. POWERS. Thank you for the question, Senator. Being a privately held company, that is not a concern that we have to deal with.

Senator CORNYN. Okay. Let me ask Mr. Anderson. You are a publicly held company, are you not, sir?

Mr. ANDERSON. No, we are not. We are private.

Senator CORNYN. Well, imagine, with me.

[Laughter.]

Senator CORNYN. Imagine, Mr. Anderson, you are a publicly held company and a hedge fund shorts your stock and then generates a patent infringement lawsuit against you. What would go through your mind? What sort of pressures would that bring to bear on a publicly held company to settle that lawsuit even though it was a frivolous lawsuit? I realize it is a hypothetical.

Mr. ANDERSON. I cannot really answer that, Senator.

Senator CORNYN. I imagine it would be pretty devastating.

Mr. Sauer?

Mr. SAUER. A very quick observation. Yes. So, I think settlement pressures can be terrible, I think, especially for smaller businesses.

The reason why I believe the stock markets might react differently is that know statistically when patents are challenged in district courts on the same grounds that are available in the Patent Office IPR proceeding, they go down approximately 45 percent of the time in district court. That is the invalidation rate for these reasons: patent and written publication to have prior art.

In IPR proceedings, the patents go down approximately 80 percent of the time or only 20 percent come out. So, we believe that the markets react probably more strongly to IPR proceedings because they just see these statistics with higher kill rates than what

is available in the district courts, and it is great for people who bet against patents when they have a proceeding like that where the statistics bear that out.

Senator CORNYN. Mr. Chairman, thank you for your generosity in terms of the time. I would just say, I think we need to also recognize that when frivolous patent litigation is filed, it exacts a cost not just on the company, the defendant, and extracts perhaps a nuisance settlement, it also can have a dramatic impact on the shareholders of that publicly held company and basically constitute legal extortion and, of course, have much broader impact on the people who own the shares in that company.

Thank you.

Chairman GRASSLEY. Now, Senator Schumer.

I am going to ask Senator Lee if he will Chair while I take a couple appointments in my office.

Senator Schumer.

Senator SCHUMER. Thank you, Mr. Chairman.

First, I would like to congratulate Mr. Anderson on his public offering. I hope your stock does very well.

[Laughter.]

Senator SCHUMER. I want to thank Senator Cornyn for working closely with me in trying to come up with a bipartisan solution, and Senators Grassley and Leahy for helping us put that all together. We are feeling pretty good about it.

And it is not the first time that we are coming together to discuss the problem of patent trolls. I am sure it will not be the last.

Last spring, as you know, our Committee spent several months in heated and bipartisan negotiations. But our goal remains the same and that would help us club the trolls once and for all without harming legitimate inventors and innovators who rely on a robust patent system.

Although the deal was elusive at the time, I am confident that with renewed bipartisan effort and energy, we will get this done in Congress. The witnesses before us advocating for reform represent an important cross section of the economy. We have a large tech company, a family farm manufacturer, a small business restaurant franchise company.

But I want to spend a moment focusing on those who have really animated my personal interest in this debate, the small technology start-ups that are energizing the New York economy every day.

Mr. Gupta talks a little about this in his testimony. He notes that patent trolls are a problem for large companies, but they are a larger problem for start-ups who will lose investors and easily be driven out of business by patent trolls.

I have heard about this. Good companies, they come in, they get extorted, they say we are going to file a lawsuit against you unless you give us half a million dollars, and they do not have it. And this is the lifeblood of America, these new companies.

So, I feel so strongly about this—not just from a New York point of view, but from a national point of view.

A letter our Committee received from 140 venture capitalists who invest in technology companies backs this up. Engine Advocacy has pointed out 82 percent of troll activity targets small and medium businesses; 55 percent of troll suits are filed against start-ups with

revenues of less than \$10 million because they know those people cannot afford a long, lengthy lawsuit, which the Patent Office now—the patent law now not only sanctions, but blesses.

The trolls are smart. They know these small companies cannot afford to litigate even if they are in the right, so they are more likely to settle. It is those start-ups that are in the front of my mind throughout this debate and will continue to be my lodestar.

A patent reform bill needs to meaningfully address the needs of these start-ups to earn my vote. In many ways, patent troll legislation, as all of us on this Committee have learned, is like a Rubik's Cube. You need to turn and twist all the parts properly so we are really fixing the problem, but also protecting those who are not part of the problem, who are represented by two witnesses here today.

It is very hard to do. That is why it has taken a long time. It is not ideological as much as it is trying to solve the problem without creating negatives that might outweigh the benefit of solving the problem.

Well, the good news is, I think we are in a good place. Senator Cornyn and I worked out agreements. Senator Leahy asked me to get involved, which I did, I was happy to do. And I believe that the compromise Senator Cornyn and I came up with remains a positive framework for bipartisan cooperation.

In fact, I see patent reform as a little oasis of bipartisan cooperation in what many of us worry is a desert of partisanship these days. So, I want to continue to work with Senator Cornyn, Chairman Grassley, Ranking Member Leahy, on putting together a package that is fair and meaningful and protects patent holders while eliminating the leverage that bad actors currently exercise in the patent system.

So, Mr. Gupta, you mentioned in your testimony that the biggest impact on patent trolls is on smaller start-up firms. Can you elaborate on that point? What reforms would be most significant in protecting those companies?

Mr. GUPTA. Thank you for the question, Senator.

I have cited some research from reputable universities and the conclusion is unanimous that it impacts investment. It also impacts their ability to hire people on focused research and development and it is a big distraction for these companies.

The biggest challenge they have is that patent litigation is so expensive right now—and not only that, but the risks are so asymmetric that defendants really do not have the ability to get their day in court.

To get to trial, the data that I have cited, the average time to trial now is almost 3.5 years, 1,220 days.

Senator SCHUMER. It is a crazy system.

Mr. GUPTA. So, most small companies do not have the financial wherewithal to actually get their day in court.

Senator SCHUMER. So, let me, before my time expires or expires any longer, ask you one more question.

You have talked about the importance of post-grant administrative review with the PTO. Can you explain the effect that the changes in the STRONG Act, which my dear colleagues have intro-

duced, but I disagree with, would have on your ability to utilize those proceedings to weed out poor-quality patents?

Mr. GUPTA. A particular proposal around claim amendment is a reasonable proposal that I think we could work around. However, for example, one suggestion is that there should be a different panel that ought to consider the—make the institution decision and a different panel should look at the final decision or be responsible for the final decision. That does not seem to be a practical solution.

In district court litigation today, for example, we do not say that if a judge rules on a motion to dismiss adversely, that we get a different judge for the rest of the trial.

In Patent Office prosecution, we do not say, for example, that if a patent examiner rejects the claims of a patent in a first office action, that the second office action be considered by a different examiner.

So, I think there are various aspects that are not practical. And this was a system that was designed to lead to a quick, efficient way to have the Patent Office, the body that granted the patents in the first place, simply revisit their work.

So, they should have the rulemaking authority. The Federal circuit looked at the process and has blessed it, in my words, and I think it is too early to tinker with this. The Patent Office is actually asking for comments from practitioners, litigators, the public. They are expected to issue quick fixes in the next few months and final rules by the end of the year. We should let this process play out.

Senator SCHUMER. Well, thank you.

And I just want to say, Mr. Chairman, I am optimistic that Senators Grassley, Leahy, Cornyn, and I can come up with a bipartisan solution that will actually pass the Senate this year.

Thank you.

Senator LEE [presiding]. Thank you. Thanks to all of you for being here today. This is a very important issue.

The way I can tell that it is an important issue has a lot to do with what I see at town hall meetings. This is an issue that just a few years ago was very rarely discussed outside of the sort of wonky circles that we see inside of Washington.

But this is something that has now become important to people not just on K Street or on Wall Street, but on main streets throughout America. I hear about it routinely from small business owners across my State and from throughout the country.

It is a subject that we need to pay more attention to and there is a lot of enthusiasm on this Committee for patent reform, which, I think, has now become indispensable for American businesses, large and small, who want to be able to operate and grow without fear of extortion from patent trolls; for example, unscrupulous entities who will send your small business a letter accusing you of infringing one of their asserted patents, with the Wi-Fi router you happen to use in your small business, perhaps allowing your customers to access it while in your store.

But in this demand letter, although you are told that you are infringing, you are not told how you are infringing and you are threatened with litigation and you receive a demand for payment.

Last Congress, this Committee worked hard to pass patent reform legislation that would crack down on abusive practices in patent litigation. Senator Leahy and I worked together on a bill called the Patent Transparency and Improvements Act that would have attacked the problem of demand letter abuse and would have protected businesses like retailers who use equipment manufactured by someone else from having to immediately defend against infringement claims.

Meanwhile, Senators Grassley and Cornyn proposed important reforms to address the way patent cases are tried. Their reforms were designed to make the business model of these patent trolls unprofitable and to give parties the incentives to conduct efficient litigation in patent infringement cases and to, of course, hold them accountable when they impose unreasonable burdens on each other.

I am hopeful that this year we will succeed in uniting these reforms and that we will finally pass legislation so desperately needed by American businesses, both big and small.

Mr. Anderson, in your testimony you describe some of your experiences with abusive patent infringement demand letters. How does a business like yours decide whether or not to pay up on a demand letter?

In other words, do you try to evaluate the merits of the infringement allegations against you or are you more likely to try to size up the size of the demand and weigh it against the inevitable cost of litigation?

Mr. ANDERSON. The routine is, I try to gather—thank you, Senator—as much information as I can, but ultimately we end up in the same place. We cannot afford to litigate one of these cases. There is too much unknown information out there. And so ultimately we know that we are going to enter into a license agreement. The question is, can we negotiate that price down a little bit?

But as I said in my earlier testimony, the price has nothing to do with the technology. The technology may be something that really does not drive business and may not be worth much to us, but somebody alluded to earlier that maybe you could just stop using the technology.

That does not matter because you are still responsible for past use. So, at that point in time, the demand is not going to go much—down very much if you cease using that technology.

So, it is just a question of trying to reduce my outside attorney's fees with the IP attorney and reduce the licensing fee. But that is where we end up.

Senator LEE. If you had to identify just one reform or, say, one small list of two or three reforms that would help alleviate this problem, what would that or what would those reforms be?

Mr. ANDERSON. Senator, it would be difficult to narrow it down to one or two or three. We are looking for comprehensive reform. The more that you can do for us, the better.

This really is crippling to our business and it is steering us away from technology, which, as I said before, our customers want, our franchisees want, and we really would like to give business to the small innovator.

Senator LEE. Would it help, separate and apart from what other reforms might be helpful, would it also help if Congress somehow channeled the FTC's enforcement activities toward going after demand letter abuse?

Mr. ANDERSON. Certainly that would be one step that would be helpful.

Senator LEE. And I assume you see a lot of demand letter abuse in your line of work based on your description earlier.

Mr. ANDERSON. Yes, we do.

Senator LEE. How many of those do you get in a typical year, if you feel comfortable sharing that?

Mr. ANDERSON. Patent troll demand letters, we received two and we have—we are the defendant in a lawsuit. But I have reached out to other restaurants and retailers and this is common practice across the industry.

Senator LEE. All right. I see my time has expired.

Senator Durbin.

Senator DURBIN. Thank you, Senator Lee. And thank you to the panel for being here.

The first major patent reform in the modern era was in 1952. We waited 59 years before we tackled it again in 2011 and then we decided to wait 3 years to go after it again.

I am concerned about that. Why would we return so quickly to something enshrined in the Constitution and critical to the development of the American economy? And the explanation was given by my colleague from New York. We are out to club the trolls. That is what this is all about.

Who are these trolls? You visualize a gnomish little ambulance chaser threatening litigation, mischief, and harassment, trying to extort money when they have no legitimate claim.

Well, perhaps that is what some think a troll to be. We asked the Government Accountability Office what percentage of patent litigations are filed by non-participating entities; in other words, companies that do not make things, companies that just sue people.

Incidentally, that could be a university that came up with some research that led to patent which is licensed in favor, and they said of all the patent litigation filed, they would put the non-participating entities, the trolls, at a maximum of 20 percent.

That means out of every five lawsuits filed in patent litigation, the Government Accountability Office says, one out of five could be a troll.

So, what we are talking about are changes that are going to affect 80 percent of patent litigation, which most of us believe is totally legitimate. It is not just about clubbing the trolls. We are clubbing the filers of patent litigation and that includes a lot more than just mischievous little gnomish figures.

In fact, if you take a look at the group that opposes H.R. 9, which is the only stated position now for reform by Congressman Goodlatte, listen to who is included in the opposition to this reform effort that we have been hearing about. Listen to the opponents and tell me if you think these are ambulance chasers.

The Association of American Universities. Dr. Crum, that might include your school. The Biotechnology Industry Organization; the Medical Device Manufacturers Association; the National Venture

Capital Association; PhRMA; and, a group which represents 200,000 American scientist and engineers. Ambulance chasers? I do not think so.

The Venture Capital Association takes a look at Congressman Goodlatte's bill and writes us a letter. Here is what they say: "We're concerned that H.R. 9, if enacted as written, will have a chilling effect on investment in patent-intensive companies and will make it far more difficult, risky and expensive for emerging companies to enforce their patents, an essential part of the patent right. Further, H.R. 9 will raise the cost and risk of confronting smaller companies trying to defend against patent litigation brought by larger competitors."

This—as you look at this story and step back from this little gnomish figure, the patent troll, it starts to look a lot differently.

Mr. Gupta, you spoke in your testimony about EMC spending \$10 million in 2014 on frivolous patent litigation. What were the revenues of EMC in 2014?

Mr. GUPTA. \$24 billion.

Senator DURBIN. So, what would \$10 million—what percentage would \$10 million in legal fees be of your \$24 billion revenue?

Mr. GUPTA. And that is just outside counsel, Senator. The disruption to our business in terms of the number of people who get involved. In one particular case, we had a star engineer devote 10 percent of his time. We had to get 100 people involved in looking for documents that go back so far that we do not even have electronic records for them.

Senator DURBIN. The calculation, incidentally, is not four-tenths of 1 percent of their revenues, it is four-hundredths percent of their revenues that were spent. It doesn't suggest to me that EMC is being crippled. I would say that you probably have nuisance lawsuits in a lot of other areas that amount to as much, if not more.

But I do sympathize with, Mr. Anderson, your company and I do eat butter burgers; and, Mr. Powers, with your company. And we have got a lot of farmers in our State that use your company's inventions.

And I do know that harassment does take place. That is why I am cosponsoring Senator Coons' bill. We want to go after the real abusers in this, but we do not want to put a chilling effect on the patent system.

Honest to goodness, there are going to be small patent holders who are going to have to get up and fight the big boys who are abusing their patent rights. And when we start throwing in loser pays, most of them are going to walk away and say we just lost it.

We have lost something that is a property right enshrined in the Constitution and something that is as critical to the future of the American economy as small- and medium-sized businesses.

Dr. Crum, every major university in Illinois has written to me saying, "Oppose this patent reform." Every one of them. Tell me why the universities are speaking out against something that many have characterized as just clubbing the trolls.

Dr. CRUM. Thank you, Senator. I think it would be hard to improve on what you just articulated. I think you really hit a lot of it.

Much of our concern is for our partner companies, as we transfer our technologies to those who can take it to market and do something wonderful with it.

And precisely as you said, the concern is for those small companies—though we deal with big companies, too. There are big, innovative partners of ours, too. But it is those small companies that are at risk here.

We do not disagree with going after the abusers. We absolutely are in line with that because we see the impact. But for small companies, it is the fear that even if they are right, there is so much uncertainty and risk in going to litigation, and none of these companies are litigious. They do not have staffs or resources to do that.

We try to help them, but we also are not geared for that. We do not want to put money into litigation. We want to put it into research and innovation.

Senator DURBIN. And back into the GAO report: 80 percent of patent litigation is not being filed by trolls, it is being filed by small- and medium-sized patent holders who are many times fighting the big boys. And H.R. 9, the Goodlatte loser pays approach, is going to have a chilling effect on their efforts to protect their property rights and these ideas and their ability to assert those rights in our court of law.

This so-called reform is about a lot more than clubbing trolls.

Thank you, Mr. Chairman.

Senator LEE. Thank you.

Senator Tillis.

Senator TILLIS. Thank you, Mr. Chair.

Actually, Dr. Crum, let me come to you first. Can you give me a sense—I am from North Carolina. I have got N.C. State-Chapel Hill, Duke. They do a lot of great work there and they apply for a lot of patents.

What is unique to the university setting versus, say, the private sector that is doing fundamentally the same thing outside of a university setting? What is unique to your concern or are there any unique considerations?

Dr. CRUM. Thank you for the question. It is a very good question.

I think that there are many similarities in what we do, obviously. I think maybe, again, if you are taking a look at the kind of research that we do, that research is being performed largely by large companies, large private companies.

They do have deeper pockets, but litigation is not where they want to put their resources and it should not be where they have to put their resources if it is frivolous, but they, at least, have that ability.

Senator TILLIS. I was trying to get a sense—in North Carolina, the Research Triangle, we have a lot of smaller companies that would probably be more resource strapped than the university, quite honestly.

Dr. CRUM. Absolutely.

Senator TILLIS. So, I am trying to get a better idea for those types of companies and why they are different and unique.

Dr. CRUM. Why they are different? I missed the point. Why they are different and unique from—

Senator TILLIS. From the university, the concerns and priorities for any kind of reform that we would pursue.

Dr. CRUM. Maybe I should address that by saying what our priorities are, what our mission is. We view our mission as research, discovery, and creating knowledge that we then move to the marketplace via partner companies.

Thus, our concern is the impact on those companies that we work with, because we are not as good at technology commercialization as the private sector. We understand that.

So, we are focusing our efforts, our resources on the research and then transferring that technology.

But we have concerns, too, because the university can be subject to litigation. But much of our concerns are with our partners, particularly those small firms that we have talked about and the start-ups.

Maybe I am missing your point. I am sorry if I am.

Senator TILLIS. No, and I can follow up.

Mr. Gupta, I have a question. I know you mentioned the worldwide revenues for EMC. What was your profit last year?

Mr. GUPTA. That is a good question. Several billion.

Senator TILLIS. But the base really needs to be on your profits, not on the cost to produce.

Then, the next question is, do you know roughly what your R&D budget was?

Mr. GUPTA. About \$3 billion last year.

Senator TILLIS. About \$3 billion. So, again, I worry about the amount of money spent on these matters at the expense of innovation. Whether you are a university, whether you are a small business, whether you are a large business, you all create technologies that keep America at the forefront. I see this as eroding money that can be put to a better and higher purpose. Thank you for that.

I have a question, in general. We did patent troll legislation in North Carolina, thought it was going to be a no-brainer. It is not. I was the Speaker of the House there when we started moving it. We had everybody coming in with their concerns.

Since I have been up here, I have heard about everybody is for some sort of change, except for the kind of change that would harm them, which is why we probably could raise a hand and get 10 different groups in here for a different kind of reform.

I particularly heard concerns raised between the pharmaceuticals industry and the high-tech industry and I get the sense that one kind of likes the devil they know. The other one thinks that there needs to be some fundamental changes.

Can you all give me some sense of what the crux of the issue is? I will just leave it to those who want to volunteer their own perspective, and maybe we can start with Mr. Gupta and then we will come down there.

Mr. GUPTA. Thank you for the question, Senator. I think you are absolutely right that there is a fundamental difference in how the abuses in the system are viewed.

Fortunately for the pharmaceutical industry, they have not been targeted by abusive litigation tactics. Unfortunately, our industry seems to draw most of the attention and—

Senator TILLIS. Are you aware of the report that was issued—I do not recall the professor’s name at Harvard—that is saying it is just a matter of time where the pharmaceuticals industry will be next?

As these folks continue to raise money and they can expand their field of play, I do not think any industry should think that they are somehow going to be protected from it over time if we do not do something about it.

I am sorry to interrupt you.

Mr. GUPTA. I could not agree more with you, Senator. I am aware of that study and I think, as we found out, these shell companies are very creative about figuring out where is the next pocket of money they can chase. And pharmaceutical companies and biotech companies are highly profitable and I am sure it is just a matter of time.

Senator TILLIS. Mr. Chair, if you do not mind, I would like to hear from a couple of others, if I may. The gentlemen down here.

Mr. SAUER. Well, thank you. Our sense is within BIO, because we have so many large and small members that the divide—I think more unambiguously thoughts between large companies and small companies. On many of these issues, we have large, robust PhRMA companies who feel that they will be able to weather a lot of changes in the law and a lot of developments, whereas 80 percent of our members are small companies who are much more concerned about what is going on, whether they are biotech or in other areas.

A quick word about whether PhRMA will be next as targets for patent trolls. We, too, are aware of that particular study. We have discussed it at length within our membership and for reasons that take too long, we cannot validate hardly any of it. I think we do not share that particular concern because our landscape is somewhat different than what was presented in this study.

A quick word on what the proposed legislation would actually do. Everybody agrees that small companies deserve more protection against unfair assertion.

Our members, most of which are small companies, are quite concerned, though, that legislation that has been introduced will not do anything for them, at least to the extent they need to defend their own businesses against patent infringement.

For example, provisions like enhanced pleading, the motion practice that would be enabled by that is not for these small companies to use. Impleader practice for joining parties, they do not need to do that.

What we should be doing is treat demand letters like any other consumer scam. I think in States, your State bill, I think, takes the right approach. Whether it should happen at the State level is one question, but I think a lot of people and policymakers have caught onto that that is a very important starting point.

We need to regulate demand letters and make sure that they give proper information. And we need to do other steps like protect consumers of products and end users of products, when it is really the manufacturers of these products who should be defending the lawsuits.

Thank you.

Senator TILLIS. Thank you, Mr. Chair, and thank you for your work on this matter.

Senator LEE. Thank you.

Senator Franken.

Senator FRANKEN. Thank you, Mr. Chairman.

Just one thing that Senator Schumer brought up that I wanted to sort of balance a little bit. He talked about start-ups wanting protections from what you call the trolls.

There is the other side of it, I think, of start-ups and I think the university is—the universities sort of represent this, because he talked particularly about venture capital.

I think venture capitalists—is it not true that very often venture capitalists, when they are investing in a business, a start-up, see the value of the patent even if the business does not make it? And that is the other side of—Senator Schumer seemed to suggest that venture capitalists are on the other side of this issue because they are start-ups and they do not want to be attacked by a troll.

But is it not sort of the other side, too, which is that venture capitalists very often are in this to have the value of the patent even if the business does not work?

I guess I could ask either Dr. Crum or Mr. Sauer.

Dr. CRUM. Let me start. Thanks for the question. I think the venture capitalists view the patent as a very important reason for investing in that company, but the VCs themselves are looking for someone that can take the IP and develop the products and the processes.

So, yes, the patent is extremely important to them and the ability to protect that intellectual property. But if the business goes under, the VCs, even if they are left with ownership of the patent, they still need someone that can then develop that, develop off of that patent.

So, again, I think it still gets back to the question that we need to make sure that the small companies, the start-up companies that are truly innovative, have fair protection of IP.

Senator FRANKEN. Mr. Sauer?

Mr. SAUER. In the small companies where I worked before I joined BIO, we went through this several times, because there is always need for more capital in these companies that burn like tens of millions of dollars per year in biotech.

My experience was that whenever we went out for funding, one of the very first things the analysts would ask for and the venture capital funders would ask for would be what patent portfolio do you have, like what is your platform technology, what are the patents that protect those, can we take a look at those, how were they examined.

So, they went really in depth. It was quite stressful—at the time, I was just a patent agent—for the company to survive such scrutiny.

The scientists had it better, because they just had to talk about the merits of their technology. But when they went into the patent portfolios, because that depended on how much money they were going to give us, there was a lot of pressure from management.

So, I can only validate that at least those VCs who invest in the life sciences are very, very interested in patents and will not fund

a company, by and large, that does not have a meaningful IP portfolio.

Senator FRANKEN. Again, we are talking about balance and I just wanted to kind of balance what Senator Schumer said, because the other side of it seems to be that venture capital is very often invested because of the patent.

But on the other side of it, of course, is—Mr. Anderson, I appreciate your being here to represent the perspective of an American business that has been harmed by bad actors in this sphere, and I know that abusive tactics have harmed Minnesota businesses and there is no question that we need to do more to stop the worst abuses of the system, of the patent system.

At the same time, the patent itself also protects a lot of Minnesota businesses. So, again, I hope we can get this balance right.

Can I ask you to describe to me how Culver's approaches a demand letter? Have you ever considered litigating a patent infringement claim or has the cost always been too prohibitive given the size of your company and the capacity to confront such issues? And on the other hand, how much money has Culver's spent settling various claims with demand letters?

Mr. ANDERSON. Due to confidentiality, I cannot get into the dollar amounts of the settlement, and you will find that across the industries.

In terms of how I handle it, the first thing I do is contact—I am a solo practitioner in-house and patents, when I came to work for Culver's, I had hardly heard of a patent and, unfortunately, they crept into the restaurant industry.

I check with other in-house counsel and outside counsel to see how these things have played out, but ultimately we cannot afford to litigate.

We are the defendant in one lawsuit. We would have settled but for—we were able to form a joint defense group. So, I was paying one-tenth of every legal fee.

I still paid \$100,000 and we were still early in the lawsuit, but if I was not paying one-tenth, \$1 million, there is no way we could afford that.

Senator FRANKEN. Sure.

Mr. ANDERSON. That is money, again, that should be going towards helping our franchisees succeed, not paying out to patent trolls.

Senator FRANKEN. Well, I guess my time is up, but you said you can't tell me because of confidentiality, but my understanding is that doesn't hold in Senate hearings. Isn't that right, Mr. Chairman?

[Laughter.]

Senator FRANKEN. No, I am lying.

[Laughter.]

Senator FRANKEN. That's not true. Thank you.

Senator LEE. Senator Perdue.

Senator PERDUE. Thank you, Mr. Chairman. And thank you for being here.

I was trained as an engineer. I have been very heavily involved in the tech community in my home State. For the last few years,

I have actually been on the board of a high-tech start-up. So, I have seen both sides of this endeavor.

It seems to me that the greatest economic miracle in the history of mankind—we have sat here and watched it over the last 70 years in the United States—and it was fundamentally founded on three precepts: In addition to having the best workforce in the history of the world, we have the ability to innovate, and we have the ability to form capital, and we have the rule of law.

No other single country that we compete with today has all three of those to the degree that we do.

It seems to me that this abuse that we are talking about here today is threatening two of those three and it really is very serious, but we have got to find a balance. I have got a couple of questions about trying to find that balance, but it just seems to me that there are two objectives here. Obviously, we have got to control the frivolous nature of these lawsuits to protect the start-ups.

In my experience, start-ups need three things: One is, they have to have the innovation; two is, they have got to have the capital; and three is, they have got to survive the first 2 years. And I would bet if you look at this, a lot of these attacks happen in these first 2 years, while angel investors are in there before the venture capital community is involved, and it will scare everybody to death and it will freeze up that early capital, in my opinion.

So, I am concerned about the universities who own the technology. They are trying to transfer the technology and get a license for it, but I am also concerned about the person who is buying the technology and actually trying to commercialize it.

So, Dr. Crum, I would love for you to talk about this transfer process and about the Innovation Act, but also to talk about the specific provisions of the various bills that you believe adversely affect the ability of universities not only to transfer the technology, but also to help these start-ups, because I know you guys and other universities are very involved with angel investors in helping these start-up entities attract capital in the early, early stages of their incumbency.

Dr. CRUM. Thank you. When we have those first conversations with companies about what their needs are, what their goals are, what they are trying to do, we sit down and we work very closely with them. They become a partner. We license the technology to them. We try to help them attract capital.

I talked to the person who runs our IP and tech transfer operation just yesterday and asked if she could give me a few examples of companies for which the patents were absolutely critical to getting capitalization, and she ran through 15 just off the top of her head.

So, you are absolutely right, having the technology, the ability to protect it, is absolutely critical to attracting the capital, no question about that.

And, the second part of your question was?

Senator PERDUE. Well, it seems to me that one of the problems you have is in helping these young entities survive.

Dr. CRUM. Exactly.

Senator PERDUE. And so, the frivolous lawsuit, you see both sides of this equation.

Dr. CRUM. Yes.

Senator PERDUE. I think that you and Dr. Sauer particularly can empathize with these business owners and yet you are protecting the university for their rights as well.

So, there are two sides of this and we have got to find a balance and the way through here, the 20 percent that end up being the frivolous cases. I do not know where Google or Microsoft or Apple might have been in their first few years of development, but if they were caught up in this, they may never have gotten to maturity.

Dr. CRUM. And I think you were asking what things do we see maybe that we would strongly support. I think we have talked about a lot of that already, and a key one is ending the abusive demand letters. As has been discussed, those need to be more narrowly focused, specific, and nonthreatening.

There needs to be recourse against those who are filing those frivolous demands, the trolls.

Also, I think any changes that lead to higher-quality patents, more narrowly scoped, better defined, that would also include some of the mechanisms that were being discussed earlier by the panelists that enable and encourage challenges to patents before litigation occurs.

If we keep out of the courts, I think that is really critical in those first couple years in particular for the start-up companies.

I think there are other things out there. I am not an attorney and I am not as deep into the weeds on the proposals. I think the other panelists here probably are better suited for that.

Senator PERDUE. Dr. Sauer, would you like to answer the second part of that question?

Mr. SAUER. Yes. So, I think the small businesses need protection before large businesses. In this debate, I think we should give precedence for the concerns of small businesses and abuses that they suffer.

To that end, I agree we need to treat demand letters like other consumer scams. We need to get them within the ambit of consumer protection agencies. We need to enhance clarity and transparency in patent enforcement for everybody.

And we could talk and should talk about provisions that protect end users and consumers of product from being sued for using this product that they just bought off the shelf somewhere at retail or bought from somebody else.

I think those are worthwhile proposals. I think there is a lot of consensus that can be reached. Our worry at BIO, again, is that on some level, our small companies they feel there is a bait-and-switch at the same time going on, where there are a lot of systemic litigation reforms being proposed that do not benefit companies that do not want to or cannot litigate.

Small companies tell us, "that is not going to benefit us," like most of the things that are in the litigation reform, but those are for big guys.

The Game of Kings, that is what patent litigation is and the bigger king you are, the more you will be able to leverage the systemic litigation reforms that are being proposed.

So, they fall into two buckets and our members have different views on one versus the other.

Senator PERDUE. Thank you very much. Thank you, Mr. Chairman.

Senator LEE. Thank you.

Senator Coons.

Senator COONS. Thank you, Senator Lee. And I would like to thank Chairman Grassley and Ranking Member Leahy for holding this hearing, and for the witnesses, the broad and representative panel that we have got today, and for your testimony.

This hearing has helped reinforce a valuable lesson that I think we should all keep in mind. How you view patents and patent litigation really depends a lot on where you operate within our wide-ranging economy: whether you are a start-up or a large company, whether you are investing millions or billions of dollars into a research-intensive business model, or providing a service directly to consumers.

Our economy, as a number of Members have commented, remains incredibly successful, and important businesses that cover the whole spectrum of these characteristics have been affected, and we are all better off by retaining the diversity, the innovation, the creativity of the full scope of our country.

We have heard from witnesses, Mr. Gupta from a multi-billion-dollar technology company, Mr. Anderson from a restaurant company, who have both testified to the cost and the disruption of companies, large and small, of demand letters, and of some of the aspects of patent litigation.

But we have also heard from Mr. Powers at KINZE, from Dr. Sauer on behalf of 1,100 companies that are members of BIO, and Dr. Crum from Iowa State, who have all cautioned strongly against overreach and the unintended consequences that could come with litigation reforms that may be hitting on that with a hammer in an effort to club the trolls.

So, while we work to fight abuses of the system, we have to keep in mind that we have to honor and respect the diversity of our economy and the range of sources of innovation.

There is a great deal at stake, not the least of which is our ability to cure diseases, as Dr. Sauer referenced in his introduction, from Alzheimer's to multiple sclerosis to leukemia; our ability to develop new materials, new crops, new biofuels.

It hangs in the balance of whether we overreach in our efforts at reform. Patents are a property right at the very core of the American dream, enshrined in our Constitution, and for generations Americans with little funding or manufacturing capabilities have clung to that patent right which gives them the possibility of taking a chance, of building a new model, of tinkering and solving a problem, and that is the kind of entrepreneurship that has made America great and we need to work to preserve the best of that system and inspire future generations.

So, to address abuses in our patent system, the real abuses that have been described today, yet ensure fairness in post-grant proceedings and a strong patent system, I have introduced the STRONG Patents Act of 2015, along with my colleagues, Senators Durbin and Hirono.

This legislation would ensure that we strengthen the pleading requirements for patent litigation to match the stringent standard currently enforced in other civil litigation.

It empowers the FTC to go after those who send deceptive and abusive letters to extort from large and small businesses, and it tackles some of the recent abuses of the post-grant system at the PTO, described by Dr. Sauer, when a hedge fund can raise hundreds of millions of dollars of investor capital simply by filing a challenge for the purpose of profiting from shorting the stock. And it would end fee diversion to ensure an increase in the quality of the work at PTO.

I look forward to working with my colleagues to enact meaningful reforms that will respect the diversity of business models in our economy.

And if I might, Senator Lee, I would like to submit for the record letters that express support for the approach of the STRONG Patents Act from the National Venture Capital Association, the National Small Business Association, the Biotechnology Industry Association, the Association of American Universities, the Association of Public and Land-Grant Universities, the Medical Device Manufacturers Association, the Pharmaceutical Research and Manufacturers of America, the Innovation Alliance, and the IEEE USA.

I think it is important when we look at the very wide range of folks who have weighed in on behalf of this focused, targeted approach that we respect the range of innovators in our economy.

So, if I might, I think I have time for one question, to Mr. Powers, if I might.

I really appreciate your testimony about the growth of KINZE Manufacturing from a small welding shop to a company that today employs 1,000 people. Your CEO was named the inventor on 19 patents, including, I think, if I remember, the rear folding planter toolbar, which I couldn't describe in any detail if my life depended on it.

But just help us understand how these patents helped KINZE attract investors and compete against larger competitors.

I was struck that, in your written testimony, you said, "we should urge caution on provisions which would create significant hurdles for legitimate inventors seeking to enforce their patent rights, such as blanket fee-shifting provisions. There is a balance to be struck, and"—that word, balance, has been used by most of the Senators who spoke today—"we want to be careful to go far enough to take away the incentives from those who abuse the litigation system, and no farther."

In KINZE's experience, what does that mean? And then I would like to ask other members of the panel if you care to comment: What does it mean to go "no farther" and why is that important given the history of your company and the inventions of your founder?

Mr. POWERS. Thank you for the question, Senator. Starting out with the role of patents in KINZE Manufacturing, Jon has been fortunate enough to be a good enough businessman that he did not need to seek outside investment, just truly a self-made man.

What it did give us the ability to do is to get out in front and commercialize a planter that made farmers' lives much easier, re-

duced the amount of time that they had in the field, and gave them the ability to plant their fields during a very narrow window during the spring. You actually have, roughly, about 2 to 3 weeks where if you can get your crop in during that time, you are going to get peak yields. If rain or other things delay you, the farmer is going to be hurt.

So, that having been said, patents are very important to us and we would like to see a strong patent system.

Turning to the limits—you know, we should go no further than to prevent the patent trolls. KINZE is not in favor of blanket fee-shifting or mandatory fee-shifting provisions. However, we do believe that fee shifting when parties bring baseless litigation would serve as a practical deterrent to those who would go ahead and do abusive patent litigation.

Senator COONS. Thank you, Mr. Powers. And I appreciate KINZE bringing a balanced view to this.

Dr. Sauer, would you just make some comment about how some of the proposals that were discussed today, like a blanket fee shifting or a loser pays system would impact the way that BIO as an ecosystem operates, particularly the smaller and start-up companies you described earlier.

Mr. SAUER. I think it can be well exemplified by perhaps the impleader provisions that are connected to the fee-shifting provisions of the bill. From fee shifting comes concepts of, how do we make sure the loser pays once we have a loser pays system.

The impleader provision, like a few other provisions, exemplifies the ecosystem within which biotech works, which implicates small companies, university licensors, and the like. So, that system works in a way that implicates not just patent owners who must defend their businesses against patent infringement, but drags their business partners into the litigation as unwilling co-plaintiffs and subjects them to potential liability.

That makes a big difference on the ability of biotech companies and their licensors to agree on the scope of their business, do licenses and the like.

Senator COONS. Thank you, Dr. Sauer. I can see my time is coming to a close.

Mr. SAUER. I regret that.

Senator COONS. I just wanted to make sure, whether it is a Hawkeye, a Cyclone or a Panther, we had an opportunity to hear from Dr. Crum on behalf of Iowa State and the other inventors and innovators at the university system. Can you just give us a context about the dangers of overbroad patent reform on universities?

Dr. CRUM. Yes. I just would follow up on what Hans was just saying about the involuntary joinder concerns, that is really huge for us, because we could have our university individual faculty and departments pulled into this. And if you want to talk about throwing a wet blanket over innovation: that kind of fear and concern about being pulled into something over which you had no control, because you developed some outstanding technology, that would definitely throw a wet blanket over innovation. That is a real concern for us and it also diverts a lot of resources that we should be putting back into the research enterprise and diverts it to litigation.

Senator COONS. Thank you. I appreciate the entire panel and I appreciate the opportunity to focus on the idea that inventors, innovators, companies large and small, established, private, public, have real concerns about overreach in patent litigation reform and we need to find a balance.

Thank you, Mr. Chairman.

Chairman GRASSLEY [presiding]. Well, without objection, the material that Senator Coons wanted put in the record will be made a part of the record.

[The information appears as submissions for the record.]

Chairman GRASSLEY. And quite frankly, I believe it would be Senator Whitehouse would have priority, if you want it.

Senator WHITEHOUSE. Thank you, Chairman. I will be brief and I will yield to my extremely distinguished colleague, Senator Blumenthal, very shortly.

I just want to make the point that I think we have a really significant opportunity to pass a significant piece of legislation.

If people will rein in their ambitions for ulterior purposes being achieved through this, I think the key areas have been addressed, in large part, in Senator Coons' legislation, then I think there is agreement. I think we could pass that very quickly if people did not want to add extraneous things.

The areas where I hear from Rhode Islanders that I particularly want to focus on are making sure that a plaintiff is a real plaintiff and there are not shell and sham plaintiffs that are allowed to exist; that patents that were written at a time when people did not understand the internet or other things and need to be reviewed, there is an ability to review those patents rather than to have them be weapons in the hands of trolls; that the abuse of demand letters, which has become a scandal, be controlled, and that we focus the litigation between the patent holder and the person who is actually using, in the ordinary sense of the word, the patented technology—not the florist or the grocer who is using the end product.

And I think if we can agree on those four things—and for the record, I see an awful lot of heads nodding here—we have a bill that we can pass.

But if we want to add, you know, abortion provisions to human trafficking bills, and if we want to add running around in national security WRDA dam and hydroelectric sites with firearms to bills that protect sportsmen, and if we want to add tort reform to this bill, then we are going to end up with unnecessary fights. And I hope we can go forward with that.

I'd like to read into the record what Brown University says, which is a very, very important player in our Rhode Island ecosystem.

Brown University President Christina Paxson says that “the bill in the House of Representatives, H.R. 9, the Innovation Act, goes far beyond what is needed to curb abusive patent practices. Of particular concern are very broad mandatory fee shifting and involuntary joinder provisions. I urge you to oppose efforts to add broad provisions like these to any Senate patent troll legislation.”

And Brown has a lot of patents. URI has a lot of patents.

Our university signed another letter that I would like to read from into the record. In fact, I think every State represented on this Committee has a university on this list that signed this letter, except maybe Utah. I think they are the one exception.

But every other State represented on this Committee has signed this letter and it says that “mandatory fee shifting and involuntary joinder are especially troubling to the university community because they would make the legitimate defense of patent rights excessively risky and thus weaken the university technology transfer process, which is an essential part of our country’s innovation and entrepreneurial ecosystem.”

So, I hope with universities like that making the point that if we focus on what is really the problem, we can get something done.

In that spirit, I hope we can move significant bipartisan legislation. And my plaudits again to Senator Coons for the scope that he has provided. I have not signed onto that bill yet because I am not—I am in the same neighborhood that he is in, if I am not exactly down to the same street and mailbox.

But I really think that is the way to proceed, Mr. Chairman, and adding extraneous fights to things where we can go forward on a bipartisan basis I do not think is helpful.

So, I hope we can go forward in that spirit, and I will leave with that comment.

Chairman GRASSLEY. Thank you, Senator Whitehouse.

Now, Senator Blumenthal.

Senator BLUMENTHAL. Thanks, Mr. Chairman, and thanks for holding this hearing on a supremely important topic where I think there is broad consensus that abuses need to be stopped and inventiveness and creativity encouraged. And the great enemy of constructive change has been overreaching.

My colleague, Senator Whitehouse, referred to it as overbroad ambitions, but I think it is overreaching in terms of what proponents have sought to accomplish. And we need to respect what is happening in the real world where circumstances are changing.

The Supreme Court has changed the law. The *Octane Fitness* decision, which makes it significantly easier for the prevailing party to get attorney’s fees in patent cases, the *Nautilus* decision, which required more specificity in patent claims, the *Alice* decision, and the very likely development in the Judicial Conference abolishing Form 18, these are changed circumstances that we need to respect because they are having some results.

And likewise, for me, as a former law enforcer, the great question here is how can existing law be used more effectively. The mantra in the legislature always is there ought to be a law or a new law. But if existing law, let alone new law, is unenforced, it is dead lettered, it is useless.

So, the Federal Trade Commission ought to be using existing law. Federal officials ought to be following the lead of State attorneys general, who are going after deceptive or misleading practices under the good old consumer protection laws. Fraud and deception in some of the letters that are sent widely perhaps can be pursued under existing law.

So, I would like to know from this panel what existing laws can and should be enforced more aggressively to pursue this problem and who ought to be doing it.

Mr. GUPTA. Senator, I can take a shot at it, if you would like.

I think, first off, it is not really about labeling the actor. If it is a large company, a small company, a university, if they initiate abusive litigation, unmeritorious claims, there has to be a remedy available to those that are subject to it.

So, requiring that pleadings be specific to state with clarity what the defendant is accused of having done wrong seems to be a fundamental principle that everyone should be able to agree to. And right now you stated that the Judicial Conference has recommended that Form 18 be abolished. At least Form 18 gave us a form that we knew that we had to be able to comply with.

With Form 18 being abolished, we are being asked to refer to *Iqbal* and *Twombly*, which are not patent cases and which all the guidance that those two cases provide is to say that you need to state enough facts to show that you plausibly—

Senator BLUMENTHAL. Well, State attorneys general are taking more action under existing laws.

Mr. GUPTA. Yes.

Senator BLUMENTHAL. Why not encourage law enforcers to use those existing laws more aggressively and effectively? Apparently, all of these developments are having some effect because the numbers of patent cases has diminished. You would agree with me on that point. Mr. Sauer made that point in his testimony.

Mr. GUPTA. I would respectfully sort of disagree in that the last 3 months of data that we have from December, January, and February, if you look at the same period the previous year, the litigation numbers are up again.

So, we do not know whether that was a temporary modest dip in 2014, but certainly the data that we have from January and February of this year suggest that the numbers are up again relative to the same time—

Senator BLUMENTHAL. Do you agree, Mr. Sauer?

Mr. SAUER. I think the more robust data show—if we compared, let us say, the whole year last year to the year before, the year was down almost 20 percent over the year before. So, we can wait until the end of this year and see what the numbers show.

What we are not seeing is skyrocketing or the sky is falling or other strident rhetoric what would support that.

With respect to your question about which existing laws could be enforced, I would add to your list, veil piercing—corporate veil piercing. This is not the first time the law encounters shell corporations and undercapitalized paper entities. But they are well-established principles. Veil piercing is difficult, but the corporate form is very important. But it is not that judges are unfamiliar with companies who set up paper entities behind which they hide. So, the law is not helpless against these kinds of events.

Senator BLUMENTHAL. Mr. Gupta, from what we have seen, I think we can agree, and I do not want to make too much of the data that exists, but I think we can agree that the trend is heading in the right direction. And if that is so, shouldn't we be cautious about legislating in an area where circumstances are changing and

the courts are developing new law in the wake of the United States Supreme Court opinions?

Mr. GUPTA. As I stated, Senator, I am not sure that 2014 was not a one-time——

Senator BLUMENTHAL. Well, shouldn't we wait until we know what is actually happening in the courts on the ground in the real world?

Mr. GUPTA. Unfortunately, the Supreme Court decisions that we have discussed today, none of them address the issue of reduction of discovery expenses or unreasonable discovery. Those decisions do not provide us with any guidance in terms of how specific pleadings need to be, and how a defendant is notified as to what is it that it is accused of infringing.

Senator BLUMENTHAL. I know that the Supreme Court has not dealt with the whole problem for all time, but in terms of framing solutions when circumstances seem to be changing, shouldn't we target those solutions to the problems that are causing the abuses and target them narrowly in very limited ways, especially since the facts on the ground—and facts are stubborn things—seem to be changing and perhaps going in the right direction?

Mr. GUPTA. I agree, Senator, which is why I think we have been a proponent of very specific reform targeted at pleadings, something that the courts are not looking at, and discovery reform, something that the courts are not looking at, and also an ability to recover fees.

Now, the Supreme Court decision says that the prevailing party—it says nothing about the defendant—so, a prevailing plaintiff is actually now better able with a fee shifting—I am sorry—with the fee-shifting proposal says that the prevailing party would be entitled to their fees. So, it helps plaintiffs and defendants. In fact, a small plaintiff without the ability to hire a lawyer could actually now get a contingency attorney who knows that even when the damages are small in a case, they have an upside because they can get their fees recovered.

So, these are areas where we want targeted reform because the Supreme Court does not have anything on their docket today that would address those issues.

Senator BLUMENTHAL. My time has expired. Thank you, Mr. Chairman.

Chairman GRASSLEY. This will end the hearing, but before you get up, I want to thank you, once again, for a good discussion on a very controversial issue. I do not think it is controversial that things need to be done in this area, but it is somewhat controversial even in my own State between various interests.

We are going to have to find common ground, particularly in the Senate, to get a bill through the United States Senate. We are open to hearing everybody's point of view. But we thank all of you very much for your fine testimony.

I have questions I am going to submit for the record and for the benefit of the other Members of the Committee the record will be open for a week for questions to be submitted for answer in writing, and particularly from Members that could not be here to participate in oral questions, I am sure you will get some questions.

So, we would appreciate very much your response to those written questions.

Thank you very much. The meeting is adjourned.

[Whereupon, at 12:24 p.m., the hearing was adjourned.]

[Additional material submitted for the record follows.]

# **A P P E N D I X**

## **ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD**

Witness List

Hearing before the  
Senate Committee on the Judiciary

On

“The Impact of Abusive Patent Litigation Practices on the American Economy.”

Wednesday, March 18, 2015  
Dirksen Senate Office Building, Room 226  
10:00 a.m.

Mr. Brad Powers  
General Counsel  
KINZE Manufacturing, Inc.  
Williamsburg, IA

Mr. Hans Sauer  
Deputy General Counsel for Intellectual Property  
Biotechnology Industry Organization  
Washington, D.C.

Mr. Steven E. Anderson  
Vice President and General Counsel  
Culver Franchising System, Inc.  
Prairie du Sac, WI

Dr. Michael R. Crum  
Vice President for Economic Development and Business Engagement  
Iowa State University  
Ames, IA

Mr. Krish Gupta  
Senior Vice President and Deputy General Counsel  
EMC Corporation  
Hopkinton, MA

**Prepared Statement by Senator Chuck Grassley of Iowa  
Chairman, Senate Judiciary Committee  
At a hearing entitled:  
“The Impact of Abusive Patent Litigation Practices on the American Economy”  
March 18, 2015**

We’re here today to discuss the topic of patent litigation abuse, and in particular, the destructive tactics of so-called “patent trolls.” This practice of patent trolling has hit businesses both big and small across all industries, and it’s having a harmful effect on the economy. Patent litigation abuse imposes high costs on American businesses. It wastes resources that could instead be utilized for research, development, job creation and economic growth. It undermines the innovation and creativity that patents are supposed to protect.

Patent assertion entities focus on buying and asserting patents, rather than on developing or commercializing patented inventions. Now I want to make clear that licensing one’s patent is not in itself a bad thing. Inventors and patent owners, including universities, often aren’t in a position to commercialize their patented inventions – but they certainly have the right to protect their intellectual property against infringers.

Patent trolls, however, are entities that engage in abusive and deceptive tactics to assert poor quality patents against businesses already utilizing technologies as common as wireless email, digital video streaming and the internet. They use overly broad patents to allege infringement against companies that are simply engaging in normal business activities or have bought a technology, product or service from a vendor, many times right off the shelf. They send out intentionally evasive and misleading blanket demand letters, and employ overly aggressive litigation practices to extort settlements. They frequently hide behind patent holding subsidiaries, affiliates and shells of operating companies in order to escape scrutiny.

Frivolous patent lawsuit filings have increased over the years, and they rarely have merit. But the extent of the problem is actually much worse because most cases don’t reach merits judgment stage. Patent trolls strategically set their royalty demands below litigation costs to entice companies to settle rather than run the risk of expensive and risky patent litigation. Many companies don’t have the expertise or resources to litigate these cases, so most of the time they have no choice but to submit to this patent extortion. This, in turn, drives up costs which many times are passed on to consumers.

We’ll be hearing from three witnesses today about their experiences with, and the impact of, abusive patent litigation tactics. These witnesses represent businesses from different industries. Two of these companies have patent portfolios, while one company doesn’t own patents. Yet their conclusion is the same – patent troll abuse is counterproductive to our nation’s economic growth.

The United States should remain at the forefront of technology, innovation and creativity. Patents and the U.S. patent system are a significant component of the American tradition of opportunity, invention and innovation. But we shouldn’t allow bad actors to bring the entire system down.

I've heard many Iowans express concern about this problem, and the need for Congress to take action.

For example, one letter I just received comes from industry groups representing a diverse mix of Iowa businesses. This letter is from the Iowa Gaming Association, the Iowa Bankers Association, the Home Builders Association of Iowa, the Iowa Restaurant Association, the Iowa Retail Federation, the Iowa Communications Alliance, the Iowa Grocery Industry Association, the Iowa Lodging Association, the Iowa Credit Union League, and the Iowa Realtors Association.

They urge Congress to address these abuses, stressing that "Meaningful reforms that make it difficult for patent trolls to continue their destructive business models, by improving patent quality, streamlining litigation, enhancing discovery protections and pleading requirements, as well as increasing transparency, will drastically reduce costs for Iowa businesses and entrepreneurs."

I'd like to put this and several other letters, a number of them from Iowans, in the record. In the last Congress, the House passed by an overwhelming vote the Innovation Act, which the White House supported. And although we started working on a product here in the Senate Judiciary Committee, we weren't able to proceed.

Almost everyone agrees this is a problem and a drag on our economy. But, there are those concerned that certain proposals could undermine the ability of legitimate patent holders to enforce their patent rights. They maintain that recent Supreme Court decisions on pleading standards, fee shifting and patent quality, as well as actions by the Federal Trade Commission and U.S. Patent and Trademark Office, have largely taken care of issues and comprehensive legislative action is unnecessary. We'll be hearing from representatives of two different stakeholder communities that believe certain proposals under consideration by Congress will harm legitimate patent holders.

I don't dispute that we should preserve patent rights and valid patent enforcement tools. We do need to strike the right balance. But Congress should act decisively if we want to alleviate the problems that are harming businesses both big and small. This will strengthen our patent system and benefit inventors, businesses and consumers alike.

So we're back at it again in this Congress – Chairman Goodlatte has reintroduced the Innovation Act, which has 9 Republican and 11 Democrat cosponsors. I look forward to working with Ranking Member Leahy, Senators Cornyn and Schumer, as well as with my other Judiciary Committee colleagues, on passing meaningful legislation that will provide a strong deterrent to those who prey on innocent businesses.

We're fortunate to have with us today a distinguished panel – including a couple of witnesses from Iowa, so I know there will be some excellent testimony.

Our first witness is Mr. Brad Powers, General Counsel at KINZE Manufacturing in Williamsburg, Iowa. A leading manufacturer of agricultural planters in the United States, KINZE is quite the success story. Jon Kinzenbaw started the company in 1956 with a few bucks in his pocket, a small bank loan, and a knack for fixing farm equipment. Since then, Mr. Kinzenbaw has been named inventor for 19 patents for KINZE, and the company itself owns many others. Today, KINZE employs nearly 1,000 people in Iowa. Prior to joining KINZE, Mr. Powers worked on IP litigation, licensing and portfolio management at McKee, Voorhees and Sease. I understand his family has made the trip out from Iowa with him, so it's my pleasure to welcome Mr. Powers and his family.

Our next witness is Mr. Hans Sauer, Deputy General Counsel for Intellectual Property at the Biotechnology Industry Organization, a trade association representing over 1,100 biotechnology companies and research institutions. At BIO, Mr. Sauer advises the Board of Directors and various departments on patent and other IP matters. He has 20 years of professional in-house experience in the biotechnology industry.

Next we have Mr. Steven Anderson, Vice President and General Counsel for Culver Franchising System, Inc., located in Prairie du Sac, Wisconsin. Famous for its Butter Burgers and frozen custard, Culver's has 528 restaurants in 22 states—including over 30 locations in my home state of Iowa—and employs more than 20,000 people. At Culver's, Mr. Anderson is responsible for overseeing all legal matters involving the corporation, including its intellectual property. Prior to joining Culver's, Mr. Anderson worked as a lawyer for the law firm of Murphy Desmond.

Then we have Dr. Michael Crum, Vice President for Economic Development and Business Engagement at Iowa State University, located in Ames, Iowa. Dr. Crum has been a faculty member in the College of Business at ISU since 1980. He led the initiative to create the Office of Economic Development and Industry Relations, which helps organizations connect with ISU's research, technical and business expertise. I'd like to make special note on the record that the Cyclones are in the "Big Dance," along with the Iowa Hawkeyes and University of Northern Iowa Panthers. It's a very good day for Iowa.

Finally, we have Mr. Krish Gupta, Senior Vice President and Deputy General Counsel at EMC Corporation, located in Hopkington, Massachusetts. EMC is the world's leading developer and provider of information infrastructure technology. Mr. Gupta has 20 years of experience working in patent law. At EMC, he has worldwide responsibility for intellectual property law and technology licensing matters. He oversees EMC's IP portfolio of over 5,100 U.S. patents—a portfolio that earned EMC recognition by the Wall Street Journal as the 8th most innovative IT company.

**Statement of Senator Patrick Leahy (D-Vt.),  
Ranking Member, Senate Judiciary Committee  
Hearing on “The Impact of Abusive Patent Litigation Practices  
on the American Economy”  
March 18, 2015**

America’s patent system fuels our Nation’s greatest innovations. It promotes investment in new products and designs that benefit us all. In recent years, however, some bad actors have abused the patent system in ways that detract from its purpose. Small businesses in Vermont have been threatened with patent suits simply for using office equipment they purchased off the shelf. Website owners have faced costly litigation for using basic software in e-commerce. Instead of using patents to drive new creation, bad actors have held up main street businesses and innovative companies to extort financial settlements.

Last Congress, the Senate Judiciary Committee dedicated months of work to develop bipartisan solutions for such behavior. These solutions include: promoting transparency to hold bad actors accountable; curbing misleading demand letters; and protecting customers who are targeted simply for *using* a product, when the manufacturer should defend the suit instead.

We also considered measures relating to patent litigation, to address concerns that it is unusually difficult to defend against frivolous patent suits. These concerns include the extreme cost of discovery, and the fact that today, patent holders can file a lawsuit with only minimal information, so a defendant cannot even assess whether they are liable.

When I convened a hearing on this topic last year, John Dwyer from the New England Federal Credit Union in Vermont testified at length about the problems his small community institution faced because of patent litigation over the use of ATMs in their building lobbies. Gas stations and convenience stores were targeted in the same series of litigation threats. Because of inadequate rules about transparency, John and other defendants could not tell if they were being targeted by the same corporation. Because of broadly-written complaints, they could not tell whether the item accused of infringement was the credit union’s own computer system, or the ATMs they had purchased from someone else. Because of lax rules about demand letters, the sender did not have to tell the defendants that many of the patents at issue had been declared invalid by the Federal Circuit and the Patent Office months before. Instead of focusing on serving customers, John’s credit union and the other targets spent months and hundreds of thousands of dollars in litigation.

A second witness I invited to testify at the hearing, Michael Makin from the Printing Industries of America, described the exact same problems in the printing industry, where small businesses have been targeted for using basic software and other products they purchased off the shelf. I continue to hear concerns about these issues from companies in Vermont like MyWebGrocer, Vermont Teddy Bear, the Vermont Country Store, King Arthur Flour, and the Montpelier restaurant Pinky’s on State.

Many have raised concerns that, if taken too far, litigation reforms like those in the House-passed Innovation Act would harm *legitimate* patent holders when they enforce their rights in court. I agree we must find a balance, which is why we worked for months last Congress on legislative text. Although the Committee was not able to complete its work, we made significant progress

on comprehensive draft legislation. I hope we can build on that work now to pass meaningful legislation into law.

Three years ago, Congress came together to enact the Leahy-Smith America Invents Act, the greatest update to our patent law in 60 years. That achievement was reached because Senators and stakeholders joined together to find solutions that work for all participants in the patent system. Abusive practices by bad actors are a discredit to our strong patent system, and it is in no one's interest that they continue.

The real-world accounts we have heard from the New England Federal Credit Union, the Printing Industries of America, and some of the businesses who will testify today, illustrate the impact of abusive practices on our economy. They also illustrate the need for thoughtful but swift work by this Committee and the Congress. These businesses need us to build on last year's extensive work to enact meaningful legislation. I hope we can again come together to pass meaningful, effective reform.

I thank the witnesses for coming today, and look forward to their testimony.

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Statement for the Hearing  
“The Impact of Abusive Patent Litigation  
Practices on the American Economy”

Before the United States Senate  
Committee on the Judiciary

Mr. Steven E. Anderson  
Vice President & General Counsel  
Culver Franchising System, Inc.

March 18, 2015

Chairman Grassley, Ranking Member Leahy, and members of the Judiciary Committee, I am Steven E. Anderson, Vice President and General Counsel of Culver Franchising System, Inc. I want to thank you for giving me opportunity to testify today about the devastating impact of abusive patent litigation practices on Culver's restaurants. It is an honor to present our company's perspective to you, and I can assure you that our views are shared by other restaurants and retailers throughout our country.

Culver Franchising System, Inc.

Culver's® is a real American success story. A family business from the very beginning, Culver's opened its first restaurant in Sauk City, Wisconsin, in 1984, highlighting the signature combination of homemade, cooked-to-order Butter Burger® hamburgers with fresh frozen custard that is our hallmark to this day. We have been franchising since 1990, and today we have 538 restaurants serving our customers in 22 states. All but seven of our Culver's restaurants are franchised -- which means they are individually owned and operated. Our company headquarters has 107 employees, and more than 20,000 people are employed at Culver's restaurants. We are experts in delivering great food with warm hospitality to our guests. We are not experts in the fields of technology or patent law. Therefore, we at Culver's, like most restaurants and retailers, are at a real disadvantage in being able to anticipate, plan for, and react to the demands of patent trolls.

The Problem: It Costs Too Much to Fight

Ten percent of the U.S. workforce is employed by the restaurant industry, the nation's second-largest private-sector employer. Restaurants account for roughly 4% of the nation's GDP with an estimated \$709 billion in annual sales -- and serve 130 million hungry customers each day.<sup>1</sup> Restaurants create meals, and restaurants create jobs, hundreds of thousands of both; we are a powerful force for job-creation and for customer satisfaction in the United States. However, most restaurants are small businesses, like our franchisees, and operate on very thin margins. We simply cannot afford to litigate patent infringement lawsuits, and we lack the technical expertise to evaluate the merits of technology patent claims that are asserted against us. This lack of resources -- both informational and financial -- makes restaurants prime targets for patent trolls. As the National Restaurant Association has previously testified, "Patent trolls often seek to extort settlements, knowing that it will be expensive and time consuming for businesses to fight the baseless claims in court. Patent assertion entities stifle innovation and inhibit the implementation of customer facing technologies at the store or e-commerce level, while draining necessary time and money from businesses."<sup>2</sup>

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<sup>1</sup> National Restaurant Association, 2015 Restaurant Industry Forecast

<sup>2</sup> Testimony of Jamie Richardson, White Castle System, Inc., on behalf of the National Restaurant Association of America, "The Impact of Patent Assertion Entities on Innovation and the Economy," before the

Patent trolls had not set their sights on us until recently, but this recent experience is more than enough to bring me to the Senate today to plead for your intervention. In the past few years, Culver's has been the victim of two demand letters and one lawsuit from patent trolls. Each entity claimed to own the rights to a basic technology used by virtually every restaurant and retail chain: in the case of the lawsuit it was a nutrition calculator on our website, and in the case of the demand letter it was the use of shortened links and time content in text messages. The third instance -- another demand letter -- I cannot discuss today, because as with many such situations, the resolution of the case included a confidentiality agreement that forbids public discussion.

Beginning in 2011, a patent assertion entity sued Culver's and over fifty other restaurants and retailers, such as grocery stores, in the Eastern District of Texas, claiming that we infringed upon the asserted patent by having a calculator on our website that listed the nutritional content of menu items, and then recalculated that information if the customer removed or added a condiment (for example, taking cheese off a burger or adding salad dressing). The "technology" that we were using did nothing more than add to or subtract from nutritional totals as the menu item was customized. This complaint took us completely by surprise, for we had heard nothing from the plaintiff prior to being served with the summons and complaint. After filing the lawsuit the settlement demand was \$350,000 per defendant and stated that even removing the technology from our website, which we immediately did, would have little or no impact on the amount demanded. This is an enormous amount of money for a small business, especially for the use of a technology that does nothing to drive business. These types of settlement demands can be crippling to a small business, but the attorneys' fees required to fight the lawsuit might be ten times as much, so in most cases defendants will choose to settle regardless of the extent of their use or the merits of the patent claim.

We also received a demand letter in 2011 from a troll claiming patent rights to the use of shortened Web links, like the popular bit.ly service, in text messages, and the patent holder also claimed that its patent portfolio covered any text message that included an expression of time (e.g. \$1 off a sundae before 5:00 PM or 2 for 1 onion rings today). Many of the accused text messages are automated or created by third parties, such as text alerts of social media posts, and therefore we had no way of ensuring that they would not be sent. Regardless of legal advice that we received indicating that it is likely that we would not have been found to have infringed upon such patents, we reached a settlement because we simply could not afford to battle the issue in court, which we were told would cost \$2 million to \$4 million in legal fees.

### Effect of Demand Letters on Business

As General Counsel for Culver's there is literally nothing that I dread more than receiving such a patent demand letter. Through my own experiences as well as from talking to countless other in-house counsel, I can tell you exactly how this patent troll system works. The demand letters read like extortion letters. They are customized form letters that are very obscurely drafted, with broad but limited information about the alleged infringement, the company making the claim, the patented technology, and the validity and ownership of the claimed patents. These mass-produced demands may be sent to tens or hundreds of companies at a time. After reviewing the demand, we still have no idea as to the validity of the patent, exactly what the alleged violation might be, and whether or not we are actually infringing upon that patent. But we must secure knowledgeable outside counsel to investigate such demands and the price tag for that legal work is very high and the resulting opinion is never conclusive. These patent assertion entities are quite happy to tell us that we are welcome to test their claims in litigation, knowing that a trial is cost prohibitive, with typical attorneys' fees of well over \$1 million, and too much of a distraction from our business for us to undertake. The trolls strategically offer the alternative of a licensing fee that is a mere \$250,000 to \$500,000. This demand amount has nothing to do with the value of the technology that has supposedly been patented, but is instead offered as a less expensive alternative to litigating. And although we do not know if the patent is valid, let alone whether we are infringing, this form of extortion is very effective -- and in most cases the recipient of this demand letter pays the demand.

Moreover, the money we spend dealing with these demands has to come from somewhere; we have to take it from some other place in our business where it might be productive and profitable, and instead use it to placate trolls. In our case, because such use of technology is related to advertising our business, we are forced to use the money we collect from advertising fees to pay and fight patent assertion entities. This is the same money that we would have otherwise reinvested in promoting our business and driving traffic to our franchisees to help them succeed.

Patent trolls strategically target their demands against the end-user or purchaser of the technology, who has limited knowledge of the technology or patents around it, rather than the producers and sellers of the technology. Again, we have two limits in such situations: information and money. We are vulnerable because the patent assertion entities can get away with providing us far too little information for us to determine whether we think the patent is even valid, and whether we might be infringing upon it. At the same time, we lack the financial resources to gamble on the outcome and go, effectively blind to the real information, into federal court. Furthermore, we cannot insure against such claims, and we cannot rely on technology providers to indemnify us for the costs of these risks. Therefore, we and other restaurants have resorted to avoiding the use of technology whenever possible, or only purchasing from companies large enough to protect us against patent

claims. Other small businesses suffer, for the lack of our purchases and patronage, and they become casualties of these troll attacks. Furthermore, our customers want the latest technology on our websites and in our restaurants. They like to be able to find the nearest Culver's with a few taps on their smartphone, to be able to figure out whether the combo they want to order fits within their diet, and to be able to get text messages about the frozen custard flavor-of-the-day. And we want to provide our customers with the best restaurant experience; we do not make money off such technology, we simply want to satisfy our customers. As we are driven away from the use of such technology by trolls, our guests will also suffer.

The costs imposed by patent assertion entities are high enough that they jeopardize our business model and could force small and mid-sized companies out of business. I have spoken to more than forty in-house counsels from other restaurants and retailers, and they tell me that their businesses and industries are suffering from these demands. In the current patent litigation marketplace, where usually only a Fortune 500 company has the resources to defend itself in court and challenge these likely invalid patents, there is nothing to deter a patent assertion entity from demanding exorbitant licensing fees and no choice for restaurants and retailers but to pay the toll. Under the current state of the law, as soon as the ordinary business receives a demand from a patent assertion entity, it has lost.

#### The Solution

Now is the time for Congress to step in, and I know I speak for a multitude of businesses when I say how heartened I am that you are tackling this problem. As I said earlier, when we receive a patent troll demand letter, we have lost. Simply receiving such a letter will cost my company over six figures in attorneys' fees and licensing payments, regardless of the merit behind such a letter. And that is not how our patent system, or our litigation system, ought to work. You can stop, or at least seriously diminish, the abuse of the courts and the patent system, and you can save businesses. I believe you are considering a variety of reforms to curb patent trolls' frivolous behavior, and I urge you to consider every useful change that could increase transparency and shift the economic incentives away from trolls making baseless claims. In particular, we at Culver's believe that increased demand letter transparency would be very effective: if a patent holder is required to relay the simple facts about what its patent is, what its product does, and how we are allegedly infringing, we would all be better off. Additionally, clear and complete pleading standards for cases that do get to court would have a positive effect in the same way that transparent demand letters would as well. But most of all, allowing claims between a patent owner and a manufacturer, which is the company that makes the technology the end users are accused of infringing, to proceed before claims between a patent owner and a manufacturer's end users, like Culvers, which is the consumer of such product, is essential. Manufacturers are better positioned to address such claims, and do not suffer from the same lack of information that my company and others similarly situated do. With these changes, patent

assertion entities might well think better of playing on a somewhat more even field, where companies like mine are no longer at quite such an informational and financial disadvantage.

In closing, let me be clear about another important thing, which is that we fully support the ability of individual inventors and legitimate patent holders to market their products and bring claims to protect their intellectual property. But we believe that appropriate patent litigation reform can promote incentives for innovation and still shutter out the exploitation and abuse that runs rampant in the patent system today.

Thank you, once again, Chairman Grassley, Ranking Member Leahy, and members of this Committee for holding this critical hearing. This is a vital step in shedding light on the growing problem of patent assertion entities and the negative affect they have on business, innovation, and the economy. We urge Congress to pass meaningful reforms, without delay, so Culver's, and others in the restaurant industry, can spend more funds on jobs and services that benefit the American economy, and less on payments to patent trolls.

**STATEMENT OF**

**DR. MICHAEL R. CRUM**

**VICE PRESIDENT FOR ECONOMIC DEVELOPMENT AND BUSINESS**

**ENGAGEMENT**

**IOWA STATE UNIVERSITY**

**BEFORE THE UNITED STATES SENATE COMMITTEE ON THE JUDICIARY**

**HEARING ON:**

**“THE IMPACT OF ABUSIVE PATENT LITIGATION PRACTICES ON THE  
AMERICAN ECONOMY”**

**MARCH 18, 2015**

**10:00 A.M.**

**226 DIRKSEN SENATE OFFICE BUILDING**

**Statement of Dr. Michael R. Crum  
Iowa State University**

Chairman Grassley, Ranking Member Leahy, and Members of the Senate Judiciary Committee, thank you for this opportunity to testify on such an important topic. I am Dr. Michael R. Crum and I serve as Vice President for Economic Development and Business Engagement at Iowa State University. On behalf of Iowa State, I am pleased to offer the following statement, which is endorsed by the six major higher education associations and councils that collectively represent the majority of our nation's research universities, academic health centers, and their associated technology transfer operations and technology transfer officers.<sup>1</sup>

Universities are dependent upon the U.S. patent system and the capacity of that system to protect the legitimate intellectual property rights of individual university inventors and large companies alike. This system drives U.S. innovation and our economic competitiveness in the world. Patents provide universities with the means to ensure that many discoveries resulting from research are transferred to the private sector where those discoveries can be turned into innovative products and processes that power our economy, create jobs, and improve quality of life.

Universities therefore have a direct, vested interest in maintaining a strong patent system and in protecting that system from abusive practices that can cripple it. Consequently, our nation's academic institutions support multi-pronged efforts to target abusive behaviors, including *but not limited to* balanced patent litigation legislation, such as the STRONG Patents Act of 2015 and the Patent Transparency Improvement Act of 2013 (S. 1720). All such efforts should be carefully calibrated so that they both effectively target abusive patent litigation practices and preserve the ability of patent holders to legitimately protect their inventions through assertion of their patent rights.

**The Role of Academic Institutions in the Nation's Innovation System**

America's academic institutions are the principal source of basic research that expands the frontiers of knowledge and produces discoveries that enhance our national security, strengthen our economy, improve health, and enrich the lives of our citizens. Each year since the late 1990s, universities have performed between 50% and 60% of U.S. basic research. In 2012, universities performed just over 53 percent of all basic research and almost 20% of applied research conducted in the United States.<sup>2</sup> Academic institutions are also the nation's leading centers for clinical and translational research, food and agricultural research, and cutting-edge engineering and computational science.

<sup>1</sup> The Association of American Medical Colleges (AAMC), the Association of American Universities (AAU), the American Council on Education (ACE), the Association of Public and Land-grant Universities (APLU), the Association of University Technology Managers (AUTM), and the Council on Governmental Relations (COGR).

<sup>2</sup> National Science Foundation, National Center for Science and Engineering Statistics, *National Patterns of R&D Resources: 2011–12 Data Update* (2013). See [http://www.nsf.gov/statistics/nsf14304/content.cfm?pub\\_id=4326&id=2](http://www.nsf.gov/statistics/nsf14304/content.cfm?pub_id=4326&id=2).

University research has greatly strengthened our nation's innovative capacity and economic competitiveness. More than half of U.S. economic growth since World War II has resulted directly from technological innovation, much of which stems from scientific, medical, and engineering research conducted at our universities.<sup>3</sup> Although the primary means by which university research results are disseminated is through training and peer-reviewed publications, conferences, consulting and other forms of open communication, our country increasingly benefits from university technology transfer. Technology transfer is the process by which fundamental discoveries are moved into the commercial sector for development into socially and economically beneficial products and processes.

University technology transfer's contributions to our nation were greatly enhanced by the passage of the Bayh-Dole Act in 1980, which allowed universities to retain the patent and licensing rights to inventions resulting from federally funded research. The enactment of that landmark legislation sparked a dramatic increase in university-to-industry technology transfer:

- In 1980, the year the Bayh-Dole Act was passed, the government held the titles to approximately 28,000 patents, fewer than 5% of which had been licensed for further commercial development by industry. At that time, fewer than 250 patents in total – both federally and non-federally funded – were being issued to U.S. universities annually.
- In 1985, 500 patents were issued to the top 200 research institutions.
- In 2013, U.S. university research led to 5,163 patents in total; 5,790 executed license agreements and options with companies; 747 new companies; and more than 700 new commercial products.
- Between 1996 and 2013, U.S. university licensing activity contributed \$181 billion to the U.S. GDP, supporting 1.44 million person years of employment and \$404 billion in gross output.<sup>4</sup>

Federally funded university research has played a critical role in the development of the laser and its myriad applications, microprocessors, magnetic resonance imaging and later MRI applications, the CAT scan and PET/CT scanner, Doppler radar, GPS, bar codes, web browsers, and hundreds of medicines and vaccines, to name just some of the most widely known examples.

<sup>3</sup> Robert Solow, *Technical Change and the Aggregate Production Function*. REVIEW OF ECONOMICS AND STATISTICS 39, no. 3 (1957): 312–20; see also Gordon Reikard, *Stimulating Economic Growth Through Technological Advance*, AMSTAT NEWS (Mar. 1, 2011), available at <http://magazine.amstat.org/blog/2011/03/01/econgrowthmar11/>.

<sup>4</sup> See Appendix C of Biotechnology Industry Organization, *Measures of Economic Contribution of University/Nonprofit Inventions in the United States: 1996-2013* (March 2015).

Furthermore, university research has not only produced ground-breaking inventions that have led to valuable products, processes, medicines, medical treatments, and new technologies in a wide range of fields, but has also led to the creation of new companies — as noted above, nearly 750 in 2013. The Science Coalition’s list of 100 companies that have grown out of federally funded university research includes major companies such as Google, Cisco Systems, Genentech, Sun Microsystems, and Xenogen, a leader in *in vivo* optical imaging.

At my home institution of Iowa State University, for example, technology transfer has led to numerous technologies, products, and processes that have had a major impact locally, nationally, and internationally, including the fax machine; hybrid corn (named in 2015 by the Association of University Technology Managers as one of the forty most important inventions by a university); a method for monitoring the communication signature of digital communication devices that can be used for authentication and other security applications; and a vaccine that can help prevent transmission of the bacteria that cause salmonellosis among chickens and reduce food-borne disease caused by eating contaminated eggs.

Between 2010 and 2014, inclusive, the three State of Iowa Regent universities — the University of Iowa, Iowa State University, and the University of Northern Iowa — were responsible for the execution of 472 licenses and options, including 183 to companies in Iowa. During that same period, Iowa universities generated 1,059 invention disclosures and 767 patent applications.

The Iowa Regent universities also preferentially license the technologies they develop to Iowa companies, such as Iowa Approach, Inc., which licensed intellectual property from the University of Iowa to commercialize a collection of catheter-based tools to treat atrial fibrillation. Over the past twenty years, more than 500 Iowa companies and individuals have licensed patented and non-patented varieties of soybeans from the Iowa State University Research Foundation (ISURF) covering more than 500,000 acres.

In the last five years, faculty and students from the Regent universities in Iowa have launched 190 startups, supported by over \$24 million in outside funding. In 2014, Iowa companies earned \$24,724,000 in revenue from technologies and inventions created by these three universities.

As noted above, by allowing universities to retain the rights to their inventions arising from federally funded research, Bayh-Dole has created a powerful incentive for academic institutions to pursue the technology transfer that the federal government did not. It is essential to emphasize here, however, that the purpose of university technology transfer — consistent with the overall university mission of education, research, and service — is to enable the commercial sector to generate products and processes that benefit society, *not* to enable the higher education sector to generate revenue. In fact, most university technology transfer operations do not receive enough royalties to offset their total operating costs.

The ability of university technology transfer to achieve its societal benefits is critically dependent on a strong patent system. Because the inventions emerging from university research tend to be early-stage, high-risk inventions, successful university technology transfer transactions must operate within a patent system that protects these inventions. Without such robust patent protections, licensees and venture capitalists will not take on the significant risk associated with investing in and developing such inventions. Strong patents are particularly critical for the small, often undercapitalized startup companies built upon university discoveries. Indeed, patents are often the most critical assets of these startups and small businesses. To be able to gain a foothold in often well-developed markets, such companies must be able to assert their patent rights effectively.

It is also crucially important for universities and their licensees, particularly startups without substantial financial resources, to be protected from potentially crippling abusive patent litigation practices. We also note that many universities own or are affiliated with hospitals and academic health systems that provide lifesaving services to local communities and are often major regional economic drivers. These health centers, too, are targets for abusive patent litigation practices. Accordingly, like so many other innovators in the U.S. economy, academic institutions have a genuine interest in pursuing balanced reforms that address abusive practices and also safeguard the ability of patent holders to enforce their patent rights in good faith.

#### **Balanced Patent Legislation in an Evolving Patent Landscape**

We recognize that abusive patent litigation practices are a corrosive assault on the nation's patent system and must be forcefully countered. We also believe strongly, however, that a careful, fact-based cost/benefit evaluation of each of these proposals must be carried out, particularly given that the evidentiary basis for sweeping patent reform has been called sharply into question. Moreover, the patent landscape has shifted considerably since various patent reform proposals were first proposed, creating fundamental questions about the urgency of broad patent reform at this time.

#### The necessity of cost/benefit analyses to preserve balance in the patent system

A number of prevailing proposals to curtail abusive patent litigation practices would cause far more damage to the system than the benefits they might provide in stemming or mitigating abuses. In fact, they would have the presumably unintended consequence of eroding the overall strength of the U.S. patent system by weakening the ability of patent holders to legitimately enforce their patents.

Universities are particularly concerned about proposals for presumptive fee-shifting and involuntary joinder. The fee-shifting proposals would require courts to award attorneys' fees and costs to the prevailing party in patent cases, unless the position and conduct of the nonprevailing party was "reasonably justified in law and fact" or "special circumstances" (such as severe economic hardship to the named inventor) would make fee-shifting unjust.

Proposals for waiver of fee-shifting are well-intentioned, insofar as they propose to target fee-shifting at nonprevailing parties whose conduct and position are judged by the court to be unreasonable. But judges already have discretion to make a sensitive, case-specific determination to shift fees to punish parties for bringing frivolous or nuisance patent lawsuits. A codified presumption in favor of fee-shifting would diminish just such judicial discretion and result in increased uncertainty and financial risk that would discourage universities and other patent holders lacking extensive litigation resources from legitimately asserting their patents. This heightened uncertainty and risk also would deter potential licensees and venture capitalists from investing in university patents, reducing the number of research discoveries that advance to the marketplace.

The proposed involuntary joinder provisions would magnify the potentially damaging impact of the proposed fee-shifting provisions. Involuntary joinder would force universities into paying costs and damages for the actions of third parties over which they had no control. As with fee-shifting, the proposed joinder provisions include language calling for courts to implement joinder only in cases where the nonprevailing party's interest in the subject matter of the case is primarily to assert the patent in litigation. The joinder language is sufficiently vague or subjective, however, that a well-financed prevailing party could successfully conflate very different kinds of non-practicing patent-holding entities.

Proposals for heightened pleading, discovery limitations, and increased disclosure would also cause more harm than good. Heightened pleading would add unnecessarily to the burden of filing infringement cases, discovery limitations would preclude cases where broader discovery would lead to more efficient resolution of those cases, and new disclosure requirements would require information that would violate confidentiality agreements, thereby chilling venture capital investments.

#### Evolving patent landscape

Several judicial and administrative actions have occurred since the initial patent litigation reform proposals were advanced in 2013. These actions call for a broad re-evaluation of patent litigation before proceeding with proposals that could do serious damage to the strong U.S. patent system.

The Supreme Court's April 2014 decisions in *Octane Fitness v. Icon Health & Fitness* and *Highmark v. Allcare* significantly expanded the discretion of district courts to award attorney costs and fees and raised the bar to overturning such determinations on appeal. One early study that examined samples of awards before and after *Octane* showed a significant increase in the rate at which awards are granted (from 32% to 45% between 2011 and 2013).<sup>5</sup> A second, more recent study that looked at post-*Octane* grants of

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<sup>5</sup> Randy Lipsitz, Aaron Frankel, & Hanna Seifert, *Recent Supreme Court Decision Takes Us Back to the Future: Attorney Fee Award Rate Increases in Patent Cases*, BLOOMBERG BNA PATENT, TRADEMARK & COPYRIGHT LAW DAILY (Jan. 7, 2015), available at <http://www.bna.com/recent-supreme-court-n17179921906/>.

motions for attorney fees also determined that there has been a substantial increase in the percentage of motions granted after *Octane*.<sup>6</sup>

The Judicial Conference of the United States has recommended changes to the Federal Rules of Civil Procedure that will make it harder for plaintiffs to pursue frivolous patent claims while protecting the rights of patent holders to enforce their patents. These changes will heighten pleading requirements by eliminating the Form 18 standard, which will make operative the Supreme Court standards established in *Ashcroft v. Iqbal* and *Bell Atlantic Corporation v. Twombly*. These decisions obviate the need for stricter statutory guidelines.

The Judicial Conference recommendations will also streamline discovery by proposing that discovery in patent litigation cases include only documents that are “proportional to the needs of the case,” and directing courts to shift discovery expenses to the requesting party if producing the documents would place undue burden on the producing party.

The enactment of the America Invents Act (AIA) provided the U.S. Patent and Trademark Office (USPTO) with enhanced post grant review procedures, substantially improving the pre-AIA *inter partes* reexamination with a new *inter partes* review, and establishing a new post-grant review. Both provisions provide a faster, cheaper alternative to court for challenging weak or overly broad patents, and initial evidence shows that these provisions are proving highly effective in eliminating invalid patent claims.<sup>7</sup>

#### Scope of the problem of abusive patent practices

Among the evidence cited for the need for sweeping patent litigation reform is a sharp increase in patent litigation. But the cited increase in patent cases is attributable largely to changes in the joinder provisions of the AIA. A recent study of 2014 litigation trends shows a 23% decrease from 2013 to 2014 to 16,089 cases, the lowest level since 2009.<sup>8</sup>

A widely cited claim that patent trolls cost U.S. businesses \$29 billion a year has been vigorously criticized. A recent [letter](#) written by forty economists and law professors thoroughly documents the methodological flaws in studies purporting to show that litigation by non-practicing entities (NPEs) is harmful to startup firms, reduces R&D, and reduces venture capital investment. In calling into question the claims made by these studies, the authors of the letter cite conflicting data sources, inaccurate proxies, limited and non-generalizable samples, flawed methods for measuring costs of litigation, and disregard for the AIA and other factors.

<sup>6</sup> In the 365 days preceding *Octane*, district courts granted seven motions for fees filed by defendants and denied forty and they granted eight motions filed by plaintiffs and denied seventeen. In the period after *Octane* and, as of January 2014, district courts granted 20 motions for fees filed by defendants and denied thirty-three and they granted ten motions for fees filed by plaintiffs and denied two. See Eric C. Cohen, *Is There a Need for Patent Reform Legislation?* Pre-publication White Paper (March 15, 2015).

<sup>7</sup> According to Kappos, former USPTO Director, 86% of IPR requests are instituted by the PTO and, of those, 77.5% have found at least one claim unpatentable. *Id.*

**Conclusion**

Abusive patent practices are real and they are harmful. Universities vigorously support efforts to rein in such practices. But we believe that sweeping patent legislative reform is not the right instrument. Such a blunt instrument would do more harm than good by weakening the nation's patent system and, by extension, crippling the innovative capacity of the nation. To quote a March 13, 2015 speech by former USPTO Director David Kappos: "[W]e now have a lot of facts and data showing that our intellectual property system is rapidly returning to health. In fact, I submit to you that there is no patent troll driven crisis facing our nation that needs to be corrected with sweeping new legislation. Of course, the system can be further streamlined to reduce needless litigation, but no major overhaul is needed."

Instead, we believe that an approach involving carefully targeted legislation, developed in the context of the changing landscape created by judicial and administrative actions, can effectively combat abusive patent practices while maintaining the capacity of our robust patent system that supports the innovation and economic competitiveness that serves this nation and its citizens so well. U.S. universities stand ready to work with members of Congress in crafting and supporting such legislation.



**Committee on the Judiciary  
U.S. Senate**

**Hearing  
The Impact of Abusive Patent Litigation Practices on the American Economy**

**Testimony of Krish Gupta  
Senior Vice President and Deputy General Counsel  
EMC Corporation**

**March 18, 2015**



**Testimony of Krish Gupta  
EMC Corporation  
Before the Senate Judiciary Committee  
March 18, 2015**

Chairman Grassley, Ranking Member Leahy, and Members of the Committee, my name is Krish Gupta, and I am Senior Vice President and Deputy General Counsel for EMC Corporation (EMC). I appreciate the opportunity to testify on the impact of abusive patent litigation practices on EMC. We applaud the Committee's bipartisan efforts to address this issue and believe strongly that legislative reforms are necessary to protect the patent system and spur innovation and competition.

I am a registered patent attorney with 20 years of experience in patent law. At EMC, I have worldwide responsibility for intellectual property (IP) law and technology licensing matters, including IP policy, patent and trademark prosecution, and IP litigation. I will discuss the importance of patents to EMC, the current state of the patent litigation system, EMC's experience as a target of abusive litigation practices, and the continued and urgent need for patent litigation legislation despite recent Supreme Court decisions and related developments.

Abusive litigation has become so prevalent in our current patent system that it threatens to undermine the benefits that the system was created to provide. A legislative solution is necessary to rebalance the patent system and to help ensure it serves its intended purpose: to provide the incentives and protections necessary for innovators to invest in the next new technology that will benefit the American consumer and our economy.

**About EMC**

EMC was founded in Newton, Massachusetts, in 1979. Today, EMC is a global leader in enabling businesses and service providers to transform their operations and deliver information technology as a service. Through innovative products and services, EMC accelerates the journey to cloud computing, thereby helping businesses store, manage, protect, and analyze their most valuable asset—information—in a more agile, trusted, and cost-efficient way.

Since 2003, EMC has invested approximately \$42 billion in research and development, as well as in acquisition of technologies that have revolutionized the world of information technology. EMC currently has an annual R&D investment of approximately \$3 billion, and our investments have enabled us to broaden its product portfolio, enter new market segments, and expand its market opportunity.



Headquartered in Hopkinton, Massachusetts, with additional concentrations of employees in California, North Carolina, Utah, and Washington State, EMC employs approximately 68,000 people in 86 countries around the world. We rank 128<sup>th</sup> on the Fortune 500, based on 2014 revenues of \$24.4 billion.

### **Importance of Patents to EMC**

EMC's position of market leadership is the result of pioneering innovation, hard work, and substantial investment in new technologies. Innovation and intellectual property are our lifeblood, our keys to survival, and our future. We have a 36-year track record of anticipating future needs and building and acquiring technology solutions to solve problems in new and innovative ways.

We at EMC rely greatly on patents to establish and maintain our proprietary rights in our technology and products. EMC and its majority-owned businesses hold more than 5,100 issued U.S. patents. EMC's patent portfolio is regularly recognized as one of the strongest and most impactful in the information technology business. In fact, the Wall Street Journal and the Patent Board recently ranked EMC as the 8<sup>th</sup> most innovative information technology company based on the quality and quantity of its patents.<sup>1</sup> These patents cover EMC's many innovations, including the hardware and software technologies used in our diverse products and offerings. In short, EMC is an advocate of a strong patent system; however, we want a system that protects and promotes innovation rather than inhibiting it, and we want a system that cannot be exploited by those who would use abusive tactics.

### **Abusive Patent Litigation is a Serious Problem**

In 2014 alone, more than 5,000 new patent lawsuits were filed.<sup>2</sup> That is nearly twice as many as were filed only four years earlier, when Congress passed the Leahy-Smith America Invents Act (AIA).<sup>3</sup> The number of patent lawsuits filed last year was the third highest ever.<sup>4</sup> After adding in patent disputes filed in administrative agencies, the total number increases to more than 6,600 patent disputes—the second highest level in history.<sup>5</sup>

Some claim that recent Supreme Court decisions, and procedures introduced by the America Invents Act, have led to a decline in the number of new patent suits, thereby

<sup>1</sup> THE PATENT BOARD, <http://www.patentboard.com/> (last visited February 9, 2015).

<sup>2</sup> *Unified Patents 2014 Litigation Report*, UNIFIEDPATENTS (January 8, 2015), <http://unifiedpatents.com/unified-patents-2014-litigation-report/>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *2014 Patent Dispute Report and Analytics*, UNIFIEDPATENTS (January 26, 2015), <http://unifiedpatents.com/2014-patent-dispute-report-and-analytics/>.



eliminating the need for patent litigation reform. We disagree that there has been a lasting decline in new patent suits. We did see a dip in new patent litigation filings in 2014, but recent data suggests that this may have been only a temporary aberration. In fact, February 2015 marked the third month in a row of increased patent litigation filings as compared to the same period a year earlier.<sup>6</sup> Specifically, as compared to the same month the previous year, new patent cases were up by 4% in December 2014;<sup>7</sup> by 36% in January 2015;<sup>8</sup> and by 10% in February 2015.<sup>9</sup> While one should not draw too many conclusions from three months of data, there is significant reason to be skeptical of assertions that recent Supreme Court case law and new Patent Office procedures have fundamentally reduced the number of new patent suits.<sup>10</sup>

In 2011, litigation costs arising from cases filed by so-called “patent assertion entities” (or “PAEs”) were estimated at \$29 billion in direct out-of-pocket costs.<sup>11</sup> At that time, commentators estimated the total costs, direct and indirect, associated with abusive patent litigation by PAEs at \$80 billion per year,<sup>12</sup> and those numbers certainly have gone up since then. Abusive patent litigation is a costly problem that is stifling American innovation and impeding job creation each and every day.

While legitimate patent litigation is a necessary part of a robust patent system, small, medium, and large enterprises are all adversely affected by abusive patent litigation. According to a 2013 survey, startup companies and venture capitalists overwhelmingly believe that the threat of patent litigation has a negative impact on their businesses.<sup>13</sup> Survey respondents cited monetary costs, as well as distraction to management, engineers, and other employees. Respondents also described the human toll that these threats have taken on entrepreneurs, citing not only the impact on morale, but also the overall fear of losing a business. Further, the surveyed venture capitalists stated that if a company had an

<sup>6</sup> Daniel Nazer, “Innovation Act Needed More Than Ever As Patent Trolls Roll On,” ELECTRONIC FRONTIER FOUNDATION (Feb. 18, 2015), at <https://www.eff.org/deeplinks/2015/02/innovation-act-needed-more-ever-patent-trolls-roll>.

<sup>7</sup> *Patent Case Filings Up 32% in December But Down 18% for 2014*, LEX MACHINA (January 12, 2015), <https://lexmachina.com/2015/01/patent-case-filings-28-december-20-2014/>.

<sup>8</sup> *January 2015 Patent Dispute Report*, UNIFIEDPATENTS (January 2015), <http://unifiedpatents.com/january-2015-patent-dispute-report/>.

<sup>9</sup> *February 2015 Patent Dispute Report*, UNIFIEDPATENTS (February 2015), <http://unifiedpatents.com/february-2015-patent-dispute-report/>.

<sup>10</sup> See generally Nazer, *supra* n.6.

<sup>11</sup> James E. Bessen & Michael J. Meurer, *The Direct Costs from NPE Disputes*, 99 CORNELL L. REV. 387 (2014), available at <http://ssrn.com/abstract=2091210>; see also *Litigations Over Time*, PATENT FREEDOM, <https://www.patentfreedom.com/about-npes/litigations/> (last visited February 8, 2015); Robin Feldman, Tom Ewing, & Sara Jeruss, *The AIA 500 Expanded: Effects of Patent Monetization Entities*, UC HASTINGS RESEARCH PAPER NO. 45, April 9, 2013, at 7, <http://ssrn.com/abstract=2247195> (patent monetization entities filed 58.7 percent of patent lawsuits in 2012).

<sup>12</sup> James E. Bessen, Jennifer Ford & Michael J. Meurer, *The Private and Social Costs of Patent Trolls*, REGULATION, Winter 2011-2012, at 26.

<sup>13</sup> Robin Feldman, *Patent Demands & Startup Companies: The View from the Venture Capital Community*, UC HASTINGS RESEARCH PAPER NO. 75, October 28, 2013, <http://ssrn.com/abstract=2346338>.

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existing patent litigation threat against it, that fact could potentially be a major deterrent in deciding whether to invest. The survey succinctly summarized the responses on the impact of patent demands on startups: “[w]hen companies spend money protecting their intellectual property position, they are not expanding; and when companies spend time thinking about patent demands, they are not inventing.”<sup>14</sup>

Other commentators echo this core conclusion: abusive patent litigation harms innovation.<sup>15</sup> While Congress hears a lot from large companies like EMC, in fact, the biggest impact is on smaller firms, including startup firms.<sup>16</sup> Most of the cases filed by abusive litigants are targeted at companies with revenues of less than \$100 million per year,<sup>17</sup> although such litigants do try to target cash-rich entities.<sup>18</sup> A study conducted at the Massachusetts Institute of Technology concluded that frequent litigants caused a decline of \$22 billion in venture investing over a five-year period.<sup>19</sup> A Rutgers University study concluded that small companies that were hit with abusive lawsuits significantly decreased their spending on research and development.<sup>20</sup> Likewise, researchers at Harvard University and the University of Texas found a substantial decline in research and development spending following protracted patent litigation initiated by patent assertion entities.<sup>21</sup>

In 2013, litigation by PAEs accounted for 67% of all new patent cases,<sup>22</sup> yet only 20% of issued decisions in the same year involved PAEs.<sup>23</sup> This confirms the belief that defendants targeted by PAEs find it more economical to settle rather than to try to defend themselves in expensive litigation. PAE litigation has cost “tens of billions of dollars per year since 2007,” with startups and venture-backed companies being particularly hard-hit.<sup>24</sup>

<sup>14</sup> *Id.*

<sup>15</sup> James Bessen, *The Evidence Is In: Patent Trolls Do Hurt Innovation*, HARV. BUS. REV., July 2014, available at <https://hbr.org/2014/07/the-evidence-is-in-patent-trolls-do-hurt-innovation>.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> See Lauren Cohen, Umit G. Gurun, and Scott Duke Kominers, *Patent Trolls: Evidence from Targeted Firms* HARVARD BUSINESS SCHOOL FINANCE WORKING PAPER NO. 15-002, August 7, 2014, <http://ssrn.com/abstract=2464303>, at 2-3.

<sup>19</sup> Catherine Tucker, *The Effect of Patent Litigation and Patent Assertion Entities on Entrepreneurial Activity*, MIT SLOAN SCHOOL WORKING PAPER 5095-14, June 22, 2014, at 31, <http://ssrn.com/abstract=2457611>.

<sup>20</sup> Roger Smeets, *Does Patent Litigation Reduce Corporate R&D? An Analysis of US Public Firms*, April 28, 2014, <http://ssrn.com/abstract=2443048>.

<sup>21</sup> Cohen et al., *supra* n.18.

<sup>22</sup> 2014 Patent Litigation Study, PRICE WATERHOUSECOOPERS (July 2014), at [http://www.pwc.com/en\\_US/us/forensic-services/publications/assets/2014-patent-litigation-study.pdf](http://www.pwc.com/en_US/us/forensic-services/publications/assets/2014-patent-litigation-study.pdf); 2013 NPE Litigation Report, RPX (January 2014) at 2, <http://www.rpxcorp.com/wp-content/uploads/2014/01/RPX-2013-NPE-Litigation-Report.pdf>.

<sup>23</sup> 2014 Patent Litigation Study, *supra* n.22, at 2.

<sup>24</sup> Letter from 51 Economics and Legal Scholars to United States Congress (March 2, 2015), available at <http://www.unitedforpatentreform.com/files/ip-scholars-letter-to-congress1554891030.pdf>.



Especially telling is the fact that “the more R&D a firm performs, the more likely it is to be hit with a patent lawsuit, all else equal.”<sup>25</sup>

It is often said that PAEs support small inventors. But small inventors only receive from PAEs about 5% of the proceeds of successful enforcement of the inventors’ patents. Lawyers and the PAEs and their investors get the vast majority of the proceeds.<sup>26</sup>

This data does not come from just one or two studies, researchers, or institutions. As reflected in a recent letter to Congress signed by 51 economics and intellectual property scholars, “academic researchers have published over two dozen empirical studies on patent litigation and its economic impacts.”<sup>27</sup> The letter explains that “[t]hese studies have been conducted by researchers with diverse views and using different methodologies.”<sup>28</sup> According to the studies, “a large and increasing body of evidence indicates that the net effect of patent litigation is to raise the cost of innovation and inhibit technological progress, subverting the very purpose of the patent system.”<sup>29</sup> Significantly, “[n]ot one study of the economic impact of current patent litigation concludes that the effects are negligible.”<sup>30</sup>

Thus, the evidence is clear: frivolous and abusive patent litigation results in less innovation and less investment in cutting-edge technologies and companies.

We at EMC wholeheartedly agree with these conclusions. While a healthy patent system benefits innovators and the economy, public confidence in our nation’s patent system suffers, justifiably, when that system allows low-quality patents to be asserted in litigation and allows abusive litigation practices to be used. Baseless patent litigation distracts innovators, preventing them from spending their time productively contributing to technological progress and to our economy.

The staggering costs of such abusive patent litigation are borne by innovative companies in all industries. While 63% of the patent lawsuits filed last year were in the high-tech field,<sup>31</sup> a recent article suggested that patent assertion entities may soon increase lawsuits targeting biotech and pharmaceutical companies.<sup>32</sup> In short, the patent system that was created to promote innovation, has, in far too many instances, actually had a detrimental

<sup>25</sup> *Id.*

<sup>26</sup> See Bessen & Meurer, *supra* n.11, at 4; see also *Patent Trolls: Why No One Likes Them*, THE ECONOMIST (March 3, 2015), available at <http://www.economist.com/news/business-and-finance/21645604>.

<sup>27</sup> Letter from 51 Economics and Legal Scholars to United States Congress, *supra* n.24.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Unified Patent’s 2014 Litigation Report*, UNIFIED PATENTS (January 8, 2015), <http://unifiedpatents.com/2015/01/08/unified-patents-2014-litigation-report/>.

<sup>32</sup> Robin Feldman & W. Nicholson Price, *Patent Trolling — Why Bio & Pharmaceuticals Are at Risk*, UC HASTINGS RESEARCH PAPER NO. 93, Feb. 14, 2014, <http://ssrn.com/abstract=2395987>.



impact on innovation by taking money and resources from those who innovate and handing it over to those who do not.

### **EMC's Experience**

EMC is a frequent target of unscrupulous patentees with low-quality patents. Since 2005, EMC has faced dubious patent lawsuits more than thirty five times, and has never been found to have infringed. As a matter of principle, EMC does not settle unmeritorious suits. For us, doing so would be tantamount to giving in to extortion, and only encourage more such suits. Yet defending against abusive litigation has cost us millions of dollars that could have been invested in growing our workforce or furthering innovation. In 2014 alone, EMC spent more than \$10 million in defending frivolous patent actions.

Typically, abusive patentees provide very little information about their allegations until months into the case. EMC is forced to devote significant time, resources, and manpower to analyzing vague complaints that are directed at very diverse technology areas and complex systems. This effort is needed because we must speculate about what will be the subject of the plaintiff's infringement argument. And in the process, we waste the time of our engineers—the driving force of our company—studying technical details of features that ultimately are not at issue in the case.

At the beginning of a lawsuit, EMC spends between \$100,000 and \$150,000 per month in outside legal fees for routine investigation and administration of a patent suit. Once a case becomes more active with discovery, depositions, expert reports, and Markman hearings, the fees typically range from \$150,000 to \$300,000 per month, and often can be even higher. Added to such costs are expenses for outside vendors, experts, and prior art searching, which may cost several hundred thousand dollars each.

Further, we often challenge the validity of low-quality patents through a Petition for Inter Partes Review (IPR). These petitions—highly beneficial proceedings introduced by the AIA—are filed with the Patent and Appeals Board of the U.S. Patent and Trademark Office, an expert agency that is often better situated to evaluate patent validity than a court. Although EMC is a great proponent of this new proceeding, an IPR can cost between \$500,000 and \$1,000,000 per patent. In instances in which the district court does not stay its proceedings, this expense may need to be borne simultaneously with the above-described litigation costs.

In total, we can easily spend several million dollars to reach a resolution on the merits of each case. With the expenses associated with such litigation, it is understandable how unscrupulous plaintiffs use the leverage associated with these costs to extort unreasonable settlements from defendants. This tactic is especially effective against startups and small companies that may not have the capital for a robust defense. Indeed, some patentees negotiate scores of cost-of-litigation settlements with the majority of defendants, then

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simply dismiss the rest rather than proceeding with litigation. Although this tactic demonstrates the frivolous nature of the lawsuit, defendants rarely have any recourse, much less a cost effective one, against patentees who conduct no business aside from filing meritless cases.

Discovery is a major contributor to the overall cost of litigation. Discovery costs in intellectual property cases are almost 62 percent higher than in other cases.<sup>33</sup> In a case brought by a patent assertion entity, these discovery costs are borne almost exclusively by defendants. This sort of plaintiff typically has few documents and fewer employees. No matter how many discovery requests they are served, they can often simply produce all their documents in a single banker's box. There is a significant incentive for a patent assertion entity to drown a large company defendant in discovery requests, seeking to force its engineers, its IT department, and its legal staff to unearth tens of thousands of requested documents. Such discovery costs are particularly troubling because they are unpredictable. Judges across the country, abetted by the lack of uniform national patent rules, have very different views on the proper scope of discovery.

Making matters worse, excessive discovery burdens are unnecessary and unwarranted. According to one estimate, less than one document in ten thousand produced in discovery is actually introduced at trial.<sup>34</sup> Email appears even more rarely.<sup>35</sup> Yet despite the irrelevance of most documents produced in discovery, some plaintiffs still use the threat of exorbitant discovery costs to increase the pressure and incentives to settle.

One of the lawsuits in which EMC is involved provides a compelling example of the need for reform. When this case was first filed, the complaint listed eight patents, with no explanation of which of the hundreds of claims in those patents were allegedly infringed. The complaint generically accused two large EMC product lines of infringing, with no designation of which specific models infringed, and no explanation of why any EMC product supposedly infringed, or which claims might be infringed.

Based on the limited information we had, we at EMC set to work investigating the plaintiff's allegations and preparing our defenses. But six months later, the plaintiff amended its complaint, adding three new patents with dozens of additional claims and a third, separate EMC product line. The plaintiff still failed to identify any specific claims or any specific model numbers. EMC again diligently attempted to investigate the allegations, but the sheer number of claims and the lack of any explanation as to how the claims were allegedly infringed resulted in a monumental task, involving hundreds of hours of potentially unnecessary analysis. It was not until eight months into the litigation that specific claims were identified and claim charts provided.

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<sup>33</sup> Chief Judge Randall B. Rader, *The State of Patent Litigation*, E.D. TEX. JUDICIAL CONFERENCE, Sept. 27, 2011, at 7, available at <http://patentlyo.com/media/docs/2011/09/raderstateofpatentlit.pdf>.

<sup>34</sup> *Id.* at 8.

<sup>35</sup> *Id.*



Then, a year and four months into the lawsuit, the plaintiff again tried to expand the case, asking the Court for permission to add new products and previously undisclosed claims. EMC should not have to litigate for more than a year, investing enormous sums of money for its defense, only to have the case fundamentally change direction again and again.

As a result of all this uncertainty, EMC has spent hundreds of thousands of dollars *per month* combating allegations that are a fast-moving target. If the plaintiff had identified its theory of the case from day one, we at EMC could have conducted our own investigation into infringement and validity in short order, spending a fraction of the time and expenses that we have been forced to incur. Instead, as is common in abusive patent litigations, the ever-changing allegations make it impossible to efficiently and effectively prepare a defense. This is by design and in the plaintiff's interest, as so many companies would prefer to settle for a fraction of the litigation cost and avoid the aggravation rather than continue to fight on these uneven terms.

Discovery represents a significant part of EMC's overall expenses in this case. The plaintiff has accused EMC products that are complex, refrigerator-sized storage systems that may cost up to \$1 million or more. However, the alleged infringement is based solely on a relatively inexpensive commodity chipset that is supplied to us by a third party and embedded within the accused products. The plaintiff's damages contentions ignore this fact, improperly claiming damages based on the entire market value of EMC's products. Despite the narrow scope of the patent, EMC is forced to spend considerable money producing reams of technical and financial information that has nothing to do with the tiny third party chipset that is at the heart of the infringement allegations.

But the money EMC spends in connection with these discovery burdens does not begin to capture the total cost to EMC, which includes the lost time of our engineers, executives, and other valued employees. For example, one of EMC's star engineers was required to formally set aside ten percent of his time for an extended period of time to assist with document collection efforts. This single engineer devoted over one hundred hours of time tracking down relevant documents. Some of the documents were so old and irrelevant to EMC's current business that additional employees needed to be consulted for the sole purpose of determining where this obsolete information resided. And this one engineer was only one of more than 100 employees who were asked to assist and dedicate their time to the process of locating documents.

In short, the system as it exists today is highly skewed. Patentees who file frivolous cases can gain significant unfair leverage by increasing the risk and costs on the part of defendants. They are rarely, if ever, subject to counterclaims, so they share no part of the risk, and little part of the costs. Today, they are rarely held accountable for a defendant's attorneys' fees, even when the litigation they filed lacked any reasonable basis. We urge the Committee to address these core issues and ultimately allow for a healthier system.



### **Recent Supreme Court Cases and Related Developments**

Some have suggested that recent decisions by the Supreme Court of the United States reduce the need for Congress to act. While these decisions help bring clarity to, and therefore benefit the patent system, the great majority of small, medium and large entities that have been negatively impacted by abusive patent litigation know that much still needs to be done, and that legislative action is required to address the core aspects of abusive litigation. That is, legislative action is required to secure the patent system so that it operates in the manner in which it was originally intended—to promote innovation. I will summarize the relevant recent cases and explain why Congressional action is sorely needed to promote consistency and predictability.

**Limelight.** Last June, the Supreme Court decided *Limelight Networks, Inc. v. Akamai Technology*,<sup>36</sup> a case relating to induced infringement of method claims. A method claim is a patent claim that sets forth steps to be performed rather than physical components of a patented machine. In a claim of induced infringement, the defendant is accused of encouraging someone else to infringe a patent. In *Limelight*, the Supreme Court confirmed that there can be no induced infringement unless there is direct infringement. This decision properly returned the law to the way it was before the Federal Circuit's decision in this case, but did not have any additional impact on baseless patent litigation.

**Alice.** In *Alice Corporation v. CLS Bank*,<sup>37</sup> also decided last June, the Court turned to the category of patents that abusive plaintiffs more often assert in patent litigation: patents on computer-implemented business ideas. The Court held that you cannot get a patent on a fundamental economic practice, like the idea of escrow, even if you limit your patent to escrow performed on a computer. Computers are so ubiquitous, the Court explained, that merely taking a longstanding idea and doing it on a computer is not truly inventive.

While *Alice* is helpful in some cases, it impacts only a small percentage of patents. Even patent cases that do not survive motions to dismiss under *Alice* run up enormous costs for defendants. Plaintiffs who file bad-faith litigation understand these costs, and can still coerce settlements out of defendant operating companies that would rather pay less to settle than to litigate.

**Octane/Highmark.** Last year, the Court decided two cases addressing when courts can award attorneys' fees to the prevailing party in patent litigation. Currently, Section 285 of the Patent Act says that even when a defendant wins, the defendant still must pay its own attorney's fees unless the defendant demonstrates that the case was "exceptional." In *Octane Fitness v. Icon Health & Fitness*,<sup>38</sup> the Supreme Court interpreted this provision to mean that fees are available in any case that "stands out from others." In *Highmark v.*

<sup>36</sup> *Limelight Networks, Inc. v. Akamai Technology*, 134 S.Ct. 2111 (2014).

<sup>37</sup> *Alice Corporation Pty. Ltd. v. CLS Bank Int'l*, 134 S.Ct. 2347 (2014).

<sup>38</sup> *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S.Ct. 1749 (2014).

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*Allcare Health Management System*,<sup>39</sup> the Court held that district courts have great discretion in deciding whether to award fees. EMC filed amicus briefs in these cases urging the Court to make it easier for district courts to award fees, and these cases did loosen the prior standards applicable to deciding motions for fees. Unfortunately, as I will explain, these decisions have been only moderately successful in increasing the success rates of defendants who seek to recover their attorneys' fees when they are faced with baseless patent litigation.

**Nautilus.** In June of last year, the Court addressed how clear or "definite" patents must be in *Nautilus v. Biosig Instruments*.<sup>40</sup> The Court interpreted language in Section 112 of the Patent Act requiring that a patent "conclude with one more claims particularly pointing out and distinctly claiming the subject matter" of the invention as requiring the patent to provide "reasonable certainty" of what it covers. EMC filed an amicus brief in this case as well, successfully urging the Court to overrule the Federal Circuit's overly-narrow view of when a patent should be held invalid for indefiniteness. Nevertheless, since the Supreme Court issued this decision, few patent claims have actually been invalidated as a result of the new standard, and the Federal Circuit continues to reverse cases where indefiniteness was found in the district court.<sup>41</sup>

**Teva.** In its recent decision in *Teva Pharmaceuticals USA v. Sandoz*,<sup>42</sup> the Court took a step backwards in its line of patent decisions, addressing the Federal Circuit's standard review of district court claim construction decisions. The Federal Circuit had always given a fresh look to such decisions, which enabled that court to ensure that a patent had been interpreted consistently across the district courts. But in January, the Supreme Court held that some aspects of a district court's claim construction decision would be reviewed with deference—that is, the Federal Circuit should allow district courts some leeway in interpreting patents, even if they get it wrong.

EMC filed an amicus brief in this case as well, warning that giving deference to a district court's claim construction decision would encourage abusive patent litigation. Patentees typically get to pick the district court in which they bring suit, and so they can shop for the forum most likely to interpret patents overly favorably. The Federal Circuit's fresh review of district court interpretations of a patent had put a small check on such forum shopping. Now unscrupulous patentees have an additional incentive to pick the district court most favorable to them, and that court's claim interpretation will be more insulated from Federal Circuit review.

**Twombly, Iqbal, and Form 18.** In 2007 and 2009, the Court decided *Bell Atlantic v. Twombly*<sup>43</sup> and *Ashcroft v. Iqbal*<sup>44</sup>, a pair of non-patent cases that increased, to a degree, the

<sup>39</sup> *Highmark, Inc. v. Allcare Health Mgmt. Sys., Inc.*, 134 S.Ct. 1744 (2014).

<sup>40</sup> *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S.Ct. 2120 (2014).

<sup>41</sup> See *Eidos Display, LLC v. AU Optronics Corp.*, \_\_ F.3d \_\_, 2015 WL 1035284 (Fed. Cir. March 10, 2015).

<sup>42</sup> *Teva Pharmaceuticals USA, Inc. v. Sandoz Inc.*, No. 13-854 (U.S. Jan. 20, 2015) (slip. op.).

<sup>43</sup> *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955 (2007).



level of specificity required in a complaint by requiring the complaint to include enough facts to “plausibly” suggest that the plaintiff is entitled to relief.

Today, these cases do not directly apply to patent complaints that assert direct infringement (although they do apply where indirect infringement is alleged) because the Federal Rules of Civil Procedure include a sample form for patent infringement, Form 18, which requires less detail than is required by *Twombly* and *Iqbal*. Thus, today, a plaintiff need not fully identify the accused products; a plaintiff need not identify the asserted claims; and a plaintiff need not explain why it believes that the defendant infringes the asserted patent.

In September, the Judicial Conference of the United States, which is a 26-member committee of judges that suggests changes to the Federal Rules of Civil Procedure to the Supreme Court, recommended abolishing certain model forms, including Form 18.<sup>45</sup>

The abrogation of Form 18 would be a positive development, as it would lead to courts applying the stricter standard of *Twombly* and *Iqbal* to patent cases. But these cases do not set forth bright-line rules, and inevitably there will be satellite litigation regarding whether or not a particular complaint satisfies the requirements of these cases. Different judges in different districts will come to different conclusions, leading to variable outcomes. Legislation is needed to provide uniform, clear national standards that create balance in the patent system and allow defendants to properly respond to accusations and prepare their case from the outset.

### **Thoughtful Legislation is Needed**

A healthy and robust patent system promotes innovation and contributes to the continued economic success of our country. Unfortunately, abuses of the system undermine faith in the system and the system itself. Three issues cause most of the burden associated with lawsuits brought by unscrupulous patentees: (1) *vague pleadings*, (2) *excessively broad discovery demands*, and (3) *a lack of financial accountability on the part of losing patentees who bring baseless lawsuits*. We have heard some argue that the recent proposed rule amendments by the Judicial Conference and recent Supreme Court decisions will dramatically change the patent litigation landscape. We strongly disagree. These changes do not fully address the core problems of patent litigation abuse. They do not require a patentee to initially disclose which claims of a patent it is asserting, which of the

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<sup>44</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937 (2009).

<sup>45</sup> See *Judicial Conference Receives Budget Update, Forwards Rule Package to Supreme Court*, UNITED STATES COURTS, September 16, 2014, <http://news.uscourts.gov/judicial-conference-receives-budget-update-forwards-rules-package-supreme-court>; Vin Gurrieri, *Judges Vote to Nix Rule Creating Patent Complaint Forms*, IP LAW 360, September 17, 2014, <http://www.law360.com/articles/578149/judges-vote-to-nix-rule-creating-patent-complaint-forms>.

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defendants' products it is accusing, or how the accused products supposedly infringe the patents. They do not reduce the expense and burden of discovery. And they do not make fee-shifting the default rule rather than the exception. Only Congress can effect these changes. And, after over a decade debating this issue while the problem continues to grow, we believe now is the time for you to do so.

I believe each of these issues is effectively addressed in H.R. 9, the Innovation Act of 2015 ("Innovation Act"), which was reintroduced this year and overwhelmingly passed the House by a vote of 325-91 on December 5, 2013. I urge the Senate to enact comparable legislation for the reasons stated below.

**Pleading Specificity.** Businesses of all sizes, including EMC, benefit from a certain and predictable legal environment. Uniform, clear national standards, such as those included in the Innovation Act, can only be provided by Congress, and are direly needed. Those standards should require a plaintiff to explain why it believes the defendant infringes, so that the defendant can actually investigate the allegations and prepare its case, rather than face ever-shifting theories of infringement.

The Innovation Act recognizes the need to provide uniform pleading requirements for patent infringement cases. The Act would require a patentee to set out in its complaint each asserted claim, each accused product, and an explanation of how each accused product supposedly infringes every asserted claim. This imposes no new burden on good-faith plaintiffs, who are required to have conducted due diligence and arrived at a tenable, good-faith theory of infringement before filing suit. The bill's heightened pleading requirement merely requires plaintiffs to disclose the results of their required analysis. The real impact of this provision would be on those plaintiffs who file meritless, bad-faith lawsuits by making the lack of basis for the lawsuit apparent from the outset.

While several local patent rules require early disclosure of patent infringement contentions, those disclosures are not required until well after the filing of the complaint. These rules do nothing to ensure that plaintiffs have satisfied their pre-suit due diligence requirements. They do nothing to reduce the early burdens on defendants associated with investigating vague allegations of patent infringement. They do nothing to reduce the burdens associated with early discovery regarding the accused products, which is required under some local rules before the plaintiff must serve infringement contentions. And local rules certainly do not promote uniformity, since each of the country's 94 judicial districts has its own set of local rules, not all of which include local patent rules.

**Discovery.** None of the recent Supreme Court cases or proposed rule changes promises to turn the tide of the abusive discovery tactics that plague the meritless cases EMC faces on a daily basis. As I explained earlier, discovery is a significant weapon used to extort cost-of-litigation settlements in meritless cases. Abusive discovery tactics are particularly effective when used by PAEs because they typically have few employees and few records or documents, and are generally not subject to counter suit.

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The Judicial Conference has proposed amendments to the Federal Rules relating to discovery. For example, the Judicial Conference has proposed modifying Rule 26 to require that the proposed discovery be “proportional to the needs of the case.” This requirement is a step in the right direction. But when considering what is “proportional to the needs of the case,” the proposed amendment requires consideration of the “amount in controversy,” a factor that is easily manipulated by plaintiffs. Indeed, in two recent patent cases filed against EMC, patentees have entirely ignored financial documents provided by EMC and instead submitted their own damages calculations that are entirely divorced from economic reality. Patentees would accelerate this trend under the new rule, bootstrapping their own unfounded damages estimates into an argument supporting unbounded, burdensome discovery requests.

Other changes require district court judges to manage discovery disputes earlier, more often, and more actively. These amendments are welcome. But they ultimately do not provide the bright-line guidance to courts needed to make a meaningful difference in the burdens associated with abusive discovery tactics in patent cases. The Judicial Conference’s proposed changes will demand more time and attention from already overburdened district courts. The average time from case filing to claim construction decision—a crucial milestone in a patent case—was already nearly two years<sup>46</sup> between 2008 and 2014.<sup>47</sup> The average time to trial was over three years<sup>48</sup> during the same period.<sup>49</sup> Requiring overburdened district judges to spend even more time than they already do on discovery issues will necessarily mean they have less time to spend on substantive issues and will, inevitably, delay resolution of patent cases. Further, more judicial attention to discovery issues may have the opposite of the desired impact, leading the parties to spend more time on discovery disputes with the hope of obtaining favorable pretrial procedural rulings. Thus, asking judges to devote more attention to discovery matters will merely trade one cost (compliance with burdensome discovery requests) for another (costly, repetitive discovery disputes). We need a better solution.

The Innovation Act sensibly limits discovery before the court issues its claim construction ruling to only discovery that relates to claim construction issues. This would help prevent wasted effort by either eliminating the need for further discovery entirely (where, for example, the court’s claim construction order effectively resolves the case); or, at minimum, by focusing the parties on truly relevant discovery, that can only be known after the court has told the parties how the claims will be interpreted.

The Innovation Act further ensures that the technical discovery that does take place would be tailored to the issues that actually matter, and that the costs of additional and inefficient “fishing expeditions” would be borne by the party serving the discovery request. By

<sup>46</sup> 712.7 days; or 635.1 days counting only the nine courts with the most active patent dockets.

<sup>47</sup> Year in Review: 2014, PATENT NAVIGATOR (last accessed March 10, 2015) at 21, <http://home.docketnavigator.com/year-review/>.

<sup>48</sup> 1224.3 days, or 1197.2 days counting only the nine courts with the most active patent dockets.

<sup>49</sup> Year in Review: 2014, *supra* n.47, at 24.

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requiring the requesting party to cover the costs of unnecessary discovery, the Innovation Act limits the extent to which those who would abuse the litigation system can use discovery costs as a bargaining chip.

**Fee-shifting.** The Supreme Court's decisions in *Highmark* and *Octane* are welcome, but do not go far enough. Fundamental change is needed to stop the onslaught of frivolous patent cases companies have faced in recent years.

In the two years before these cases were decided, motions for fees were fully granted 18 percent of the time and granted in part 20 percent of the time. They were denied in full 62 percent of the time.<sup>50</sup> According to our analysis, in the nine month period after the Supreme Court issued its decisions in *Highmark* and *Octane* (ending in January 2015), the grant rate temporarily increased. In that period, motions for fees were fully granted 32 percent of the time and granted in part 10 percent of the time. The rate of full denials decreased marginally, from 62 percent to 58 percent. Viewed as a whole, more motions for fees have been granted in full and fewer have been granted in part. The number of denials has decreased, but only slightly.

Although at first glance, these statistics suggest that the rate of fully-granted motions for fees has risen after *Highmark* and *Octane*, in reality, that increase is largely isolated to the first three months after the Supreme Court issued its decisions. In those three months, motions for fees were fully granted 40 percent of the time, partially granted 10 percent of the time, and fully denied 50 percent of the time. But in the most recent three months, motions for fees have been fully granted only 24 percent of the time and partially granted 13 percent of the time, with full denials at 63 percent. In other words, in the most recent three months, the rate of full denials of attorneys' fees motions has gone back to where it was before the Supreme Court decided *Highmark* and *Octane*.

As this data suggests, fee-shifting remains the exception rather than the rule. At least one highly experienced and respected district judge has stated that *Octane* does not affect what cases he would consider to be exceptional.<sup>51</sup> Furthermore, the Federal Circuit's recent decision vacating a district court's award of fees to a prevailing defendant introduces uncertainty to this area of jurisprudence.<sup>52</sup> And a judge on the Federal Circuit sitting as a district court judge by designation denied fees even though he found that the plaintiff's case "was certainly a weak one."<sup>53</sup> As we can see, *Highmark* and *Octane* will not provide the sea change needed to effect fundamental reform. Critically, much is left to the discretion of district courts—discretion that is exercised very differently by different judges.

<sup>50</sup> *Docket Navigator Litigation Activity*, <https://www.docketnavigator.com/stats> (last updated Feb. 5, 2015).

<sup>51</sup> See Jess Davis, *Judge Gilstrap Keeps Eastern District's Tight Ship Afloat*, IP LAW 360 (March 6, 2015), <http://www.law360.com/ip/articles/628732>.

<sup>52</sup> See *Biax Corp. v. Nvidia Corp.*, No. 2013-1649, 2015 WL 755940, at \*4 (Fed. Cir. Feb. 24, 2015).

<sup>53</sup> *Stragent LLC v. Intel Corp.*, Civ. No. 6-11-cv-00421, 2014 WL 6756304 (E.D. Tex. Aug. 6, 2014), at \*5.



The Innovation Act would level the playing field by requiring, upon motion, that fees be awarded to the prevailing party unless the losing party's position is substantially justified or special circumstances make an award unjust. We believe that this provision embodies the most effective way to discourage the filing of frivolous and abusive suits by imposing financial accountability in the patent system. Simply stated, some patent owners—especially PAEs that are not generally subject to counter suits—have nothing to lose and everything to gain by filing suits, whether they have merit or not. Fee shifting would change that and bring some accountability to the system. Further, it would encourage parties who believe they have been wrongfully accused of infringement to pursue a vigorous defense if they believe they might recover their fees, rather than agree to nuisance settlements to avoid the expense of patent litigation.

The Innovation Act also requires disclosure of the real party in interest and permits joinder of that party. These provisions allow a prevailing party to recover fees, and to file counterclaims, against the entity that is truly behind the lawsuit. PAEs are often shell companies, with another entity providing the financial backing for the case. That entity may receive a "back end" in proceeds of the litigation. It may retain significant control over the PAE. It may be directing the litigation in the background. It may have granted licenses in the past, or committed to license its patents on reasonable and non-discriminatory terms.

This real party in interest should be required to be a party to the litigation. It should be liable for attorneys' fees if it permits a meritless case to go forward. And it should be subject to counterclaims in the event the real party in interest is infringing claims of patents owned by the defendant in the litigation. These changes would give operating companies like EMC more leverage, level the playing field and bring more fairness to suits brought by PAEs and other abusive patentees.

**Post-Grant Review Processes.** This Committee has debated the merits of reform for well over a decade and has considered all manner of legislation since the introduction of the Patent Reform Act of 2006 by Senators Hatch (R-UT) and Leahy (D-VT). These efforts culminated in the passage of the landmark Leahy-Smith America Invents Act of 2011, which most notably invigorated the post-grant review procedures at the Patent and Trademark Office (PTO). These procedures have proven to be effective and useful reforms for challenging the validity of patent claims and they are helpful tools to eliminate, narrow, and clarify broad, ambiguous patents. These changes were based on the sound recommendations of the National Academy of Sciences to Congress and have been implemented as Congress intended.

In our view, the post-grant procedures have been a phenomenal success. Inter Partes Review (IPR) proceedings, in particular, have been very popular with patent practitioners.

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As of mid-February 2015, approximately 2,500 IPR petitions had been filed.<sup>54</sup> EMC has filed 19 petitions requesting the PTO to institute IPR proceedings and has defended 7 IPR petitions against its patents. Based on our experience in these proceedings, as both petitioner and patent owner, we believe the IPR process is operating as Congress intended and has proven to be a powerful and effective tool for culling out bad patents from the system.

Legislative proposals that change the post-grant review processes are premature and untimely. Despite the success of these new proceedings, the PTO is already reviewing and further improving the post-grant processes. According to PTO Director Michelle Lee, the PTO is holding roadshows and seeking public comments and plans to issue interim rules soon that she considers “quick fixes” to the post-grant review process. Additional rules are slated for later this year to address more challenging changes.<sup>55</sup> Director Lee stated, “Let me be clear that the Agency is open to considering changes to ensure the most effective and fair AIA trials possible in compliance with our legislative mandate. We aim to implement final rules by the end of this year.”<sup>56</sup> I strongly believe Congress should not interfere with post-grant processes that are working and are in the process of further evaluation and improvement.

I also believe the current broadest reasonable interpretation (BRI) standard is appropriate for post-grant review. The BRI standard appropriately places the burden on the patentee to draft claims that are clearly novel and nonobvious over the prior art. The BRI standard is based on a well-established body of law and has been in effect for nearly a century at the PTO. There is no reason why the standard the patent office uses in IPR proceedings should be any different from the standard it uses in every other patent proceeding, including prosecution, interference, and reexamination.

The BRI standard was also recently affirmed by the Federal Circuit in *In re Cuozzo Speed Technologies, LLC*, holding that “[a]pplying the broadest reasonable interpretation standard reduce[s] the possibility that, after the patent is granted, the claims may be interpreted as giving broader coverage than is justified.”<sup>57</sup> We are concerned that rolling back this standard would allow overly broad patents to continue to be used as weapons to abuse the patent litigation system.

**Willful Infringement.** Patent law has long required that willful infringement only be found where there is clear and convincing evidence that (1) an adjudged infringer took its wrongful actions “despite an objectively high likelihood that its actions constituted

<sup>54</sup> Remarks by Deputy Director Michelle K. Lee at the IPO Education Foundation PTO IPO Day Luncheon, March 10, 2015, available at <http://www.uspto.gov/about-us/news-updates/remarks-deputy-director-michelle-k-lee-ipo-education-foundation-pt-ipo-day>.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *In re Cuozzo Speed Technologies, LLC*, \_\_ F.3d \_\_, No. 2014-1301, 2015 WL 448667, at \*6 (Fed. Cir. Feb. 4, 2015) (citations and internal quotation marks omitted).



infringement of a valid patent,” and (2) that the objectively-defined risk was or should have been known to the infringer. This standard is based on a well-developed body of case law that has limited willful infringement and, relatedly, treble damages to only the most egregious of abuses.

I believe legislative proposals that lower the willful infringement standard to establishment by a “preponderance of the evidence” would increase the leverage that abusive litigants currently enjoy in the economics of patent litigation. A finding of willful infringement results in an award of punitive damages. In other civil litigation contexts, an award of punitive damages ordinarily requires proof by clear and convincing evidence. There is no reason to depart from this standard in the context of willful patent infringement. Lowering the standard of proof would lead to an explosion of willful infringement claims and only provide opportunity for further abuse of the patent system. I strongly believe that such a change would be unwarranted and harmful.

**Divided Infringement.** I also oppose legislation that overturns the Supreme Court’s most recent decision in *Limelight Networks, Inc. v. Akamai Technology*. There is no reason to change the long-standing rule that a single defendant must perform or control all of the steps of a method claim for there to be infringement. Overturning the *Limelight* decision would merely belatedly expand the scope of poorly-drafted patent claims. This change would undermine certainty in patent law and upend the well-settled expectations of businesses regarding what does and does not constitute patent infringement.

### **Conclusion**

Congress is uniquely situated to make a real difference in these important areas. While the Supreme Court has been active in correcting some of the flaws in the patent system that frivolous litigants seek to exploit, the judiciary—even at the highest level—cannot bring about the prompt and comprehensive solution that Congress can structure. It takes time for a case to reach the Supreme Court and it only accepts for review a handful of IP cases each term. Congress on the other hand can enact balanced solutions in a single, coordinated approach, such as that set forth in the Innovation Act. The proliferation of abusive patent litigation is the kind of broad problem, causing billions of dollars in misdirected spending, that cries out for a legislative solution.

Legislative action to address patent litigation abuses is necessary to restore confidence and balance in our patent system. The courts have made great strides, but the decisions are not sufficient to address all of the tactics associated with abusive patent litigation, including vague pleadings and discovery misconduct, which force many companies into settlement. The money spent on this frivolous litigation would be better invested in jobs and research and development. I must tell you, unfortunately, that I am certain that unless Congress acts, the problem will continue, unabated. The efforts undertaken by this Committee will be essential to the health of our patent system and the innovation of businesses in the United States.



Statement for  
the Hearing  
“The Impact of Abusive Patent  
Litigation Practices on the  
American Economy”

Before the United States Senate  
Committee on the Judiciary

Mr. Brad Powers  
General Counsel  
Kinze Manufacturing, Inc.

March  
18, 2015



Chairman Grassley, Ranking Member Leahy, and Members of the Judiciary Committee, I am Brad Powers, General Counsel of Kinze Manufacturing, Inc. On behalf of Jon and Marcia Kinzenbaw and Kinze Manufacturing, we are honored to have the opportunity to present testimony today about the profound negative impacts of abusive patent assertions on our company, on innovation, and on our economy.

#### Kinze Manufacturing, Inc.

Kinze Manufacturing is a leading manufacturer of planters in the United States, but it didn't start that way. In 1956, Jon Kinzenbaw was 21 years old. With \$5 in his pocket, a small bank loan, and a gift for fixing farm equipment, he opened a welding shop in Victor, Iowa. Jon's first patented invention was a plow the farmer could adjust from his tractor. Shortly thereafter, Jon invented the first-ever single axle, low-profile grain cart. After his invention in 1975 of the rear-folding planter toolbar, the company grew quickly. Kinzenbaw himself has been the named inventor for 19 patents for Kinze Manufacturing Inc., and the company holds numerous other patents. Kinze impacts Iowa factory workers as well as farmers and small business owners throughout the country. Today, Kinze is still privately held by the Kinzenbaw family, and has employed up to 1,000 people in the state of Iowa manufacturing high-quality agricultural equipment, providing farmers with the tools they need to help feed the world. Our products are distributed through a network of independently owned dealers located in agricultural states throughout the country.

#### The Impact of Abusive Patent Tactics on Our Company

Kinze is built on innovation and relies upon a strong and healthy patent system to continue to deliver innovation to farmers. Kinze has asserted its patents against competitors and has successfully defended itself from allegations from competitors. Litigation is part of the process and, when the litigation is with merit, Kinze accepts this. Unfortunately, patent assertion entities take unfair advantage of the patent system and, today, threaten its health.

In 2012, Kinze experienced the impact of a patent assertion entity first hand, when "Clear with Computers" sued Kinze, alleging infringement of two of its patents. Unlike Kinze, Clear with Computers makes no products. What it does make is lawsuits: It has filed over 60 patent cases since 2008. Clear with Computers argued that Kinze.com violated the company's patents for an "electronic proposal preparation system" and "electronic proposal preparation system for selling computer equipment and copy machines" -- in short, the complaint alleged that Kinze infringed the patents by allowing users to search for products and filter search results. This suit cost us many hours of time and significant legal fees before we were ultimately able to resolve the dispute.

That experience has left a lasting impact on Kinze. Farmers rely on access to the latest technology to help them get more out of every acre while reducing their costs and



protecting their soil. But Kinze's contract negotiations with suppliers and service providers now routinely include discussions of allocation of liability in the event of patent assertion. These additional negotiations require additional resources and delay research, development and production of new products, slowing farmers' access to key technology. We are spending more time and effort developing contracts, and thus have less to spend on developing the new inventions that will make farming more productive and efficient.

The allocation of IP liability also limits Kinze's ability to work with small companies. Smaller companies, because of their limited resources, are hesitant to provide indemnification for IP liability. As a result, many smaller companies must decide whether to sign an agreement and accept the risk of defending baseless suits or not accept the business.

#### Abusive Patent Tactics as a Growing Problem

In the beginning, patent assertion entities seemed to focus on web-based software. This is what Kinze saw in our encounter with Clear with Computers. Unfortunately, the problem seems to be spreading beyond this limited domain. By way of example, companies like Cisco Systems have seen this type of issue in areas such as electronic equipment.

The planters used today have come a long ways since Jon's first folding planter back in 1975. New technology lets farmers precisely target inputs such as fertilizer and insecticide -- reducing their costs and benefitting the environment. This technology includes high-tech electronics, GPS location and software. As technology moves to the field, it is no stretch of the imagination to believe the assertion entities will follow.

#### Moving Forward

The patent system, which was designed to foster innovation and bring the fruits of American creativity to everyone, has been thrown off balance by a few bad actors taking advantage of the high costs and uncertainty of litigation. Congress must step in to restore that balance, and Kinze is ready and eager to be part of that effort. Kinze supports efforts to increase the pleading requirements for filing suit, reduce the costs and burdens of discovery, and increase transparency of ownership in patent litigation. We are clear about who we are, what we own, and what can be done with it -- so should those who say we are infringing their patent rights.

We are innovators ourselves at Kinze, and proud of what we have done -- and will continue to do -- to bring our creativity to bear on the problems faced by modern farmers, and to help them get the best yields out of every acre. Our business is to innovate, so that we can help those farmers feed the world -- and so we would urge caution on provisions which could create significant hurdles for legitimate inventors seeking to enforce their patent rights, such as blanket fee-shifting provisions. There is a balance to be struck, and



we want to be careful to go far enough to take away the incentives from those who abuse the litigation system, and no farther.

Thank you, once again, for giving the Kinzenbaws and Kinze Manufacturing the opportunity to talk on this critical issue. As you consider legislation to address the very real threat posed by patent assertion entities, we strongly encourage you to consult representatives from all industries, including agricultural manufacturing. Improving our patent system is a vital and ongoing process, and we thank you for your commitment to seeking the right balance between providing incentives for innovation and protecting American businesses from the high cost of illegitimate patent assertion.

Testimony of Hans Sauer, Ph.D., Deputy General Counsel for Intellectual Property,  
Biotechnology Industry Association

To the United States Senate Committee on the Judiciary Committee Hearing on

"The Impact of Abusive Patent Litigation Practices on the American Economy"

March 18, 2015, 10:00 AM, Dirksen Senate Office Building, Room 226

**Summary of Testimony:**

As Congress considers legislation to curb misuse of the patent system by entities that seek to use the system for financial gain rather than to promote innovation, Congress must ensure that responsible patent owners remain able to protect and enforce their patents and protect their own businesses against patent infringement. And, in scrutinizing dubious practices of some patent holders, Congress should not overlook abuses by others who seek to undermine the patent system for similarly illegitimate reasons.

Unfortunately, misuse of the patent system against legitimate patent owners is a real and growing problem. In particular, the PTO's Inter Partes Review (IPR) system – a new administrative patent challenge system created by the America Invents Act of 2011 – is undermining the value and predictability of patent rights and wreaking havoc on the legitimate, investment-backed expectations of patent owners. This is happening because, contrary to the intentions of Congress, this new system unfairly stacks the deck against patent owners in many ways, leading to patent invalidation rates far exceeding those seen in district court patent litigation involving similar types of patents and similar grounds for challenges. Not surprisingly, the statistically disproportionate "kill rates" of IPR proceedings invite unintended abuses and predatory practices by those seeking to attack patents for illegitimate reasons, including for their own financial gain. For example, questionable entities have begun to approach biotech companies with threats of dragging their key patents into IPR proceedings unless substantial payments are made. And just recently, the New York Times reported on an investment scheme in which a hedge fund takes a "short" position in the stock of biopharmaceutical companies and then files IPR challenges against one or more patents protecting their key products in an effort to profit from driving down the companies' stock prices. The biotechnology industry is particularly vulnerable to such manipulation, because our companies tend to be small, derive most of their revenue from one or two products on the market, and have just a handful of very valuable patents protecting those products. The mere filing of an IPR demonstrably can have significant impact on the stock prices of such companies, as well as their ability to continue to raise the investment needed to develop future treatments for patients in need. Indeed, the first company to be targeted by this hedge fund strategy was a small biotech company whose main product is an innovative treatment that helps patients with Multiple Sclerosis walk better. In one day this company lost more than \$150 million in market capitalization because a hedge fund, which may have shorted the stock, announced an IPR challenge. These market-manipulating, cynical efforts not only damage the value of companies working on cures, but also hurt patients and their families who are eagerly waiting for such cures.

Senators Coons, Durbin and Hirono have introduced the STRONG Patents Act, which BIO supports, which would prevent such abuse.

BIO encourages this Committee to develop a legislative package that will curb abusive patent practices, including the abuse of the IPR system, through a balanced and targeted approach that does not undermine the ability of legitimate patent owners to defend their inventions and businesses against infringement. We believe consensus can be achieved on a range of issues, including enhancing transparency of patent ownership and enforcement; curtailing unfair or deceptive practices in the indiscriminate sending of patent licensing or settlement demand letters; addressing how patents can be enforced against innocent end-users or consumers of infringing products manufactured and sold by others; and making the IPR system a more balanced and fair system for patent owners.

We remain concerned, however, that proposals for more general patent litigation changes presently lack this requisite balance. Concepts such as excessive pleading requirements, mandatory stays of merits discovery, and joinder of third parties as unwilling co-plaintiffs for the purpose of expanding liability for attorney fee awards, are found in no other area of civil litigation and go too far in restricting the ability of all patent owners to enforce their patents against infringers.

The re-introduction of the Innovation Act (H.R. 9) in the House of Representatives revives, on a dramatically shifted landscape, this debate over the right “balance” that was begun in the last Congress. A series of court decisions, Judicial Conference rule changes, PTO actions, and legislative and enforcement activities over the past two years have greatly changed the dynamic for systemic patent litigation reforms – by raising patentability standards and the requirements for filing patent lawsuits; increasing the shifting of litigation costs for baseless infringement suits; reducing the asymmetries in litigation that some plaintiffs have exploited to demand unfair settlements; and enhancing consumer protections against the bad faith assertion of patents against consumers and other end users. In short, both the bar and the stakes have been raised in the patent system, and the result has been a substantial decline in patent litigation since this Committee last considered the need for broad patent litigation reforms. These changes reinforce the need to ensure that any patent reform legislative package does not swing the pendulum too far in any one direction.

Achieving this balance is essential for biotechnology. Reliable patents are critical in ensuring the steady stream of investment necessary to develop innovative medicines, alternative sources of domestic renewable energy, and more productive and sustainable farming techniques that raise farm incomes and reduce environmental degradation. And they are essential to the technology transfer process that leads from inventions in the lab to products on the shelves. A recent independent study pegged the value of such technology transfer to the U.S. economy at up to \$1.18 trillion since 1996 alone.

The majority of biotechnology companies are small businesses that have no products on the market, and thus their research and development activities are funded through massive amounts of private sector investment – on average, more than \$2 billion per new biotech medicine – which must be sustained over many years, sometimes even decades. Without strong, predictable and enforceable patent protections, many investors will stop investing in

biotech innovation or limit such investment to only "low risk" products. This decline in investment will degrade our ability to provide solutions to the most pressing medical, agricultural, industrial and environmental challenges faced by our Nation today.

We look forward to working with this Committee towards developing a balanced legislative package that meets these requirements. We are optimistic that targeted solutions that address the practices of entities who unfairly enforce, or unfairly attack, patents can be achieved.

### **Introduction**

Chairman Grassley, ranking member Mr. Leahy, members of the Judiciary Committee, thank you for inviting me today to testify on the subject of protecting small businesses and promoting innovation through further patent reform.

By way of personal introduction, I am Deputy General Counsel for Intellectual Property for the Biotechnology Industry Organization, a major trade association representing over 1,100 biotechnology companies, research institutions, technology incubators, and similar entities in the medical, agricultural, environmental and industrial biotechnology sectors. At BIO I advise the organization's board of directors and BIO's various policy departments on patent and other intellectual property-related matters. Prior to joining BIO in 2006, I was Chief Patent Counsel for MGI Pharma, Inc., in Bloomington, MN. I have 20 years of professional in-house experience in the biotechnology industry, having begun my career as a postdoctoral research fellow at Genentech, Inc. in South San Francisco in 1995, and subsequently worked as a research scientist at Guilford Pharmaceuticals Inc. in Baltimore. My research specialty was the biology of age-related degenerative brain disorders; in this role I participated in several drug development programs before becoming a patent lawyer in 2003. I hold an M.S. degree in biology from the University of Ulm in Germany; a Ph.D. in Neuroscience from the University of Lund, Sweden; and a J.D. degree from Georgetown University Law Center where I serve as adjunct professor of law.

### **Background**

Very few sectors of the Nation's economy are as dependent on predictable, enforceable patent rights as is the biotechnology industry. Robust patents that cannot be easily circumvented, and that can be predictably enforced against infringers, enable biotechnology companies to secure the enormous financial resources needed to advance biotechnology products to the marketplace, and to engage in the partnering and technology transfer that is necessary to translate basic scientific discoveries into real-world solutions for disease, pollution, and hunger.

Research and development within the biotechnology industry comes at a very high cost, and every idea that is funded comes with a much greater risk of failure than success. Investment thus is predicated on an expected return in the form of patent-protected

products or services that ultimately reach the market. The typical BIO member company does not have a product on the market yet, nor a steady source of revenue, and spends tens of millions of dollars on R&D annually. The biotechnology industry as a whole is responsible for well more than 20 billion dollars of annual research investment, and provides employment to millions of individuals nationwide. Virtually all of this investment is through private funding.<sup>1</sup> Developing a single therapy requires an average investment ranging from \$1.2 billion to over \$2 billion, and the clinical testing period alone consumes more than 8 years on average.<sup>2</sup>

Such investments are not only expensive; they are risky. For every successful biopharmaceutical product, thousands of candidates are designed, screened, and rejected after significant investments have been made. The chances that a biopharmaceutical medicine will advance from the laboratory bench to the hospital bedside are approximately one in 5,000.<sup>3</sup> Only a small minority of candidate drugs even advance to human clinical trials, and most of those will never ultimately reach the market. For example, at the time human clinical testing begins, the odds that a biopharmaceutical compound will eventually receive FDA approval are less than one-third.<sup>4</sup>

Because such risks and costs cannot usually be borne by any one entity alone, biotech drug development depends heavily on licensing, partnering, and access to capital. Patents allow biotech inventions of great societal value to be passed or shared among parties best suited to unlock their potential at any given stage of development and commercialization – each contributing their part, each sharing the risk of failure, each increasing the odds that a product eventually reaches patients.

If these patents can be invalidated under overly broad criteria, or if the ability to enforce them becomes limited due to an exceedingly high bar to filing a lawsuit or excessive delays in prosecuting a case through the courts, third parties would be less likely to invest in or license the technology, and major sources of R&D funding would move elsewhere. The result – patients waiting for the next new cure or treatment will have to wait longer, or may not ever get it at all.

For these reasons, currently-pending patent litigation reform legislation is highly relevant to the biotech business model. A small or mid-sized biotech company that today decides to begin development of, for example, an Alzheimer's treatment must look a decade or more

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<sup>1</sup> Moving Research from the Bench to the Bedside: Hearings Before the Subcomm. on Health of the House Comm. on Energy and Commerce, 108th Cong., 1st Sess. 47 (2003) (testimony of Phylliss Gardner, M.D) (<http://archives.energycommerce.house.gov/reparchives/108/Hearings/07102003hearing990/Gardner1579.htm>) ("The biotechnology industry is the most research and development-intensive and capital-focused industry in the world," noting that 98 percent of research and development investment comes from the private sector).

<sup>2</sup> Joseph A. Di Masi and Henry G. Grabowski, The Cost of Biopharmaceutical R & D: Is Biotech Different? Manage. Decis. Econ. 28: 469-479, 2007)(hereafter: "Di Masi and Grabowski").

<sup>3</sup> Secretary of Health and Human Services Tommy G. Thompson, Remarks at the Milken Institute's Global Conference (Apr. 26, 2004), available at [www.hhs.gov/news/speech/2004/040426.html](http://www.hhs.gov/news/speech/2004/040426.html)

<sup>4</sup> Di Masi and Grabowski, 472-3.

into the future. Long-term financial commitments will be required; several hundred million dollars will need to be raised; and development partnerships will need to be secured in a situation where the cost of capital is high and the odds of ultimate success are small. Because investment-intensive businesses can tolerate only so much risk, even moderate additional uncertainty can cause business decisions to tip against developing a high-risk, but potentially highly-beneficial, product. This is not an academic consideration. Every biotech executive has stories to tell about promising experimental compounds that had very favorable medicinal properties, but were never developed because their patent protection was too uncertain. And scholars have documented this unfortunate fact.<sup>5</sup> The injection of additional systemic uncertainty by, for example, making the enforceability of patents against infringers more uncertain can negatively affect which new cures and treatments may become available a decade from now.

The average American today can realistically hope to live into her or his 8th decade. At retirement, one out of five Americans can expect to develop Alzheimer's disease during her or his remaining years. The risk of developing cancer is even greater. While much has been said about inefficiencies in the patent system that drive up business costs and prices for consumers in some sectors today, we must keep in mind that that same patent system encourages risk-taking and long-term investment in potential solutions for the biggest problems facing our world and the generations to come: disease, hunger, and pollution. Great care must be taken to ensure that we do not focus too heavily on current complaints about abuses in the patent system without appreciating the system's longer-term benefits to society.

In this regard, it is important that, despite strident rhetoric, we do not overlook a 2013 nonpartisan Government Accountability Office (GAO) report<sup>6</sup> that found that patent assertion entities – the so-called “patent trolls” – bring less than 20 percent of patent litigation cases, while traditional businesses bring 68 percent of patent litigation. Any solutions proposed by this Congress must not impede the vast majority of patent owners from trying to enforce their legitimate patents in a legitimate way.

It also is important for Congress to recognize and consider that our patent system is undergoing a period of great change as a result of recent decisions of the courts and the Judicial Conference, the ongoing implementation of major patent legislation enacted only a few years ago, and new challenges posed by emerging technologies. In the barely 16 months since the U.S. House of Representatives voted on the 2013 Innovation Act (H.R. 3309, 113th Congress; passed December 5, 2013), the courts and the PTO have changed the patent litigation landscape in ways that should be carefully taken into account by this Committee. Form pleadings for patent infringement suits will be abolished, thereby heightening and conforming pleading requirements in patent cases to other civil litigation. Discovery in patent litigation will follow a proportionality standard that makes discovery more focused and affordable for both parties, and which will allow the costs of discovery to

<sup>5</sup> Benjamin Roin, Unpatentable Drugs and the Standards of Patentability. *Texas Law Review*, Vol. 87, pp. 503-570, 2009.

<sup>6</sup> Government Accountability Office report 13-465, August 2013, *Assessing Factors That Affect Patent Infringement Litigation Could Help Improve Patent Quality*.

be shifted to the party seeking it in certain instances. Supreme Court decisions on patent-eligible subject matter and claim definiteness have raised the standard for assessing the validity of patent claims, especially software and business method claims, and have made it easier to invalidate indefinite and/or overbroad patents. Attorney fee awards are allowed more frequently and flexibly in patent cases in the wake of Supreme Court and Federal Circuit decisions, raising the stakes for those who file frivolous or baseless patent suits. Deceptive practices in sending patent demand letters to small businesses are being targeted by the Federal Trade Commission (FTC), state Attorneys General (AGs), and dozens of recently-enacted state laws that clarify consumer protections against phony patent threats.

As a result of these and other developments, the number of patent cases filed has fallen significantly. For example, in comparing the number of new patent complaints filed in September 2013 versus September 2014, the number of new patent infringement complaints decreased by a remarkable 40 percent.<sup>7</sup> 2014 as a whole was down 18% from the previous year, and this decrease so far seems to hold steady.<sup>8</sup>

In parallel, it has become clear that the PTO's Inter Partes Review (IPR) system of administrative patent challenges is having a game-changing effect on the patent litigation system. Patents that are involved in district court litigation are now routinely subjected to "second rail" administrative litigation in the PTO, where they are being invalidated at rates so high that the basic procedural fairness of these proceedings is increasingly being questioned.

It is critical that the future path of our patent system is one that preserves and maintains the incentives for innovation that have made the United States the global leader in medical, agricultural, industrial and environmental biotechnology. With this in mind, I would like to provide the following views on legislation currently under consideration.

#### **Discussion of Legislative Proposals Currently under Consideration**

At the outset, BIO's member companies reiterate their support for targeted reforms that curtail abusive practices within the patent system, without undermining the ability of patent owners to fairly defend their businesses against patent infringement. We believe it is appropriate for Congress to explore how it can help improve aspects of the patent litigation system, and during the last Congress, BIO and its members invested an enormous amount of effort towards crafting good faith, constructive proposals in this regard, including with the Members and staff of this Committee.

Based on that experience, we believe consensus can be achieved on a range of proposals that were and are being advanced in Congress, including enhancing transparency of patent ownership and enforcement; curtailing unfair or deceptive practices in the indiscriminate sending of patent licensing or settlement demand letters; and addressing the enforcement of patents against blameless end-users or consumers of infringing products manufactured and sold by others. Such provisions would seem to address the most stridently-voiced

<sup>7</sup> <https://lexmachina.com/2014/10/september-2014-new-patent-case-filings-40-september-2013/>

<sup>8</sup> <https://lexmachina.com/2015/02/patent-case-trends-business-litigation/>

concerns in the current debate, and would be appropriately focused on the need to protect small businesses, end-users, and others who do not have the resources or the means to defend themselves from unfair or misdirected patent enforcement efforts by dubious patent assertion entities.

To this end, BIO believes that a number of productive proposals have been circulated that deserve this Committee's consideration. For example, the STRONG Patents Act, as recently introduced by Senators Coons, Durbin, and Hirono, contains patent demand letter provisions that should prove effective at protecting small businesses from abusive patent enforcement practices, while at the same time sustaining the ability of innovators to continue to send legitimate licensing and enforcement-related communications to those using their technologies. The "Targeting Rogue and Opaque Letters Act" (TROL Act), a consensus bill that was crafted by the House Energy and Commerce Committee during the last Congress with diverse stakeholder input, contained similar provisions that were likewise aimed at curbing abusive patent demand practices. As did S. 1720, which as introduced by Senators Leahy and Lee in the past Congress similarly would have brought the indiscriminate, widespread sending of bad-faith demand letters within the ambit of the FTC's enforcement authority. This bill also would have advanced transparency of patent enforcement in litigation by leveraging familiar "interested party" disclosure obligations that already are in use under certain local court rules, and would have provided for "customer stays" that would make it easier for willing manufacturers of allegedly infringing products to join infringement suits against resellers or end-users of their products,<sup>9</sup> thereby providing their customers with relief from litigation pressure.

In contrast to such targeted proposals, other proposals under consideration in the recent and current Congress include far-reaching patent litigation changes, such as:

- New requirements under which initial complaints in patent lawsuits would be required to set forth vastly increased amounts of detailed information or be deemed insufficient and subject to motions to dismiss;
- Mandatory stays of discovery pending patent claim construction, forcing delays of 12 or more months in the typical patent litigation;
- Mandatory stays of actions against a broadly defined class of "customers" that could allow product manufacturers to deflect patent lawsuits towards their suppliers; and
- New impleader authority under which additional parties with a financial interest in the plaintiff or patent at issue – such as investors, licensors, or commercial partners – could be joined to the litigation as unwilling co-plaintiffs to pay the other side's costs under a new "losers pay" approach.

These provisions represent stark departures from the normal civil litigation rules that apply to other commercial litigation under the U.S. system. Congress should consider carefully the

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<sup>9</sup> Section 5 of H.R. 9, as recently introduced in the House of Representatives, likewise contains such a "customer suit" provision. Going forward, Congress should consider modifications to this provision to guard against opportunities for misuse and unintended consequences. As written, the provision could unexpectedly benefit accused infringers at every level of the manufacturing and distribution chain, contrary to its declared goal of protecting ends-users and retailers of infringing products. For example, in current form the provision would allow even manufacturers of infringing products to deflect infringement suits towards their parts suppliers, thereby inviting piecemeal adjudication and systematic litigation delays in conventional infringement cases having nothing to do with end users, retailers, or "patent trolls." Additional amendments should provide more clarity around the class of intended beneficiaries, the scope of the stay, and the circumstances under which a litigation stay would be inappropriate.

wisdom of singling out patent litigation for such an astonishing array of special rules found in no other area of civil litigation. Furthermore, in their current form these litigation reform provisions are one-sided (that is, similar requirements are not imposed on those accused of patent infringement), and will almost uniformly work against patentees of all stripes. In an effort to erect barriers against patent-asserting entities, or so-called “patent trolls,” these provisions would systematically raise the cost and risk of patent enforcement for all patentees, with disproportionately greater negative impact on smaller, poorly-funded patent holders.

In this regard, it is important to emphasize that litigation reform, by its very nature, most benefits those who have the means and the will to litigate. In our opinion, large businesses with well-funded litigation budgets are most likely to leverage these litigation changes to their advantage. At the same time, it is questionable whether small businesses that need protection from unfair patent enforcement would be able to leverage sophisticated new litigation maneuvers – such as impleader practice and extensive preliminary motion practice – that would be enabled by the various pending litigation change proposals. Patent litigation is already known as a “game of kings” and surely the pending litigation reform proposals would make it even more so.

The risk of unintended negative consequences on small-business innovation can be illustrated by consideration of several specific pending legislative proposals:

**Enhanced pleading requirements:** H.R. 9 (the Innovation Act) would require that complaints, and counter- or cross-claims, for patent infringement include a number of new information items in order to qualify as legally sufficient. The level of required detail is high and would require plaintiffs to fill out a potentially very large matrix of information: each asserted patent; each claim for each patent; each accused product for each claim; for each accused product an explanation of how each element of each claim meets each feature of each accused product, and the like.

Nobody would disagree that the pleading requirements in patent cases should be enhanced to conform to the standards generally applicable in civil litigation, and BIO supports the proposed repeal of Form 18 in the Federal Rules. However, the proposed exhaustive pleading standard requires an amount of information and degree of specificity that go beyond what would be necessary to support a civil claimant’s request for relief and to provide the defendant fair and reasonable notice of the infringement allegation. To legislate pleading requirements at such a high level of specificity invites litigation over the sufficiency of the patentee’s efforts even in instances where all parties and the court would agree that there is “enough” for a lawsuit, and where the parties fully understand the factual basis for the infringement allegations. Instead of streamlining the litigation process, the proposed pleadings provision of the Innovation Act would enable accused infringers to litigate whether otherwise sufficient pleading-stage information was nevertheless incomplete; would fuel disputes over whether information was or was not readily accessible and whether the patentee tried hard enough to obtain it; and would empower well-funded defendants to engage in extensive motion practice and “churn” to prevent the litigation from advancing to even its preliminary stages.

The provisions also lack balance and reciprocity: responsive pleadings by alleged infringers often contain counterclaims and affirmative defenses (such as patent invalidity or unenforceability) that frequently fail to provide sufficient notice to the other party (the patentee) of the underlying factual bases for such assertions. But this practice by alleged infringers would not be addressed under the provisions of H.R. 9; only patentees are singled out for additional, burdensome requirements.

We trust that this Committee will understand that patentees do not always have access to the information needed to plead at the outset of a lawsuit, with the required specificity, how the accused infringer's conduct precisely infringes which element of which patent claim. This consideration is particularly relevant to biotechnology, where, for example, a competitor's sophisticated biomanufacturing process, or the use of precursor molecules or proprietary production cell lines, are simply not accessible to a patent owner without some discovery, even if there is good reason to believe that a patent is being infringed.

Accordingly, BIO's members do not believe that such high levels of additional pleading specificity offer a targeted solution that would protect small businesses from abusive patent assertion on the one hand, while at the same time enabling them to protect their own businesses against patent infringement on the other hand. To be sure, some additional information beyond what is currently required under Form 18 of the Federal Rules of Civil Procedure may be beneficial for inclusion in model complaints for patent infringement, so as to convey reasonably detailed information on which the infringement allegation is based. The level of detail should be adequate to allow parties and judges to decide whether there is a sufficient basis for a lawsuit. Indeed, if the complaint sets forth sufficiently detailed grounds explaining why and how at least one patent claim is believed to be infringed, then good grounds for a lawsuit exist. There is no need to additionally require the inclusion within the initial complaint itself of dozens of alternative grounds, or to litigate the sufficiency of such alternative grounds, when it is already clear that there is "enough" for a lawsuit to proceed. To require otherwise would impose an undue burden on the patent owner to plead all details of its case before any discovery has commenced. And doing so would significantly raise the cost and complexity of preparing a patent suit, particularly harming the ability of small businesses to enforce their patent rights, as well as those that need to protect their inventions against competitive threats in an immediate manner.

Instead of legislating this extreme heightened pleading proposal, it would be preferable to amend the law in ways that ensure that the judiciary would play a greater role, and assume more responsibility, for developing the applicable pleading standards in a balanced manner, as part of its traditional rulemaking function. Any final approach also would need to ensure that existing statutory schemes governing certain biopharmaceutical patent litigation are not covered by these new pleading rules, in order to avoid conflicts with the highly detailed nature of the statutory rules already in place for such litigation.

**Fee Awards and "Interested Parties":** Within the context of the currently-pending H.R. 9, and the Patent Abuse Reduction Act (S. 1013) from the last Congress, the concepts of "real party in interest," "loser pays," and "impleader" are all connected, and should be evaluated together. The cost award and recovery provisions of both bills constitute a true "loser pays" system: as a default, the non-prevailing party must pay the winner's

reasonable costs and expenses, and the burden will be on the loser to explain why it should not have to pay. Under H.R. 9, the non-prevailing party can meet this burden by a showing of special circumstances making an award unjust, or by showing that its position was "reasonably justified in law and in fact." Among its proponents there is an assumption that this standard will be easy to meet, and that fee and cost awards will therefore occur only in truly frivolous cases. In the same vein, it has been said that this standard is not unprecedented – it is the same standard that has been in place since 1980 in the Federal Equal Access to Justice Act (FEAJA).

Despite such assurances, there is reason to wonder whether cost and fee awards would not occur more often than expected if this standard were transposed to patent litigation.<sup>10</sup> At a minimum, its predicted operation is unclear: unlike many other tort cases, patent cases often do not have clear winners and losers; each party may prevail on some issues and lose on others,<sup>11</sup> such that little can be predicted at this time about how fee awards would be assessed under such a system.

To be clear, BIO's members hold a diversity of views on the advisability of including fee-shifting provisions, such as those of H.R. 9, in any further patent legislation, and therefore BIO does not support or oppose any particular fee-shifting proposal at this time.

Our members have pointed out, however, that proposed "loser pays" provisions currently use overly broad language in defining the classes of civil actions to which they would apply, and are in no way limited to patent infringement actions under title 35 or section 337 investigations in the International Trade Commission under title 19. For example, by their plain terms the provisions include claimants who neither enforce, attack, nor defend against patents – such as a disappointed patent applicant who appeals to a court from an adverse decision of the PTO, or an academic inventor who seeks an accounting of royalties from a non-profit university under the Bayh-Dole Act. Much litigation over the applicability of the provision could, and should, be avoided by narrower legislative language.

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<sup>10</sup> In practice, the FEAJA standard may be more often met than one might assume. The Veteran's Administration, for example, estimates that around 45% of all cases before the Court of Veteran's Appeals result in a FEAJA attorney fee and cost award against the Government. Social Security cases in which the claimant prevails result in awards over 40% of the time. The Supreme Court has noted that these are "hardly vanishing odds of success for an attorney deciding whether to take a client's case" (*Astrue v. Ratliff*, 130 S. Ct. 2521 (2010), at n. 2, Sotomayor, J., concurring). It also should be noted that the FEAJA's fee recovery provisions are only available to small entity, nonprofit, or non-wealthy individual claimants, whereas H.R. 9 and S.1013 would let all prevailing parties recover regardless of their wealth. Moreover, the FEAJA caps recoverable attorney fees at a default of \$125/hour, whereas neither H.R. 9 nor S.1013 provide such caps – or any other protections – against runaway costs.

<sup>11</sup> To give a simple example: assume a patentee sues a competitor for patent infringement. The competitor alleges that the patent is (i) invalid, (ii) unenforceable, and (iii) not infringed. The court rules *against* the competitor on the question of patent validity and enforceability, but agrees that the patent is not infringed. In this scenario, the competitor ultimately "prevailed" because it escaped liability, but did not "prevail" in its attempt at striking down the patent. Who reimburses whose litigation costs? Does the competitor reimburse the patentee for defending the patent? Or does the patentee pay the competitor for unsuccessfully attacking the patent? Or do both parties reimburse each other for portions of each other's cases?

In addition, under H.R. 9's fee-shifting provision, patentees (but not defendant-counterclaimants) would be penalized for extending a covenant not to sue after an answer has been filed in the lawsuit, by deeming such a patentee to be a non-prevailing party for purposes of recovering the defendant's attorney fees and costs. Doing so would create disincentives for the private resolution of patent litigation. There also are many legitimate reasons why either party to a patent infringement case may extend a covenant not to sue at some point in the litigation. It remains unclear why covenants not to sue should be disfavored in such a blanket fashion.

We also trust that this Committee is conscious of significant judicial developments in the fee-shifting area, which have taken place over the past year. Federal courts have long had the power to award attorney fees to prevailing parties in exceptional cases, although traditionally the showing required to make a case exceptional has been high, and fee shifting has been uncommon. The 2014 Supreme Court decisions in *Octane Fitness v. Icon* and *Highmark v. Allcare* now permit courts to grant such awards more readily, and provide that a court's fee-shifting decision is reviewed more deferentially on appeal. Preliminary indications are that these decisions may be having a real impact. A recently-published analysis<sup>12</sup> reports 43 published decisions on fee awards in the eight months following the Supreme Court decisions, of which 21 of them, or nearly half, granted a fee award. In contrast, in the eight months *before* the Supreme Court decisions, there were 31 such decisions and only six of them granted fee awards, or less than 20 percent.

The fee-shifting provisions of H.R. 9 also are relevant to the provisions regarding disclosure and joinder of "interested parties." Under the bill, an interested party would be defined as anyone who has an ownership interest in the patent, or is an exclusive licensee, has enforcement rights, or who has a direct financial interest in the outcome of the litigation, including a right to receive royalties based on the patent or part of a damages award. Under H.R. 9, such "interested parties" must be disclosed in patent litigation, and can be impleaded into the lawsuit and held liable for the winning party's costs, expenses and attorney fees if a fee award is granted.

There is nothing remarkable about the proposition that litigants should identify to the court those who have a financial interest in the litigation or the litigated assets. Under many local court rules, judges require such information today, as they need to know when to recuse themselves from a case, or to take other action to avoid conflicts of interest. But there is a real question whether the pending "real party in interest" provisions go too far in requiring disclosure of any financial interest, including for example, extensive disclosures of patent ownership transfers between subsidiaries having the same corporate parent, and extensive disclosures of third parties having "financial interests" (including passive financial interests) and *their* corporate parents. This level of disclosure would significantly increase the burden of compliance and create traps for unwary legitimate patent holders without providing substantially more useful information in many cases. And, such requirements become

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<sup>12</sup> Synopsis is available at: <http://www.insidecounsel.com/2015/02/25/fee-shifting-before-and-after-the-supreme-court-de>

particularly problematic when they are being leveraged to join third parties into the lawsuit as unwilling plaintiffs, or to subject them to liability for litigation conduct that is beyond their control.

To this end, H.R. 9 would provide new impleader authority under which the court “shall” grant a defendant’s motion to join “interested” third parties as plaintiffs. These impleader provisions are closely linked to the bill’s litigation cost-shifting provisions, and are intended to ensure that somebody will be responsible for paying the winning party’s litigation expenses if the losing party cannot or will not pay. Only winning defendants would have an opportunity for 3<sup>rd</sup> party reimbursement, as there are no comparable provisions under which winning patentees can join potential payors on the defendant’s side.

Section 3(c) of H.R. 9 is not the first time impleader practice in patent cases that is being discussed. During the last Congress, H.R. 3309 and S. 1013 contained similar provisions for joining third parties as plaintiffs to ongoing infringement litigation. To inform the Committee’s deliberations on the matter, it is useful to highlight some differences between the impleader provisions of these bills: S. 1013 would have provided that the defending party could at any time join an interested party by showing that the plaintiff’s interest in “any patent identified in the complaint, including a claim asserted in the complaint, is limited primarily to asserting any such patent claim in litigation.” While this definition was intended to capture only “patent troll” lawsuits, BIO was concerned that it could easily apply also to conventional litigation between brick-and-mortar businesses.<sup>13</sup>

The business ramifications of joining unwilling “interested” third parties as co-plaintiffs on the patentee’s side of a lawsuit would be significant. As described above, S. 1013 would have defined an interested party as anyone who has an ownership interest in the asserted patent, is an assignee, or an exclusive licensee, or who has a direct financial interest in the outcome of the litigation, including the right to receive proceeds from the litigation. Under this definition, university licensors or business partners who sublicensed the patent to the plaintiff could be impleaded into the litigation at the infringer’s option, and face potential liability for the defendant’s litigation costs. While university-licensors today often appear as co-plaintiffs in patent cases *pro forma*, the prospect of potentially having to pay part or all of the infringer’s defense costs is an entirely new proposition for academic institutions. This

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<sup>13</sup> For example, if a complaint were to assert 20 claims in three patents, and the defendant makes the requisite showing with respect to only one of these claims, the whole litigation would become subject to the impleader provision. In other words: defendants would have as many opportunities to invoke the impleader provision as there are asserted claims. This would be the case even if the remaining claims in the litigation involve patent-infringing products that compete with the patentee’s own products. We note that the heightened pleading requirements of S. 1013 (as do those of currently-pending H.R. 9) would require patentees to assert greater numbers of patent claims than is required under current law, thereby increasing a defendant’s chances to implead additional parties. Moreover, it is not uncommon, especially among start-up businesses, to hold patents on “unfunded” technology. For example, a company may start out with two in-licensed portfolios of patents, and proceed with R&D work on one of them while seeking funding to begin development of the other. If a patent on such unfunded technology is infringed, even a brick-and-mortar research company that sees its chances for future funding evaporate if it does not defend itself against ongoing infringement could be deemed indistinguishable from a patent-assertion-entity under the definition in S. 1013.

is especially problematic when the university-licensor, as is common, does not actually have control over the litigation.

Because they would face potential liability for the patentee's litigation decisions, impleaded university-patent owners or corporate licensors likely would have to hire their own legal teams to participate in the litigation, complicating and raising the costs of patent litigation for all parties. Existing and future licensing agreements would need to be restructured to insulate licensors or business partners from potential liability in these circumstances, or to provide for indemnification. The more risk-averse parties to patent licensing agreements would want to retain enforcement rights or the right to veto patent enforcement decisions and litigation strategies – or worse, may decide against entering into these transactions at all.

The process by which "loser pays" awards can be recovered from third parties under H.R. 9 differs from that described above for S. 1013. First, under section 4 of H.R. 9, the plaintiff must disclose the identity of "interested parties" at the inception of the litigation. Then, the defendant can provide these interested parties notice that they could be impleaded and that the defendant's litigation expenses could be recovered from them if the court confirms that they are an interested party. The third-party recipient of such a notice then has the option to renounce, within 30 days, any and all ownership, right, or direct financial interest in the patent – or otherwise face the risk of being joined to the action at the end to pay the winner's bills. Later, if the plaintiff loses and is subjected to a "loser pays" award that it cannot satisfy, the prevailing defendant can make a showing that the plaintiff had "no substantial interest in the subject matter at issue other than asserting such patent claim in litigation." If this showing is met, the court "shall" grant a motion to implead the third party that was earlier notified. The award can then be made recoverable against the impleaded interested party.

The impleader provision of H.R. 9 is byzantine, and problematic for several reasons. A third party would be identified at the beginning of a lawsuit with no input from that party, and would receive a notice of potential liability with an invitation to renounce all interest in the patent at that time or else face such potential liability. Later, after the plaintiff loses the case, the third party could be impleaded "after the fact" and made responsible for meeting unsatisfied "loser pays" awards that are premised on litigation conduct over which that third party may have had no control. The required showing of "no substantial interest in the subject matter at issue other than asserting such patent claim in litigation" is not readily intelligible and (just like the parallel definition in S. 1013 in the last Congress) does not clearly limit the provision to litigation that was brought by patent assertion entities, but could capture R&D businesses that have to enforce patents they were not yet able to develop or commercialize.

On the patentee's side, the net result of such joinder provisions would be to create many additional encumbrances especially for smaller R&D businesses, that would make partnering and collaborations, as well as the enforcement of patents, needlessly more expensive and more complicated. Given their potential negative impact on the businesses of legitimate

patent-owning innovators, the rationale for creating such new impleader provisions for "interested parties" deserves further debate.

Proponents have described these provisions as safeguards that would only very rarely come into play, under truly egregious circumstances when deliberately under-capitalized paper entities bring frivolous litigation in the knowledge that they would be "judgment proof" against a litigation cost award. And yet, under H.R. 9 for example, a broad class of business partners, licensors, or other affiliates of *any* patent plaintiff would be exposed to preemptive threats of liability in the form of menacing legal notices informing them that they could be joined to a lawsuit over which they may have no control, be subjected to fee awards over which they have no control either, and inviting them to renounce all interest in the patent (and effectively dissolve their business relationship with the plaintiff). And under the process that was proposed in S. 1013, such unwilling "interested parties" would be impleaded *before* it is even known that the patentee lost the case, before it is known that the patentee acted unreasonably and without justification, and before it is known that the patentee cannot or will not reimburse the defendant's litigation costs. But not all patentees lose, not all act unreasonably, and not all are penniless. In such ways, the proposed impleader provisions would not just systematically interfere with the business relationships of patentees of all stripes, but also lead to a great deal of legal conflict over who should be in a patent case at its inception when, after all is said and done, it likely will not have been necessary to do so.<sup>14</sup>

In our view, the joinder provisions under consideration present a great departure from normal civil litigation under the American system, and have the potential for significant negative business impact on investment-intensive innovation, especially for smaller companies and non-profit and academic innovators. The joinder/impleader provisions should, at a minimum, be changed to limit the class of "interested parties" that could be brought into the lawsuit as unwilling co-plaintiffs. Business partners, patent owners, financing companies, and others who engage only in arm's length business with the patentee should not be subjected to potential liability or forced to renounce all of their rights in a patent just to avoid being dragged into litigation between two other parties. On the other hand, with proper safeguards it may be fair to permit impleader of entities that directly benefit from and have the right to control the patentee's litigation conduct. In particular, courts should be encouraged to look to well-established bodies of law that permit vicarious liability or corporate veil-piercing to identify patent enforcers who operate through

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<sup>14</sup> If, on the other hand, the reason for impleading "interested parties" is to address "privateering" – a practice whereby large companies reportedly license or assign their patents to other entities that then assert these patents as a proxy for the large company – it is unclear what the impleader provision would accomplish in such instances. For example, it has been said that large companies assert patents through proxies in this way to insulate themselves from counterclaims – but if good grounds for a meritorious counterclaim exist, it should almost certainly be possible to sue such a company separately. At any rate, under U.S. corporate law, it is perfectly common and permissible to establish corporate affiliates for the purpose of isolating assets or liabilities, and that holds true for IP assets as well. There also is a well-developed body of law that allows veil-piercing, not just to establish liability but also to collect debts and unpaid awards, and U.S. courts have not shied away from allowing recovery against corporate parents or affiliates that sought to hide behind paper entities. We are not convinced that opening the doors to new, relatively unselective impleader authority would accomplish anything that cannot already, under existing law, be done more selectively and with less collateral damage.

undercapitalized paper entities, rather than creating broad and vague new categories of potentially impleaded parties.

**Deferral of discovery:** H.R. 9, as did bills in the past Congress, contains provisions that would require courts to defer discovery in patent cases except as necessary to judicially construe the meaning and scope of the asserted patent claims. In effect, these provisions would routinely defer merits discovery in virtually all patent cases until after the court issues a claim construction order. While there undoubtedly are cases in which such discovery deferrals are appropriate, doing so as a general rule would effectively bifurcate discovery on the merits in most cases and tend to prolong patent litigation by 12 months, if not longer, across the board. Such delays would accrue even in routine patent litigation that does not involve meritless claims, small businesses defendants, or “patent trolls.”

In BIO’s view, these proposals are too rigid and interfere unduly with the responsibility and authority of district courts to manage patent litigation in a case-specific manner. In instances where there is ongoing infringement, these provisions would perpetuate uncertainty for patentees whose market share continues to erode, as well as for accused infringers whose potential damages continue to accrue. Settlement negotiations would be hampered by delays in developing a sufficient factual record. The development of other potentially case-dispositive issues would be put on hold, and opportunities for early resolution of the litigation on other grounds would be lost. Interlocutory appeals from claim construction orders would become more common, which would contribute to further piecemeal adjudication and delay. In such ways, legislation that is intended to make patent litigation more streamlined and less costly likely would end up achieving the exact opposite result.

To be sure, the discovery stay provision of H.R. 9 does permit limited flexibilities – for additional discovery “as necessary” to ensure timely resolution of certain litigation that is required by existing federal laws to proceed under defined statutory timelines, or as necessary “to resolve a motion properly raised” prior to claim construction, or to prevent “manifest injustice.” But these exceptions do not alter the fact that patent litigation in the overwhelming majority of patent cases would incur significant across-the-board delays and increased expense for all parties. Even in cases where these very limited flexibilities can be invoked, it is clear that litigants would *not* be entitled to discovery as under current practice. Instead, the burden would be on the requesting party to show why its discovery request is necessary and how its rights would be affected if the discovery request were not granted, all of which would be subject to dispute and counterarguments by the opposing party.

If the goal is to address a subset of cases – litigation brought by patent-assertion entities – it is unclear why Congress would insist on such across-the-board rigidity. The majority of patent litigation manifestly does not involve “patent trolls,” and while it may be difficult to define “troll” cases *affirmatively* in statutory language, it is not too difficult to identify whole classes of cases that have nothing to do with “patent trolling.” H.R. 9 takes one half-step in this direction: as introduced, H.R. 9 provides that its limitation on discovery would not apply to “an action seeking a preliminary injunction to redress harm arising from any allegedly infringing instrumentality that competes with a product sold or offered for sale, or a process used by a party alleging infringement.” Providing such a categorical exemption for cases

between manufacturing marketplace competitors is entirely reasonable. It is perplexing, however, that this exemption should be limited only to preliminary injunction cases. Preliminary injunctions are uncommon in cases between manufacturing competitors, and it is not understood how the goal of limiting discovery in patent-assertion-entity cases would in any way be advanced by interfering with patent litigation between marketplace competitors. If there is a reasonable basis for objecting to a general competitive harm exception for cases between practicing patent owners, it has not been articulated.

In the same vein – and of particular relevance to biotechnology companies – patent litigation under the Hatch-Waxman (HWA) or the Biologics Price Competition and Innovation Acts (BPCIA) likewise manifestly does not involve patent-assertion entities. These statutes spell out in detail the identity of the parties, the products that are the subject of the litigation, and the timelines under which the litigation must commence and proceed. Not only is there no question that the parties to this special kind of patent litigation are each involved in the real-life commercialization of valuable therapeutic products, but there is also a real risk that the currently-pending general patent litigation reforms could interfere with the detailed litigation schemes previously established by Congress under the HWA and BPCIA. Patentees under the HWA and BPCIA have very little leeway as to who they can sue, when they can sue, and the timelines under which the litigation must go forward. It would be simply inconsistent with these statutory litigation schemes to now inject systematic discovery stays into these cases, to require the parties to such litigation to make burdensome showings why any given discovery request is necessary under the circumstances of their case, and to narrowly tailor permissible discovery accordingly. Notably, parties to such litigation may not be able to take advantage of a broad competitive harm exemption such as the one discussed above, because under the unique provisions of the HWA and the BPCIA, patent litigation is intended to begin before the allegedly infringing product enters the marketplace. Accordingly, for reasons that are at least as strong as those supporting a general competitive harm exception between actively marketing competitors, a clear exemption for patent litigation under the HWA and BPCIA should also be included in any discovery stay provision.

It also must be understood that not all patent litigation in biotechnology will fall into the above categories. The vast majority of U.S. biotechnology businesses are far from having a product on the market, yet depend critically on the enforceability of their patents to attract funding, to enter into development partnerships, and to advance their technology. A solution must be found for such businesses as well, businesses that are actively trying to develop, and seeking investment to further develop, patent-protected inventions. Any bill that would equate such quintessentially American entrepreneurial companies with patent trolls would be highly objectionable.

To be clear, BIO's members agree that there should not be unfocused discovery during the early phases of patent litigation. Focusing on the *Markman* hearing as the point on which early evidence development should hinge is a reasonable approach, but it is not the only way to address the matter. For example, claim interpretation is not an issue in every

patent case,<sup>15</sup> yet every patent case should have focused, rational early development of evidence and legal positions.

Further, our members consistently tell us that a reliable, high-quality judicial claim interpretation is always informed by a range of legal and factual contentions, and backed up by evidence that must have been developed in the case at the time of the claim construction hearing. But it is all but impossible to *prospectively* limit discovery only to what is necessary for claim construction – as H.R. 9 would require – because neither party can predict at the outset the full range of facts and contentions that will turn out to be important for construing the claims. Further, in our experience, it is critically important that a judge construing disputed claims understands how the technology at issue actually works and how it compares to the prior art. And both parties need to understand the other party's legal positions, and the evidence that backs them up, in order to agree which claim terms need to be construed and to put forward a proposed claim construction.<sup>16</sup>

Accordingly, BIO believes that any legislation on discovery in patent cases should explicitly permit the development of a reasonable amount of evidence on both sides, to give the case the contours needed to identify and prioritize the questions that need to be resolved first, be it claim construction or other issues. To this end, it would be beneficial to survey the local patent rules that have been adopted in many United States District Courts, and to explore whether the principles of these rules could be applied to craft a nationally uniform pathway for developing evidence and contentions during the early stages of patent litigation in cases requiring claim construction. Under such a nationally uniform framework, the parties' contentions and supporting documentation, and discovery relating thereto, would form a "default" body of information that would need to be developed initially in patent cases. In this context, we also support the Judicial Conference's recent discovery-related initiative, which would require judges to generally grant discovery only in proportion to the needs of any particular case; and this general proposition would apply in all stages of patent cases as it should in other civil litigation. Such recommended standards, to be developed in conjunction with and implemented by the courts, would go a long way to addressing Congress's concern about discovery abuses by the few, without causing systemic harm to the large majority of legitimate participants in the patent litigation system.

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<sup>15</sup> For example if the defendant claims that he actually co-owns the patent, or that he is licensed, or that his infringing product is protected by prior user rights, or that the patent is unenforceable due to laches -- for such defenses it ordinarily won't matter very much how the patent claim is interpreted. On the other hand, if anticipation or obviousness is an issue, or infringement is disputed, claim interpretation often matters very much.

<sup>16</sup> For example, if the defendant contends that the patent is invalid in light of prior art, and for lack of enablement -- this is something the patentee needs to know with specificity prior to claim construction. Which prior art, and how does it supposedly fall into the claim? And what within the supposed scope of the claim is not enabled? Likewise, if the patent holder alleges, for example, that the accused product infringes the patent under the doctrine of equivalents, then the defendant needs to know which elements of its product are supposed to be covered literally by the claim and which ones are substantial equivalents and why. If such information isn't sufficiently developed and backed up by evidence, neither party could put forward a proposed claim construction.

**Reform of the PTO Patent Challenge System:**

The PTO's Post Grant Review (PGR) and Inter Partes Review (IPR) processes, as established by the America Invents Act (AIA), were designed to provide a quicker, cost-effective alternative to litigation. More than 2,500 petitions for such AIA proceedings have been received by the PTO since these proceedings became available in September 2012. The overwhelming majority (up to 80% by some accounts) involve patents that are in concurrent district court litigation, showing that these proceedings are being used in conjunction with, rather than as an alternative to, litigation. This creates a great risk of duplicative proceedings and inconsistent outcomes, as alleged infringers seek to gain advantages or leverage over patent owners that would not exist under district court litigation alone. For example, the way claims are interpreted, the burden of proof, and other procedural protections are less favorable to patent owners in the PTO administrative setting.

In addition, third parties with no commercial interest in the patent or field to which the patent pertains have figured out that they can extort settlements or otherwise gain financially from bringing, or even threatening to bring, patent challenges against critical patents owned or licensed by biotech companies. Biotech companies can be particularly vulnerable to such extortion because – in contrast to most high-tech companies – biotech companies often rely on just a handful of highly valuable patents to protect their products and massive investment therein. This already is being seen by several biotech companies, who have been approached by third parties threatening to file IPRs unless the company makes a substantial payment to them. And a hedge fund manager recently made news by announcing his plans to “short” the stocks of more than a dozen biotech companies and then file IPRs against their most valuable product patents in an attempt to drive down their stock prices. The first such IPR petition, filed by this hedge fund in February against Acorda Therapeutics (a mid-size biotech company which brought to market an innovative treatment for multiple sclerosis) caused the value of the company to drop by over \$150 million in one afternoon. A second IPR has now been filed against this same company, and other hedge funds are starting to get into the IPR business as well.

Such abuses of the PTO administrative review system are attractive and growing because, as is quite clear to anyone following the evidence to date, the rules governing these proceedings are unfairly stacked against patent owners in many ways. To address one of the problems with this system, H.R. 9 includes an important provision that would specify that patent claims in AIA proceedings are to be construed as they were or would be in district court, according to their ordinary and customary meaning as understood by one skilled in the art (under a *Phillips v. AWH standard*) – rather than the PTO's current “broadest reasonable construction” standard, which is more likely to result in invalidation of patent claims. This statutory change would harmonize the claim construction standards in PTO litigation with those in district court litigation, thereby increasing predictability and avoiding inconsistencies and wasteful litigation.

An IPR petition filed against BIO member company Allergan on March 9 illustrates that the difference in claim construction standards is not just an academic consideration. In this

petition, a recently-formed self-described privately-held investment venture is challenging a patent claim that had previously been litigated and upheld by both the U.S. District Court and the U.S. Court of Appeals for the Federal Circuit. The challenger candidly repeats the legal arguments that had been unsuccessfully made by prior litigants in the Article III courts, but argues that the broader claim construction standard in IPR proceedings should lead to a different outcome. In effect, the petition seeks to leverage the difference in claim construction standards to reverse the results of over four years of litigation in two Article III courts.

In light of such developments, BIO's members have firmly concluded that the harmonization of legal claim interpretation standards between district courts and the PTO is a necessary and common-sense reform that should be part of any final patent reform bill. However, any patent reform bill must go further and provide patent owners with greater procedural protections in IPR as well. First, the PTO has made it effectively impossible for patent owners to amend their claims in AIA proceedings, even though the AIA expressly grants the patent owner this right (as of November 2014, with over 2,300 such proceedings requested and close to 200 completed, the PTO had virtually never approved a claim amendment). Such a rigid approach to the granting of claim amendments undermines the purpose of the proceeding, which is to help improve patent quality and provide freedom to innovate by ensuring that patent claims are not overly broad. Instead, AIA proceedings have become a forum in which patent claims that could be sustained if properly amended are equally thrown out with the unsustainable ones, which contributes to the high "kill" rates that are driving the abusive behaviors described above. Congress should clarify its intent regarding narrowing claim amendments in AIA proceedings, so that they are more liberally allowed by the PTO, within reason.

Second, Congress should include other procedural protections to ensure that patent owners receive adequate due process, including –

- Developing rules for dealing with AIA proceedings that are brought for illegitimate reasons. Most patent challengers who file petitions for AIA proceedings seem to do so to obtain freedom-to-operate, or because they are already involved in an ongoing legal or business dispute involving the challenged patent. But as discussed above there is emerging evidence that AIA proceedings also are being brought or threatened by entities that have no interest in the challenged patent other than to extract a settlement payment or unrelated concessions from the patent owner – or to profit from the declining stock value of companies subject to these challenges. Such "reverse trolling" practices were clearly not intended by the AIA, and they deserve Congress's remedial action.
- Allowing patent owners to submit declarations of scientific experts in order to inform the PTO's decision whether or not to institute an AIA proceeding. Currently, only the patent challenger has this right, making it more likely that review proceedings will be initiated.

- Assigning different administrative panels to (i) the “institution phase” and (ii) the “merits phase” of the AIA proceeding. Currently, before instituting the proceeding, the administrative panel first decides whether there is a “reasonable likelihood” that the challenger will prevail in its challenge (or, in the case of a PGR, whether the patent is “more likely than not” invalid). The administrative panel thus becomes, at a very early point, invested in its finding that there is something seriously wrong with the challenged patent. This affects all subsequent stages of the proceeding, stacks the decks against the patent owner, and is contrary to basic notions of procedural fairness. It also appears quite clearly contrary to what Congress had intended in the AIA’s language.
- Imposing a duty of candor not just on the patent owner, but also on the patent challenger. Currently, patent challengers are under no obligation to disclose information that is favorable to patentability of the challenged claims, but patent owners are under an obligation to disclose all information that is unfavorable to patentability.
- Permitting appeals from IPR and PGR decisions to not only the Court of Appeals for the Federal Circuit (as currently allowed), but also to U.S. District Courts where appropriate. Appeals to district courts have long been an important right in administrative trials in the PTO. This form of appeal helps to ensure proper due process and fairness for patentees in situations in which there is a need for the introduction of evidence that is not available or realistically obtainable during IPR or PGR.

**Clarification of Liability for “Divided Infringement” of Process or Method Patents :**

Incredibly, under current patent law principles, an infringer who arranges for the steps of a patented method to be practiced by different actors escapes all liability because no “single entity” practiced the entire patented method. This legal loophole has existed since 2007, when the U.S. Court of Appeals for the Federal Circuit established a strict rule according to which a process patent cannot be infringed by multiple parties together unless these parties are vicariously liable for each other’s actions (e.g., they must be in a master-servant, employer-employee, agent-principal, or legally equivalent contractual relationship). Patent infringers were quick to take advantage of this strict rule, for example by agreeing to infringe the patent through their concerted actions while structuring their legal relationship with each other as an “arms-length” transaction in which neither party has the formal right to direct or control the other, thereby avoiding all liability for patent infringement.

In its July 7, 2014 decision in *Limelight Networks, Inc. v. Akamai Technologies, Inc.*, the Supreme Court (i) rejected the Federal Circuit’s subsequent attempt to close this loophole, and (ii) declined to craft an alternative rule that would bring greater clarity to this area of the law. As a result, there is now great uncertainty about the enforceability of process and method patents. Every industrial process that has more than one step is capable of being divided up between multiple actors, and the current state of the law essentially provides a

roadmap for patent circumvention whereby there would be no liability at all for, by way of example, a patent infringer who himself practices all but the final step of a patented process and then induces another actor to practice the final step.<sup>17</sup>

In its brief to the Supreme Court in the *Limelight* case, the U.S. Government identified these and other concerns with the law on divided infringement and explained the need for a Congressional (not judicial) solution. This serious anomaly in patent law urgently needs to be addressed, and Congress now has the opportunity to do so.

**Proper Codification of "Double Patenting":**

H.R. 9 would codify the judicially-created doctrine of "double patenting" for patents that are prosecuted under the AIA's new first-inventor-to-file standard for patentability. While we support these provisions, they do not go far enough. Legislative clarification of the "double patenting" doctrine also is needed for patents that were issued prior to the AIA's effective date.

**Patent-eligible Subject Matter under Section 101:**

Among BIO's members, no area of substantive patent has received more attention over the past several years than the topic of patent-eligible subject matter under section 101 of the Patent Act. The Supreme Court has weighed in on this subject four times in as many years, and patent practitioners are losing count of the numbers of patents that have been rejected by the PTO or struck down in the lower courts on this ground over the past year alone. While in terms of sheer numbers the impact on software-implemented inventions has been particularly harsh, the patentability of biotechnology inventions relating to products and processes derived from natural sources or materials also has been affected significantly by this ongoing judicial and administrative expansion of non-statutory patent law in the United States. BIO's members are greatly concerned by the significant departure from internationally-accepted norms of patentability that is increasingly manifesting itself in the courts and the PTO, particularly with regard to industrial, agricultural, and pharmaceutical preparations of naturally-derived substances, compositions, and processes.

Inventive preparations based on naturally-occurring substances have historically been of great importance in biotechnology, and innovation in this area has been spurred, at least in part, by the availability of patent protection. This is true for every sector of biotechnology. Examples include vaccine preparations, crop protection products, plant biotechnology and

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<sup>17</sup> Those who benefit from this rigid rule have expressed great concern that Sec. 109 of the STRONG Patents Act, which would close this loophole, would create unfair patent infringement liability even in instances where "no one" practices the patent claim. Statements of this kind misrepresent both current law and the STRONG Act's legislative proposal. Patent law has always required that the patent claim, with all its elements and steps, must of course have been practiced, without authority, before there can be infringement liability, and this bedrock requirement would in no way be altered by the STRONG Patents Act. The STRONG Patents Act merely clarifies, in a narrowly targeted manner, that those who orchestrate the infringement of process claims by others do not escape any potential liability. The proposal does not change the demanding showing a plaintiff would otherwise have to make in order to establish indirect infringement, and it has BIO's full support.

breeding processes, industrial enzymes, immunosuppressive drugs, anticancer compounds, and antibiotic medicines. Such historically uncontroversial inventions are now increasingly being rejected in the PTO as unpatentable subject matter under an expanded extra-statutory exception for "natural phenomena," even if they are otherwise novel, unobvious, and useful inventions that, but for the intervention of man, would not have ever been known and put into useful forms to benefit humankind. By subjecting such inventions to an unstable patent-eligibility analysis that focuses on the "gist" of the invention instead of the specific scope of the patent claim itself, courts and the PTO are in the process of creating a deep disparity in substantive patent law whereby whole categories of socially beneficial inventions would face obstacles to patent protection in the United States but remain patentable among its major trading partners, with attendant harmful effects on the flow of investment, trade, and cross-border transfer of innovation.

BIO believes that the Congress should undertake a comprehensive review of Section 101 jurisprudence and PTO implementation to determine what needs to be done to ensure that the patentability of naturally-derived substances, compositions, and processes remains consistent with our nation's best interests.

**Diversion of PTO User Fees:** On the issue of PTO user fees, BIO's members are incredulous that, after more than a decade of sustained Congressional interest in improving the nation's patent system, resulting in landmark legislation in 2011 and now progressing towards another major bill, the PTO still has neither full funding nor access to all user fees it collects. We would urge Congress to fix this problem once and for all, and applaud Senators Coons, Durbin, and Hirono for including provisions to that effect in the STRONG Patents Act of 2015.

#### **Conclusion:**

I want to thank the Committee for the opportunity to testify today and explain a view of patent litigation reform from the perspective of small, innovative, investment-intensive biotech businesses. I urge the Members of this Committee and the full Senate to ensure that adopted reforms are truly targeted at abusive practices – both by patent owners and against patent owners – and do not have negative, unintended consequences for the vast majority of legitimate patent owners or licensees who simply are seeking to protect and enforce their patents in good faith. The long-term benefit to society of a strong and predictable patent system may hang in the balance.

**Senator David Perdue  
Questions for the Record**

**“The Impact of Abusive Patent Litigation Practices on the American Economy”**

**March 25, 2015**

**Questions for Dr. Michael R. Crum, Vice President for Economic Development & Business Engagement, Iowa State University**

1. Please discuss the experience of Iowa State University with abusive litigation practices by patent assertion entities (“PAEs”). How have PAEs affected Iowa State’s research capabilities and ability to innovate?
2. In your written testimony, you address the role of academic institutions in America’s “innovation system,” which includes the process of technology transfer. Please describe how the technology-transfer process specifically, and university research generally, would be affected by the various reform proposals contained in the Innovation Act and the so-called I-Squared Act. If your answer describes how a particular proposal would harm the technology-transfer process, please specify how the proposal can be modified, if possible, to prevent the harm you describe.
3. A number of organizations representing the pharmaceutical industry and higher education have claimed that recent decisions by the Supreme Court and changes proposed by the Judicial Conference have fundamentally altered the playing field such that Congress should take a hard second look at provisions of the Innovation Act and the I-Squared Act to determine whether they are actually necessary before proceeding with legislation. Is it your view that decisions like *Octane*, *Nautilus*, and *Alice* have eliminated the need for any Congressional action? If not, what specific problems have those cases solved in your view, and what do we still need to address?
4. The fee-shifting provision of the Equal Access to Justice Act has been law since 1980 and has generated little controversy in the intervening three decades. The Innovation Act contains an identical prevailing-party standard for fee shifting. And, like the Equal Access to Justice Act, the standard in the Innovation Act only creates a presumption. It does not bind a district judge or restrict the judge’s ability to exercise discretion on a case-by-case basis. Please explain your view of the Innovation Act’s fee-shifting provisions and, more generally, whether any fee-shifting provision is a desirable component of a legislative reform package.

**Senator Grassley's Questions for Senate Judiciary Committee Hearing  
"The Impact of Abusive Patent Litigation Practices on the American  
Economy," March 18, 2015**

**Questions for Mr. Gupta**

1. Mr. Sauer testified that the new inter partes review (IPR) and post grant review (PGR) processes at the PTO have diminished the value of patents and resulted in a number of problems for patent holders. As you know, the IPR and PGR processes were established by the America Invents Act to provide a faster and cheaper way to challenge patents. Do you agree with Mr. Sauer that these processes are not working and are being abused? Do you support the changes proposed by Mr. Sauer, also contained in the STRONG Patents Act? Why or why not?
2. Do you believe the STRONG Patents Act would be effective in putting a stop to the patent troll abuses that EMC is experiencing?
3. Universities and other groups are concerned about possible adverse impacts of provisions contained in the Innovation Act on venture capital investment. Do you agree with these concerns?
4. Isn't fee shifting in the Patent Act already? What's wrong with the current statute that provides for fee shifting, and do the recent Supreme Court cases make a difference? Can you please explain how changes to the fee shifting standard in the Patent Act would change the incentives and dynamics in patent litigation?
5. Many see the elimination of Form 18 and the Supreme Court's *Iqbal/Twombly* decisions as positive developments in terms of requiring more substantive patent pleading standards. Do you think that these developments are good enough to deal with the abuses by the patent trolls?
6. There have been reports that the number of patent troll lawsuits has been dropping over the last year and, consequently, Congress should adopt a wait and see approach. Do you agree? Is the problem of abusive patent litigation over? Can you speak to the overall rate of litigation that is actually taking place in context to what it has been traditionally?

7. How much does EMC spend each year on patent troll litigation, and what is the impact on EMC's investments in the United States? In your opinion, does this kind of patent litigation encourage or discourage innovation?
8. What do you believe are the most promising proposals currently being considered by Congress that would help deter abusive activity in the patent system? How do you see the patent litigation environment changing if those reforms are enacted?

**Senator David Perdue  
Questions for the Record**

**“The Impact of Abusive Patent Litigation Practices on the American Economy”**

**March 25, 2015**

**Questions for Hans Sauer, Ph.D., Deputy General Counsel for Intellectual Property,  
Biotechnology Industry Association**

1. A number of organizations representing the pharmaceutical industry and higher education have claimed that recent decisions by the Supreme Court and changes proposed by the Judicial Conference have fundamentally altered the playing field such that Congress should take a hard second look at provisions of the Innovation Act and the I-Squared Act to determine whether they are actually necessary before proceeding with legislation. Is it your view that decisions like *Octane*, *Nautilus*, and *Alice* have eliminated the need for any Congressional action? If not, what specific problems have those cases solved in your view, and what do we still need to address?
2. The fee-shifting provision of the Equal Access to Justice Act has been law since 1980 and has generated little controversy in the intervening three decades. The Innovation Act contains an identical prevailing-party standard for fee shifting. And, like the Equal Access to Justice Act, the standard in the Innovation Act only creates a presumption. It does not bind a district judge or restrict the judge's ability to exercise discretion on a case-by-case basis. Please explain your view of the Innovation Act's fee-shifting provisions and, more generally, whether any fee-shifting provision is a desirable component of a legislative reform package.
3. In your written testimony, you state that “[t]he vast majority of U.S. biotechnology businesses are far from having a product on the market, yet depend critically on the enforceability of their patents to attract funding, to enter into development partnerships, and to advance their technology. A solution must be found for such businesses as well, businesses that are actively trying to develop, and seeking investment to further develop, patent-protected inventions.” Please describe the provisions of the Innovation Act and the I-Squared Act that would inhibit the ability of these fledgling businesses to attract investment or develop new technologies.
4. Your written testimony states that “any legislation on discovery in patent cases should explicitly permit the development of a reasonable amount of evidence on both sides” and proposes the creation of a “nationally uniform pathway for developing evidence and contentions during the early stages of patent litigation in cases requiring claim

construction.” Please briefly describe what you envision as the optimal “uniform pathway” for early-stage discovery in patent litigation and what constitutes a “reasonable amount of evidence” within the context of the pathway you propose.

Senator David Perdue  
Questions for the Record

**"The Impact of Abusive Patent Litigation Practices on the American Economy"**

April 9, 2015

Questions for Dr. Michael Crum

Thank you for the opportunity to explain further why Iowa State University and the broader higher education community remain concerned about the ways in which the Innovation Act, H.R. 9, would hinder the ability of universities to engage in technology transfer.

**Question #1**

***Please discuss the experience of Iowa State University with abusive litigation practices by patent assertion entities ("PAEs"). How have PAEs affected Iowa State's research capabilities and ability to innovate?***

Iowa State University has been very fortunate not to have had any direct experience with abusive litigation practices by PAEs. Since we do not make products, the university itself is not a direct target of PAEs. Rather, our primary concern is for our licensees, many of which are small, innovative, and often fledgling companies comprising university faculty, inventors, and alumni. Litigation costs can cripple these small businesses as they do not have the financial wherewithal to absorb such costs. Additionally, even the mere threat of litigation by PAEs could cause our licensees to discontinue their licensing activities, thereby impeding the movement of university technology and innovations to the marketplace.

At the same time, Iowa State University is considerably worried about any legislation that would increase the probability of our school's involvement in litigation, including the prospect of incurring substantial legal costs through presumptive fee-shifting, involuntary joinder, etc. in lawsuits we neither initiate nor control. Litigation costs can dramatically reduce the amount of financial resources we have to reinvest with our inventors so they can create yet more new technology and intellectual property and, by extension, reduce the financial resources we can dedicate to supporting our efforts to move our technologies into the marketplace for society.

I want to stress that the purpose of university technology transfer – consistent with the overall university mission of education, research, and service – is to enable the commercial sector to generate products and processes that benefit society, *not* to enable the higher education sector to generate revenue. As is true of most universities, we at Iowa State consider ourselves lucky when we generate enough licensing revenues to support our technology transfer operations. At Iowa State, approximately one-third of licensing revenues are returned to the inventor, one-third goes to the inventor's home academic unit to support its overall research efforts, and one-third is used to fund our technology transfer operations. When we do have "extra" revenues,

we try to utilize them as seed funds to stimulate even more technology development and innovation. Iowa State is regularly (several times each year) approached by entities offering to acquire our patents or evaluate our portfolio of patents for the purpose of defending these patents and generating income via infringement settlements. As a matter of course, we say “no” to these entities.

I also want to stress one more important point: performing a patent portfolio review for infringement is a legitimate, appropriate activity for any good faith patent holder and should not, by itself, be considered PAE- or troll-like behavior. Yet our concerns about the abusive litigation practices of many PAEs have prompted us to go so far as to back off on legitimate portfolio review activities to ensure that our institution is not associated with PAE/troll-like behavior. Universities need to be able to undertake such activities, however, without fear of being mischaracterized as patent trolls. Otherwise, our efforts to attract licensees and investors willing to develop products based on university research – which is very often early-stage and high-risk and thus depends on the “collateral” of strong patent protection – will be frustrated.

#### **Question #2**

***In your written testimony, you address the role of academic institutions in America’s “innovation system,” which includes the process of technology transfer. Please describe how the technology-transfer process specifically, and university research generally, would be affected by the various reform proposals contained in the Innovation Act and the so-called I-Squared Act. If your answer describes how a particular proposal would harm the technology-transfer process, please specify how the proposal can be modified, if possible, to prevent the harm you describe.***

The university community is most troubled by H.R. 9’s mandatory fee-shifting and involuntary joinder provisions.

Because H.R. 9 begins with a presumption in favor of fee-shifting, I am greatly concerned that the threat of fee-shifting would undermine the ability of universities and our licensees to enforce intellectual property rights in good faith. It is important to note that this approach would be highly unusual in the American legal system. Under H.R. 9, unless the patent owner is the prevailing party (and rarely is there an unqualified prevailing party in patent cases), then the presumption of fee-shifting attaches, and the burden shifts to the patent owner to prove why it should not suffer the penalty of attorney fees. Proponents of H.R. 9 assert that this bar is so low as to be easily overcome by good faith litigants, but why statutorily shift the burden at all, particularly in light of Supreme Court cases from 2014 that expand the discretion of judges to shift fees? Consider that if a good faith plaintiff patent owner misses a filing deadline, or is bankrupted by the litigation and unable to respond, then it will have failed to rebut, and fees would be shifted as a default. Given the prominence of intellectual property rights enshrined in our Constitution, and the value those IP rights bring to the economy, singling out patent enforcement for disparate treatment in our civil litigation system will not only be detrimental to the economy as a whole, but will also be especially prejudicial to enterprises that are the most innovative.

Entities without extensive litigation budgets, such as non-profit universities, are ill-equipped to operate in the environment that would be created under H.R. 9. The presumption in favor of fee-shifting would so increase the risk of expensive litigation that universities and our licensees would in many cases be unable to assume the risk of enforcing intellectual property rights. The fact that universities would be deterred from or simply unable to enforce their patent rights surely would not go unnoticed by those who conduct a risk assessment as to whether to infringe on a university's patent.

Most university technology transfer offices are not well-financed by any measure. You can imagine the pressure those engaged in technology transfer would feel from losing just one case, which easily could result in fee shifting of an amount larger than the annual budgets of many university technology transfer offices.

The direct impact of fee-shifting on the ability of universities to enforce intellectual property is of significant concern. However, what is often not as well understood is that universities are equally, if not more, concerned about the impact such statutory provisions will have on our licensees. If a patent cannot be enforced, it is of no value. Licensees have little incentive to work with entities that are unable to protect their intellectual property. Such a loss of confidence in the willingness and/or ability of universities to protect their intellectual property rights would, consequently, undermine the ability of universities to transfer their research discoveries from campus to the private sector.

Universities are not philosophically opposed to fee-shifting. We recognize there are abuses in the patent system and there is an appropriate place for a fee-shifting regime that would deter and punish frivolous litigation instigated by patent trolls. But instead of beginning with a presumption that all plaintiffs bring litigation in bad faith and, therefore, that fee shifting should be automatic if the plaintiff loses, I would urge Congress to consider a more measured approach that balances the legitimate interest in deterring and punishing patent trolls with the need to preserve access to justice for entities lacking substantial litigation budgets. I believe this could be accomplished by codifying the recent Supreme Court decisions – *Octane Fitness* and *Highmark* – that expand judicial discretion to shift fees in meritless and/or bad faith cases brought by patent assertion entities. This kind of an approach would appropriately focus the legislation on the behaviors of bad actors in the patent system.

Similarly, universities are concerned that the mandatory joinder provisions would so increase the risk of engaging in technology transfer that it would provide a strong disincentive for universities to license innovations stemming from their research. As introduced, H.R. 9, creates the real possibility that universities could be forced into court to shoulder fees and costs in cases brought by licensees or sub-licensees, including cases to which the universities did not consent or direct. The legislation provides that entities can prevent joinder by renouncing interest in the patent(s) at issue. The federal Bayh-Dole Act imposes restrictions on alienation of such ownership rights in inventions supported by federal funding. Thus, the supposed safe harbor of “renunciation” is simply not available to many universities by operation of law.

The practical implications of the joinder provisions are that universities likely would enter into fewer licensing agreements with entities such as small startups that cannot demonstrate the capacity to absorb fee-shifting; alternatively, universities would need to write into licensing agreements restrictions on the licensees' ability to enforce the universities' intellectual property. The former approach would result in significantly less technology transfer overall. The latter approach, by requiring renegotiated and presumably less favorable financial terms for the license, would diminish the value of licensed intellectual property.

Again, universities understand the valid interest in combatting the ability of patent trolls to create shell companies to remain judgment-proof. However, the creation of shell companies to avoid liability is not a problem unique to patent litigation and thus does not require a special solution only applicable to patent suits. In my view, Congress should consider addressing attempts to hide behind shell companies by enhancing existing civil litigation tools to pierce the corporate veil.

I submit that H.R. 9, as written, would inadvertently substitute patent troll problems for an entirely new set of problems. For example, as I suggested above, a statute that discourages or prevents universities from enforcing their patents would unintentionally create incentives to infringe those patents and would diminish hard-earned revenue and sponsored research opportunities that universities rely on to maintain their leading edge as the finest educational research institutions in the world. I urge the Senate to consider a more balanced approach that attacks abusive patent litigation practices while maintaining the strength and value of the patent right, as enshrined in our Constitution, which is critical to university technology transfer and promoting innovation.

### **Question #3**

***A number of organizations representing the pharmaceutical industry and higher education have claimed that recent decisions by the Supreme Court and changes proposed by the Judicial Conference have fundamentally altered the playing field such that Congress should take a hard second look at provisions of the Innovation Act and the I-Squared Act to determine whether they are actually necessary before proceeding with legislation. Is it your view that decisions like Octane, Nautilus, and Alice have eliminated the need for any Congressional action? If not, what specific problems have those cases solved in your view, and what do we still need to address?***

Several recent developments in the federal courts and the Judicial Conference of the United States and the U.S. Patent and Trademark Office (USPTO), as well as concurrent efforts of the Federal Trade Commission and state Attorneys General to protect consumers against deceptive patent threats, have the potential to substantially diminish abusive patent litigation practices. Data indicates that these developments are having a positive impact and may help achieve many, if not most, of the goals of the legislative measures that have been under consideration over the past two years. Accordingly, my recommendation would be that any congressional action should target specific bad faith activities, such as abusive demand letters,

and avoid overbroad, one-sided approaches that would render good faith enforcement of patents unduly risky and expensive.

#### U.S. Supreme Court Decisions

The Supreme Court decided five patent cases in 2014, including *Octane Fitness v. ICON Health & Fitness*, and *Highmark Inc. v. Allcare Health Management Systems*, *Alice Corporation v. CLS Bank*, and *Nautilus v. Biosig Instruments*, that should make it easier to defeat invalid or weak patents, including the kind of patents that often are asserted in abusive litigation.

Prior to the Supreme Court's April 2014 decisions in *Octane* and *Highmark*, it was very difficult for prevailing defendants to obtain fee awards under section 285 of the patent code. The Supreme Court's April 2014 decisions in *Octane* and *Highmark*, however, significantly expanded the discretion of district courts to award attorneys' costs and fees and raised the bar to overturning such determinations on appeal. A study conducted in early 2015 that looked at post-*Octane* grants of motions for attorneys' fees determined that there has been a substantial increase in the percentage of motions granted in the wake of *Octane*.<sup>1</sup> A number of post-*Octane* decisions demonstrate, moreover, that because the *Octane* "totality of circumstances" standard explicitly includes "the need in particular circumstances to advance considerations of compensation and deterrence," courts are already using *Octane* as an efficient and cost-effective tool to address litigation abuses by patent trolls.<sup>2</sup> On the contrary, the presumptive fee-shifting provisions of H.R. 9 might well "put a greater burden on the courts, and...would result in increased attorneys' fees (because of increased motion practice) for all parties."<sup>3</sup>

In June 2014, the Supreme Court's decision in *Nautilus v. Biosig Instruments* made it easier for courts to invalidate vague patents for "indefiniteness" and much more challenging for patent holders to enforce the kind of vague or otherwise weak patents that are the kind of patents most often asserted in abusive litigation. And, in another June 2014 decision, *Alice Corporation v. CLS Bank*, the Supreme Court narrowed the scope of patentable inventions, giving lower courts and the USPTO the authority to invalidate a number of patents involving elementary financial or business practices – precisely the kind of non-technical patents that in the past have posed the greatest potential for litigation abuse.

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<sup>1</sup> In the 365 days preceding *Octane*, district courts granted seven motions for fees filed by defendants and denied forty and they granted eight motions filed by plaintiffs and denied seventeen. In the period after *Octane* and, as of January 2015, district courts granted twenty motions for fees filed by defendants and denied thirty-three and they granted ten motions for fees filed by plaintiffs and denied two. Eric C. Cohen, *Is There a Need for Patent Reform Legislation?*, White Paper (March 15, 2015).

<sup>2</sup> Eric C. Cohen, *Is There a Need for Patent Reform Legislation?*, White Paper (March 15, 2015).

<sup>3</sup> Eric C. Cohen, *Is There a Need for Patent Reform Legislation?*, White Paper (March 15, 2015). Cohen's study also questions assertions that the fee-shifting standard of H.R. 9 would create great uniformity than *Octane*, observing that "reasonable justification" and "special circumstances" would give the courts at least as much leeway as the *Octane* standard.

Judicial Conference Changes to the Federal Rules of Civil Procedure

In September 2014, the Judicial Conference of the United States proposed changes to the Federal Rules of Civil Procedure that will ensure that patent cases meet the heightened pleading standards required of all other federal cases. The Judicial Conference's changes to the heightened pleading requirements will abolish Form 18, thereby addressing concerns that patent holders can file vague lawsuits that do not clearly specify how their patent is being infringed. Plaintiffs filing patent infringement complaints will be required to meet the heightened pleading standards set out by the Supreme Court in *Ashcroft v. Iqbal* and *Bell Atlantic Corporation v. Twombly*, obviating the need for stricter statutory guidelines for patent complaints.

The Judicial Conference's proposed changes to discovery requirements in patent litigation will also ensure that production of documents is "proportional to the needs of the case," reducing the ability of patent plaintiffs to use unnecessary discovery requests to drive up costs for defendants in an effort to force unwarranted settlements. Further, the Judicial Conference's changes will direct courts to shift discovery expenses to the requesting party, if producing documents would be particularly burdensome to the producing party.

These rule changes, which will go into effect in December 2015, will make any statutory provision that would heighten pleading standards or limit the scope of discovery in patent cases unnecessary and repetitive.

The America Invents Act

The Leahy-Smith America Invents Act (AIA) was fully implemented less than two years ago and its effects are only now beginning to take hold. For example, the AIA created new procedures – *Inter Partes Review* (IPR) and *Post Grant Review* (PGR) – to allow anyone to challenge patents in a fast, relatively inexpensive proceeding before the Patent Trial and Appeal Board (PTAB). These administrative proceedings are already shaping the litigation landscape: judges in patent cases are now granting 80% of all motions to stay patent litigation if the patent is also involved in a parallel IPR or PGR proceeding.

Taken together, these major developments in the patent arena suggest proceeding with caution as we consider broad statutory changes to our strong and productive U.S. patent system.

Question #4

***The fee-shifting provision of the Equal Access to Justice Act has been law since 1980 and has generated little controversy in the intervening three decades. The Innovation Act contains an identical prevailing-party standard for fee shifting. And, like the Equal Access to Justice Act, the standard in the Innovation Act only creates a presumption. It does not bind a district judge or restrict the judge's ability to exercise discretion on a case-by-case basis. Please***

***explain your view of the Innovation Act's fee-shifting provisions and, more generally, whether any fee-shifting provision is a desirable component of a legislative reform package.***

H.R. 9 would make fee-shifting the default in any given patent lawsuit, creating a new and unusual presumption against plaintiffs. The loser of a lawsuit would need to establish, based on vague, subjective criteria, that its position was “substantially justified” in order to avoid paying both its own litigation costs and those of the defendant. Although the fee-shifting provisions in H.R. 9 are modeled on the noncontroversial 35-year-old standard in the Federal Equal Access to Justice Act (FEAJA), it should be noted that there are important practical and principled differences between these fee recovery provisions.

First, and most importantly, the FEAJA was enacted to “equalize the litigating strength between the government and private litigants of modest means, and thereby deter government overreaching.”<sup>4</sup> To the contrary, the fee recovery provisions in H.R. 9 would favor better-funded and more experienced parties and, moreover, might have the unintended consequence of allowing such parties to use the statute’s fee-shifting provisions both as a shield and a sword. Larger and wealthier non-prevailing parties would be better positioned to command the attorney time and resources necessary to show why they should not be required to pay attorneys’ fees. At the same time, the fee-shifting provisions of H.R. 9 could give bad actors additional ammunition to extract nuisance value settlements: by citing the statute for the proposition that losing defendants will have to pay the plaintiffs’ attorneys’ fees, patent trolls could scare inexperienced, smaller, and/or poorer entities away from fighting even weak or unmeritorious claims of infringement. In short, the FEAJA was designed to equalize access to justice; H.R. 9 likely would have exactly the opposite effect.

Second, the FEAJA’s fee recovery provisions are limited to individuals with a net worth that does not exceed \$2 million and business interests with a net worth that does not exceed \$7 million (and no more than 500 employees); charities can recover fees regardless of their net worth. H.R. 9, however, would allow all prevailing parties to recover fees, regardless of their wealth.

Third, under the FEAJA, the amount of recoverable attorneys’ fees is capped at \$125/hour. H.R. 9 provides no such caps or any other protections against runaway costs.

As nonprofit institutions lacking substantial litigation resources, universities are ill-equipped to operate in a fee-shifting regime such as that currently proposed in the Innovation Act. Patent litigation is extremely complex and outcomes are notoriously unpredictable. Thus many universities, faced with the potentially enormous expense of losing a case – particularly a case in which a better-resourced entity is accused of infringing a university patent – would be unable

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<sup>4</sup> Harold J. Krent, *Fee Shifting Under the Equal Access to Justice Act—A Qualified Success*, 11 YALE L. & POL’Y REV. 458, 462 (1993) (citing H.R. REP. NO. 99-120 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132; H.R. REP. NO. 96-1434 (1980), *reprinted in* 1980 U.S.C.C.A.N. 5003; H.R. REP. NO. 96-1418 (1980); S. REP. NO. 96-253 (1979)).

to assume the risk of litigation. If universities are unable to enforce their patent rights in practice, this will eviscerate the value of their patents to potential licensees and investors. This, in turn, will have the socially undesirable effect of chilling university technology transfer activity and reducing the number of research discoveries that advance to the marketplace.

I would not go so far as to say that a fee-shifting provision should not be a component of a legislative reform package. Instead, I submit that any such provision should respect the “American Rule” of civil litigation that parties bear their own attorneys’ fees in the absence of a statutory or contractual exception. As I explained above in my response to Question #3, the Supreme Court’s decision in *Octane* provides an elegant solution that is already proving effective – it gives the American Rule more muscle by explicitly making deterrence of litigation abuses a factor in determining entitlement to attorneys’ fees. Thus I respectfully urge Congress to consider codifying the fee-shifting standard for awarding fees articulated in *Octane* and its companion case, *Highmark*, in lieu of advancing the fee-shifting provisions of H.R. 9 that upset the American Rule in an unprecedented way.

**Responses of Krish Gupta to the  
Written Questions of Chairman Grassley**

**Senate Judiciary Committee Hearing “The Impact of  
Abusive Patent Litigation Practices on the American Economy,”  
March 18, 2015**

**Question 1:** Mr. Sauer testified that the new inter partes review (IPR) and post grant review (PGR) processes at the PTO have diminished the value of patents and resulted in a number of problems for patent holders. As you know, the IPR and PGR processes were established by the America Invents Act to provide a faster and cheaper way to challenge patents. Do you agree with Mr. Sauer that these processes are not working and are being abused? Do you support the changes proposed by Mr. Sauer, also contained in the STRONG Patents Act? Why or why not?

**Gupta Response:** These provisions were the result of years of negotiations and were a careful balance of interests between the various stakeholders involved in the debate. In EMC’s view, the post-grant procedures have been a phenomenal success and served as Congress intended. As of mid-February 2015, approximately 2,500 IPR petitions had been filed. EMC has filed 19 petitions requesting the PTO to institute IPR proceedings and has defended 7 IPR petitions against its patents. Based on our experience in these proceedings, as both petitioner and patent owner, we believe the IPR process is operating as Congress intended and has proven to be a powerful and effective tool for culling out bad patents from the system.

Legislative proposals that change the post-grant review processes would be premature. Despite the success of these new proceedings, the PTO has solicited public input on America Invents Act (“AIA”) trial procedures and policies, and based on the comments it received, is already reviewing and further improving the post-grant processes. Indeed, only last week, PTO Director Lee announced two upcoming rules packages that directly address feedback the PTO has received regarding its AIA trials. Together, the rules changes make it easier for a patent owner to amend claims; expand the evidence that may be included in the patent owner’s preliminary response to a petition; set forth the claim construction standard to be used in evaluating expired patents; clarify the extent of discovery available on questions of standing and estoppel; address how to handle multiple proceedings involving the same patent; provide for circumstances in which live testimony may be heard; and expand the page limits for certain filings to ensure that litigants have a full and fair opportunity to present their case. The PTO is also contemplating further procedural changes, which might include a requirement that a single judge rule on whether trial should be instituted, and that a three-judge panel (two of whom would not have considered the institution decision) issue the final written decision on validity.

I strongly believe Congress should not legislate changes to these successful post-grant processes, particularly before giving the PTO an opportunity to address any criticisms on its own.

I believe that the majority of provisions in the STRONG Patents Act are unnecessary, and in some cases, harmful to the patent system. I am concerned with the changes that the STRONG Patents Act makes to presumption of validity in PTO post grant proceedings – raising the standard to clear and convincing evidence to invalidate. The PTO is the government agency tasked with issuing patents; it should not be held to a higher standard to correct a mistake it may have made in first allowing the patent.

The STRONG Patents Act also includes a proposal that would prevent an administrative law judge on the Patent Trial and Appeals Board (PTAB) who participates in the decision to grant a PGR/IPR from participating in the decision on the merits. I believe this proposal is counterproductive. It would force additional administrative law judges to get up to speed on the case, thereby losing the benefit of the time spent and knowledge gained in reviewing the PGR/IPR petition. This is a waste of time and resources that the PTO cannot afford, especially in light of the explosive popularity of these new proceedings. Such a rule is tantamount to saying a district court judge who denies a motion to dismiss cannot then participate in the rest of the case.

Finally, the STRONG Patents Act proposes to unnecessarily limit post grant review processes to parties charged with infringement. Allowing third parties to use post grant review processes was a key change in the AIA that enabled the processes to be used more often to cull overly broad or bad patents from the system. Precluding parties not subject to suit from challenging a patent would result in a number of troublesome scenarios. For example, in situations where a customer is charged with infringement but the manufacturer is not, the manufacturer may be unable to protect its customers by challenging the validity of the patent through an IPR. Further, a party who is indemnifying a defendant in a patent infringement lawsuit may likewise be unable to protect its own interests through the IPR process. Finally, a party who sees a patentee suing its competitors, knowing it is next in line, may likewise be unable to preemptively challenge the patent. We believe that these proposed limitations are unwarranted.

It is worth noting that we also believe the current broadest reasonable interpretation (BRI) standard is appropriate for post-grant review. The BRI standard appropriately places the burden on the patentee to draft claims that are clearly novel and nonobvious over the prior art. The BRI standard is based on a well-established body of law and has been in effect for nearly a century at the PTO. There is no reason why the standard the patent office uses in IPR proceedings should be any different from the standard it uses in every other patent proceeding,

including prosecution, interference, and reexamination. The Federal Circuit also recently affirmed the BRI standard in *In re Cuozzo Speed Technologies, LLC*. Rolling back this standard would allow overly broad patents to continue to be used as weapons to abuse the patent litigation system; thereby making the current state of affairs worse.

**Question 2: Do you believe the STRONG Patents Act would be effective in putting a stop to the patent troll abuses that EMC is experiencing?**

**Gupta Response:** I do not believe that the STRONG Patents Act would be effective in stopping abuses EMC encounters in patent litigation. Three issues cause most of the burden associated with lawsuits brought by unscrupulous patentees: (1) vague pleadings, (2) excessively broad discovery demands, and (3) a lack of financial accountability on the part of losing patentees who bring baseless lawsuits. The STRONG Patent Act does not address any of these issues.

I am concerned that provisions in the STRONG Patents Act would weaken post grant processes, as I discussed in my previous answers, and make it easier for bad-faith plaintiffs to assert vague and invalid patents. Other provisions included in the bill raise equally serious concerns.

First, the proposed changes to the standard for willful infringement would create a new avenue for potential abuse of the litigation system. Patent law has long required that willful infringement only be found where there is clear and convincing evidence that: (1) an adjudged infringer took its wrongful actions “despite an objectively high likelihood that its actions constituted infringement of a valid patent,” and (2) that the objectively-defined risk was or should have been known to the infringer. This standard is based on a well-developed body of case law that has limited willful infringement and, relatedly, treble damages to only the most egregious of abuses.

I believe legislative proposals that lower the willful infringement standard to establishment by a “preponderance of the evidence” would increase the leverage that abusive litigants currently enjoy in the economics of patent litigation. A finding of willful infringement results in an award of punitive damages. In other civil litigation contexts, an award of punitive damages ordinarily requires proof by clear and convincing evidence. There is no reason to depart from this standard in the context of willful patent infringement. Lowering the standard of proof would lead to an explosion of willful infringement claims and only provides another opportunity to abuse the patent system. I strongly believe that such a change would be unwarranted and harmful.

Second, I oppose the provision in the STRONG Patents Act that overturns the Supreme Court’s most recent decision in *Limelight Networks, Inc. v. Akamai Technology*. There is no reason to

change the long-standing rule that a single defendant must perform or control all of the steps of a method claim for there to be infringement. Overturning the *Limelight* decision would expand the scope of poorly-drafted patent claims, undermine certainty in patent law, and upend the well-settled expectations of businesses regarding what does and does not constitute patent infringement.

**Question 3: Universities and other groups are concerned about possible adverse impacts of provisions contained in the Innovation Act on venture capital investment. Do you agree with these concerns?**

**Gupta Response:** I do not agree with these concerns. In a recent letter, dozens of venture capitalists, who invest hundreds of millions of dollars in angel and venture capital, urged Congress to enact comprehensive patent reform legislation. Their message was clear. Changes are necessary to provide small companies the tools to fight back against abusive patent litigation. They specifically called for specificity of allegations of infringement in complaints and demand letters, limits on the scope of expensive litigation discovery, and fee shifting – the Innovation Act addresses all of these in an appropriately balanced manner.

According to a 2013 survey, startup companies and venture capitalists overwhelmingly believe that the threat of patent litigation has a negative impact on their businesses. The surveyed venture capitalists stated that if a company had an existing patent litigation threat against it, it could be a major deterrent in deciding whether to invest. This point is reinforced by a recent Massachusetts Institute of Technology study finding that frequent litigants caused a decline of \$22 billion in venture investing over a five-year period. Further, a Rutgers University study concluded that small companies that were hit with abusive lawsuits significantly decreased their spending on research and development. Likewise, researchers at Harvard University and the University of Texas found a substantial decline in research and development spending following protracted patent litigation initiated by patent assertion entities.

Finally, a recent letter to Congress signed by 51 economics and intellectual property scholars explained that the clear conclusion of over two dozen empirical studies on patent litigation and its economic impacts conducted by academic researchers with diverse views and using different methodologies is that the net effect of patent litigation is to raise the cost of innovation and inhibit technological progress.

**Question 4: Isn't fee shifting in the Patent Act already? What's wrong with the current statute that provides for fee shifting, and do the recent Supreme Court cases make a difference? Can you please explain how changes to the fee shifting standard in the Patent Act would change the incentives and dynamics in patent litigation?**

**Gupta Response:** The Patent Act does include a fee shifting provision. However, it has not been sufficient to curb the abusive practices engaged in by patent trolls. Currently, under Section 285 of the Patent Act, a defendant who prevails in litigation must demonstrate that the case was "exceptional" in order for a judge to order its fees be paid. In practice, it has been extremely difficult to convince a district court judge to award fees in patent cases.

In *Octane Fitness v. Icon Health & Fitness*, the Supreme Court interpreted "exceptional" to mean that fees are available in any case that "stands out from others." In *Highmark v. Allcare Health Management System*, the Court held that district courts have great discretion in deciding whether to award fees. EMC filed amicus briefs in these cases urging the Court to make it easier for district courts to award fees, and these cases did loosen the prior standards applicable to deciding motions for fees. Unfortunately, these decisions have had no meaningful impact on increasing the success rates of defendants who seek to recover their attorneys' fees when they are faced with baseless patent litigation. These decisions do not go far enough. Fundamental change, such as fee-shifting for unmeritorious suits, is needed to stop the onslaught of frivolous patent cases companies have faced in recent years.

It's important to note that organizations with diverse memberships, such as the Intellectual Property Owners Association ("IPO") and the Coalition for 21st Century Patent Reform ("21C") support fee shifting. IPO is a trade association that serves intellectual property owners in all industries and fields of technology. 21C is a broad and diverse group of nearly 50 global corporations that employ hundreds of thousands of Americans. These organizations have members from many different industries, including biotech and pharma. Even BIO's witness at the hearing, Dr. Hans Sauer, acknowledged in his written testimony that its members hold a diversity of views on this subject, resulting in BIO's neutral stance. The breadth of stakeholders who support fee-shifting is quite significant.

The Innovation Act (H.R. 9) would require, upon motion, a court to award fees to the prevailing party, unless the losing party can show that its position is substantially justified or special circumstances make an award unjust. The Innovation Act thus properly shifts the burden of proof to the non-prevailing party to show why fees should not be awarded. We believe that this provision embodies the most effective way to discourage the filing of frivolous and abusive suits by imposing financial accountability in the patent system. Simply stated, some patent owners—especially PAEs that are not generally subject to counter suits—have nothing to lose and everything to gain by filing suits, whether they have merit or not. A more effective fee-

shifting rule would change that, and bring accountability to the system. Further, it would encourage parties who believe they have been wrongfully accused of infringement to pursue a vigorous defense if they believe they might recover their fees, rather than agree to nuisance settlements to avoid the expense of patent litigation.

There is also a need for a reasonable and workable standard that effectively anticipates some of the gaming activities that abusive plaintiffs, and especially Patent Assertion Entities (PAEs), could use to undercut the effectiveness of a fee-shifting provision. PAEs, for example, often organize themselves into judgment-proof shell corporations, unable to satisfy an award of attorneys' fees. Without a recovery mechanism, fee-shifting is not a deterrent. The Innovation Act also includes a fee recovery and accountability provision to ensure that abusive litigants will have to pay if fees are awarded to the other party.

Some universities have expressed concern about the Innovation Act's fee-shifting proposal. But according to a study conducted by PricewaterhouseCoopers analyzing patent holder success rates between 1995 and 2013, universities and other non-profit entities involved as the patentee in patent litigation prevail 45% of the time. And according to the Government Accountability Office, universities and research firms filed fewer than 3% of patent infringement lawsuits between 2007 and 2011. Assuming universities' success rates are constant over time, cases in which courts would even consider whether a university patentee should be required to pay fees represent less than approximately 1% of patent litigation overall. And the instances where a university (or any other party) would actually be required to pay fees would be limited to circumstances where it is unable to show that its litigation position was substantially justified.

Universities are not exempt from an award of attorneys' fees under current law. Today, in an exceptional case, a non-prevailing university (like any other party) must pay the other side's attorneys' fees. Thus, the Innovation Act would not impose any substantial new burden on universities. It is entirely fair to hold universities, like other parties, to the eminently reasonable standard set out in the Innovation Act.

**Question 5: Many see the elimination of Form 18 and the Supreme Court's *Iqbal*/*Twombly* decisions as positive developments in terms of requiring more substantive patent pleading standards. Do you think that these developments are good enough to deal with the abuses by the patent trolls?**

**Gupta Response:** The pleading standards set forth by the Court in *Iqbal* and *Twombly* are unlikely to be sufficient to address pleading abuses in patent litigation. In *Iqbal* and *Twombly*, the Supreme Court addressed the level of specificity required in a complaint. With the Judicial Conference recommending the elimination of Form 18, it is expected that *Iqbal* and *Twombly* will apply to patent pleadings as well. However, these cases do not set forth bright-line rules for patent litigation, which is a specialized area of the law. Without clear standards in patent cases, many courts will undoubtedly continue to allow vague pleadings.

The Innovation Act recognizes the need to provide uniform pleading requirements for patent infringement cases. The Act would require a patentee to set out in its complaint each asserted claim, each accused product, and an explanation of how each accused product supposedly infringes every asserted claim. This imposes no new burden on good-faith plaintiffs, who are required to have conducted due diligence and arrived at a tenable, good-faith theory of infringement before filing suit. The bill's heightened pleading requirement merely requires plaintiffs to disclose the results of their required analysis. The real impact of this provision would be on those plaintiffs who file meritless, bad-faith lawsuits by making the lack of basis for the lawsuit apparent from the outset.

Businesses of all sizes, including EMC, benefit from a certain and predictable legal environment. There is broad consensus on the need for increased specificity. It's important to note that organizations with diverse memberships, such as the Intellectual Property Owners Association (IPO) and the Coalition for 21st Century Patent Reform (21C), both agree that patent complaints need to be more specific than they are today under Form 18. The debate is over how much specificity is enough. Our view is simple: a complaint should include sufficient information for a non-lawyer to understand the nature of the alleged infringement. This standard should not be difficult to meet for a patent owner who has exercised the requisite due diligence prior to initiating a suit to establish a good-faith basis for its accusation of infringement.

Furthermore, in the context of the need to deter frivolous demand letters, there is broad support for the Innovation Act's requirement of specificity. The Act states that demand letters should include information about the patent in question, what is being infringed, and how it is being infringed. Complaints for patent infringement should be required to include the same level of detail as demand letters. If there were no such requirement, a plaintiff could avoid the specificity requirement for demand letters by instead filing a bare-bones patent infringement complaint in court. If demand letters are regulated and pleadings are not, businesses will be

faced with an onslaught of vague federal court lawsuits instead of demand letters. This would increase, rather than decrease, the unwarranted burden on businesses facing unmeritorious claims of patent infringement.

**Question 6: There have been reports that the number of patent troll lawsuits has been dropping over the last year and, consequently, Congress should adopt a wait and see approach. Do you agree? Is the problem of abusive patent litigation over? Can you speak to the overall rate of litigation that is actually taking place in context to what it has been traditionally?**

**Gupta Response:** Congress already has spent many years debating the problem of abusive patent litigation and the most appropriate manner in which to address it. The problem has continued despite recent Court decisions. In 2014 alone, more than 5,000 new patent lawsuits were filed. Thus, 2014 saw the third highest number of new patent lawsuits filed, exceeded only by 2012 and 2013.

Some claim that recent Supreme Court decisions and procedures introduced by the America Invents Act have led to a decline in the number of new patent suits, thereby eliminating the need for patent litigation reform. We disagree that there has been a lasting decline in new patent suits. We did see a dip in new patent litigation filings in 2014, but recent data suggests that this may have been only a temporary aberration. In fact, February 2015 marked the third month in a row of increased patent litigation filings, as compared to the same period a year earlier. Specifically, as compared to the same month the previous year, new patent cases were up by 4% in December 2014; by 36% in January 2015; and by 10% in February 2015. While one should not draw too many conclusions from three months of data, there is significant reason to be skeptical of assertions that recent Supreme Court case law and new Patent Office procedures have fundamentally reduced the number of new patent suits.

As a practicing lawyer, I can tell you the problem is still enormous. Three areas—fee-shifting with accountability, pleading specificity, and discovery—require immediate legislative intervention. The judiciary cannot bring about the prompt solution that Congress can structure to ensure consistency and predictability in the patent system.

**Question 7: How much does EMC spend each year on patent troll litigation, and what is the impact on EMC's investments/research and development in the United States? In your opinion, does this kind of patent litigation encourage or discourage innovation?**

**Response:** EMC is a frequent target of unscrupulous patentees with low-quality patents. Since 2005, EMC has faced dubious patent lawsuits more than thirty-five times, and has never been found to have infringed. As a matter of principle, EMC does not settle unmeritorious suits. For us, doing so would be tantamount to giving in to extortion, and only encourage more such suits. Yet defending against abusive litigation has cost us millions of dollars that could have been invested in growing our workforce or furthering innovation. In 2014 alone, EMC spent more than \$10 million in defending frivolous patent actions.

The money EMC spends in connection with these discovery burdens does not begin to capture the total cost to EMC, which includes the lost time of our engineers, executives, and other valued employees. Typically, abusive patentees provide very little information about their allegations until months into the case. EMC is forced to devote significant time, resources, and manpower to analyzing vague complaints that are directed at very diverse technology areas and complex systems. This effort is needed because, faced with vague pleadings, we must speculate about what will be the subject of the plaintiff's infringement argument. And in the process, we waste the time of our engineers—the driving force of our company—studying technical details of features that ultimately are not at issue in the case.

For example, in a recent case, for an extended period, one of EMC's star engineers was required to formally set aside ten percent of his time to assist with document collection efforts. This single engineer devoted over one hundred hours of time tracking down relevant documents. Some of the documents were so old and irrelevant to EMC's current business that additional employees needed to be consulted for the sole purpose of determining where this obsolete information resided. This one engineer was only one of more than 100 employees who were asked to assist and dedicate their time to the process of locating documents.

Abusive patent litigation is a costly problem that is stifling American innovation and impeding job creation each and every day. While legitimate patent litigation is a necessary part of a robust patent system, small, medium, and large enterprises are all adversely affected by abusive patent litigation.

**Question 8: What do you believe are the most promising proposals currently being considered by Congress that would help deter abusive activity in the patent system? How do you see the patent litigation environment changing if those reforms are enacted?**

**Response:** I believe the House's Innovation Act (H.R. 9), is the most promising proposal currently being considered by Congress, as it effectively addresses the three issues that cause most of the burden associated with lawsuits brought by unscrupulous patentees: (1) vague pleadings, (2) excessively broad discovery demands, and (3) a lack of financial accountability on the part of losing patentees who bring baseless lawsuits.

As I have explained in response to prior questions above, the recently proposed rule amendments by the Judicial Conference and recent Supreme Court decisions will not fully address the core problems of patent litigation abuse. They do not require a patentee to initially disclose which claims of a patent it is asserting, which of the defendants' products it is accusing, or how the accused products supposedly infringe the patents. They do not reduce the expense and burden of discovery. And they do not make fee-shifting the default rule rather than the exception.

The system as it exists today is highly skewed. Patentees who file frivolous cases can gain significant unfair leverage by increasing the risk and costs on the part of defendants. They are rarely, if ever, subject to counterclaims, so they share no part of the risk, and little part of the costs. They are rarely held accountable for a defendant's attorneys' fees, even when the litigation they filed lacked any reasonable basis. Only Congress can effect these changes.

By enacting legislation like the Innovation Act, Congress can restore accountability and balance back into the world's premiere patent system and alleviate the unfair burdens that abusive patentees are able to impose on hardworking companies like EMC that are the life-blood of our economy.

**Senator David Perdue**  
**Questions for the Record to Hans Sauer, Biotechnology Industry Organization**  
**“The Impact of Abusive Patent Litigation Practices on the American Economy”**  
**March 25, 2015**

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 Washington, D.C., April 10, 2015

Dear Senator Perdue,

Thank you for your thoughtful questions and for the opportunity to elaborate further on certain aspects of my testimony before the Senate Judiciary Committee of March 18, 2015.

*Question 1: A number of organizations representing the pharmaceutical industry and higher education have claimed that recent decisions by the Supreme Court and changes proposed by the Judicial Conference have fundamentally altered the playing field such that Congress should take a hard second look at provisions of the Innovation Act and the I-Squared Act to determine whether they are actually necessary before proceeding with legislation. Is it your view that decisions like Octane, Nautilus, and Alice have eliminated the need for any Congressional action? If not, what specific problems have those cases solved in your view, and what do we still need to address?*

In my opinion, case law developments, judicial initiatives, and administrative actions have indeed greatly changed the patent litigation landscape in the two years since the House of Representatives first presented legislative proposals for reforming the way patents are enforced and litigated. The most recent numbers indicate that new patent case filings in 2014 dropped by 21% compared to 2013. Today, no more parties are being sued for infringement than was the case in 2009-2010. Meanwhile, the Supreme Court’s *Alice* decision has resulted in an 8-10-fold increase in the numbers of patents that are invalidated for unpatentable subject matter under Section 101 of the Patent Act, often on motions to dismiss on the pleadings, or on summary judgment. It seems that this new theory of invalidity bites particularly hard in cases involving patents for software-implemented business methods and other processes for managing e-commerce transactions. The Supreme Court’s decision in *Akamai* and the Federal Circuit’s *Commil* decision have become powerful legal devices by which accused indirect infringers can insulate themselves from infringement liability while shifting their risk to blameless downstream users or consumers of their technology. And by every account, it has become significantly easier to obtain attorney fee awards in patent cases after the Supreme Court’s fee shifting opinions, although awards of such fees in patent cases still continue to be uncommon, and are (rightly) not granted as a matter of course.

Overall, there is wide agreement in the biotech community that doctrinal developments in patent law over the past several years have clearly trended towards more and stronger protections for accused infringers. As a result, while jurisprudence in many areas of patent law is unsettled and in flux, the current picture does not support the notion of a deepening patent litigation crisis, or of a Judiciary that is helpless in the face of frivolous patent assertion.

This is not to say that biotechnology companies believe that recent caselaw developments have “fixed” all problems and eliminated the need for Congressional guidance. Congress is rightly concerned about abusive practices (such as patent enforcement against blameless end-users for purchasing and using an infringing product, or the indiscriminate sending of mass demand letters to small businesses, or the use of administrative patent challenge proceedings for stock manipulation). Rather, these caselaw developments reinforce the need to ensure that any patent reform legislative package does not swing the pendulum too far in any one direction.

*Question 2: The fee-shifting provision of the Equal Access to Justice Act has been law since 1980 and has generated little controversy in the intervening three decades. The Innovation Act contains an identical prevailing-party standard for fee shifting. And, like the Equal Access to Justice Act, the standard in the Innovation Act only creates a presumption. It does not bind a district judge or restrict the judge’s ability to exercise discretion on a case-by-case basis. Please explain your view of the Innovation Act’s fee-shifting provisions and, more generally, whether any fee-shifting provision is a desirable component of a legislative reform package.*

First, it is important to clarify that the cost award and recovery provisions of the Innovation Act constitute a true “loser pays” system: as a default, the non-prevailing party must pay the winner’s reasonable costs and expenses, and the burden will be on the loser to explain why it shouldn’t have to pay. This default would distinguish patent litigation from other civil litigation in the American system, where ordinarily each party pays its own litigation expenses, and where the burden is on the prevailing party to explain why it should be reimbursed by the non-prevailing party.

Under the Innovation Act, the presumptively liable non-prevailing party can meet its burden by a showing of special circumstances making an award unjust, or by showing that its position was ‘reasonably justified in law and fact.’ Among its proponents there is an assumption that this standard will be easy to meet, and that fee and cost awards will therefore occur only in truly frivolous cases. In the same vein, as you note in your question, it has been said that this standard is not unprecedented - it is the same standard that has been in place since 1980 in the Federal Equal Access to Justice Act, under which it has operated for decades.

Despite such assurances, there is reason to wonder whether cost and fee awards would not occur more often than expected if this standard were transposed to patent litigation. In practice, the FEAJA standard is more often met than one might assume. The Veteran’s Administration, for example, estimates that around 45% of all cases before the Court of Veteran’s Appeals result in a FEAJA attorney fee and cost award against the Government. Social Security cases in which the claimant prevails result

in awards over 40% of the time. The Supreme Court has noted that these are “hardly vanishing odds of success for an attorney deciding whether to take a client’s case” (*Astrue v. Ratliff*, 130 S.Ct. 2521 (2010), at n. 2, Sotomayor concurring). In fairness, high numbers of fee awards in sympathetic cases such as successful veteran’s, social security, or immigration appeals do not mean that patent cases, decided under the nominally same legal standard, would necessarily result in equally frequent fee awards to prevailing parties. But in the same vein, practical experience under FEAJA does not suggest that fee awards under H.R. 9’s standard would be a rare occurrence.

It should also be noted that the FEAJA’s fee recovery provisions were designed to compensate for the inequality of resources between small claimants on the one hand, and the federal government on the other, thereby serving primarily as a tool to promote access to justice – not to punish either party for their litigation conduct or as a special deterrent against certain claims (awards to punish or deter misconduct remain available through other means, such as Rule 11 sanctions). Seen this way, it is not an easy exercise to transpose FEAJA standards which are meant to *facilitate* litigation into the context of the Innovation Act, which is meant to deter litigation. For example, consistent with its goal to “level the playing field” between unequal litigants, FEAJA requires prevailing claimants to fall below certain “net worth” thresholds in order to be eligible for an award, and disqualifies wealthy, well-resourced litigants from fee recovery even if they prevail against unreasonable and unjustified government litigation. The Innovation Act, in distinction, would let all prevailing parties recover, even if the prevailing party had vastly more litigation resources than then non-prevailing party. Moreover, the FEAJA guards against the possibility of certain undesirable dynamics, such as runaway spending by claimants who seek to prevail ‘at all cost’ (and then be reimbursed), by capping recoverable attorney fees at a default of \$125/hour, subject to certain adjustments which require special justification. The Innovation Act currently only provides that fee awards must be “reasonable,” but otherwise lacks FEAJA’s controls over unpredictable liability and runaway reimbursable costs.

At a minimum, the predicted operation of the Innovation Act is quite unclear: Unlike many other tort cases, patent cases often do not have clear winners and losers; each party may prevail on some issues and lose on others, such that it may be very unpredictable how fee awards would be assessed under such a system. Assume, for example, that a patentee sues a competitor for patent infringement. The competitor alleges that the patent is (i) invalid, (ii) unenforceable, and (iii) not infringed. The court rules against the competitor on the question of patent validity and enforceability, but agrees that the patent is not infringed. In this scenario, the competitor ultimately “prevailed” because it escaped liability, but did not “prevail” in its attempt at striking down the patent. Who reimburses whose attorney fees? Does the prevailing competitor reimburse the patentee for defending the patent? Or does the patentee pay the competitor for unsuccessfully attacking the patent? Or do both parties reimburse each other for portions of each other’s cases?

To be clear, biotech companies are no strangers to fee shifting. Many have litigated in the patent courts of the major trading partners of the United States, which have sophisticated patent litigation systems where some form of “loser pays” is the norm. These systems, such as those in England, Germany or Canada, also provide a relatively high degree of predictability of a litigant’s potential liability in the event of a loss, through various combinations of official attorney fee schedules, court-appointed assessors, the

availability of claim or litigation insurance in some instances, as well as special hearings or conferences before judges or specialized court officials that prospectively determine the kinds of litigation expenses that would be reasonable relative to the value and complexity of the case. Such mechanisms to provide more prospective business certainty would eventually need to be developed in the United States as well, if Congress chooses to implement a fee shifting regime for patent cases.

On a theoretical level at least, biotech businesses are well aware of arguments that fee shifting to non-prevailing parties is likely to encourage meritorious litigation over non-meritorious litigation, is likely to affect the settlement value of cases, and is likely to affect the litigation decisions of smaller litigants more than those of wealthier litigants. But whether or not any of the promises or pitfalls of fee-shifting in patent cases would ultimately materialize is impossible to predict from reviewing Section 3 of the Innovation Act alone. BIO's members hold diverse views on the inclusion of a fee-shifting provision in future patent legislation, and BIO therefore does not advocate for or against any particular fee shifting proposal that is currently pending or circulating. Notably, discussions about fee shifting in the Senate Judiciary Committee during the last Congress appeared to be trending away from the default "loser pays" concept that is embodied in Section 3 of the Innovation Act. I believe this was a helpful development insofar as it offered the prospect of an alternative option for Congress's consideration of this difficult issue.

*Question 3: In your written testimony, you state that "[t]he vast majority of U.S. biotechnology businesses are far from having a product on the market, yet depend critically on the enforceability of their patents to attract funding, to enter into development partnerships, and to advance their technology. A solution must be found for such businesses as well, businesses that are actively trying to develop, and seeking investment to further develop, patent-protected inventions." Please describe the provisions of the Innovation Act and the I-Squared Act that would inhibit the ability of these fledgling businesses to attract investment or develop new technologies.*

It is difficult to point at any single provision of the Innovation Act as the one that would most impact smaller biotech businesses, because the effect of its litigation reform provisions is cumulative and "stacked." On balance, we believe that the combined effect of the Innovation Act's litigation provisions would systematically raise the cost and risk of patent enforcement for biotech businesses, with a disproportionately larger effect on smaller companies. Pleading standards that go beyond those applicable in other civil litigation would not only make it harder to file a patent lawsuit (compared to e.g. a contract lawsuit) but are also likely to lead to more motion practice that prevents patent cases from getting underway on the merits, involving churn and delay. Stays of discovery pending claim construction are likely to lead to threshold litigation over the kinds of information that is or is not necessary for claim construction, could lead to claim constructions that are done on an insufficient record, and to unnecessary disputes over claim terms that wouldn't need to be construed if the parties had developed their case more fully. Meanwhile, merits discovery would be delayed in many patent cases even when there is ongoing competitive harm. Similarly, the Innovation Act's impleader provisions for interested parties would significantly impact the business relationships between the plaintiff and its

licensors, venture capital backers, and business partners, who would all face the risk of being joined to a lawsuit as unwilling co-plaintiffs under the threat of liability for attorney fee awards. The net effect of such provisions, from an investment perspective, is a perception that the patents that back up a fledgling company will be harder to enforce by its owners, and easier to infringe by its competitors. Yet, investors in such companies expect that their investment will be secured by patents, and will rationally reduce their investment if patent rights are weakened.

*Question 4: Your written testimony states that “any legislation on discovery in patent cases should explicitly permit the development of a reasonable amount of evidence on both sides” and proposes the creation of a “nationally uniform pathway for developing evidence and contentions during the early stages of patent litigation in cases requiring claim construction.” Please briefly describe what you envision as the optimal “uniform pathway” for early-stage discovery in patent litigation and what constitutes a “reasonable amount of evidence” within the context of the pathway you propose.*

Biotech companies agree that there shouldn't be unfocused discovery during the early phases of patent litigation. One of the ideas that we have continued to come back to, in conversations with our member companies, is the concept that Congress could explore a nationally uniform model process for the focused, rational development of relevant information during the early phases of patent litigation. This process would involve a step-wise, comprehensive – but focused - exchange of information between the parties; it would be designed to give the case clear contours as early as possible, so as to allow the parties to identify and prioritize the issues that should be resolved next, whether it's claim construction or something else. Our members consistently tell us that a good, high-quality judicial claim interpretation is always informed by certain facts and legal positions that must have been developed in the case by that time. In other words, it is not possible to prospectively limit discovery only to what is necessary for claim construction - because neither party knows at the outset the full range of facts and contentions that will turn out to be important for construing the claims. It also helps tremendously if the judge understands how the technology at issue actually works and how it compares to the prior art. And both parties need to understand the other party's legal positions and the factual basis thereof, in order to agree which claim terms need to be construed, and to put forward a proposed claim construction.

In such a model process, both parties would be required to disclose to each other their legal contentions relating to infringement, invalidity, or absence of liability for infringement, together with supporting documentation. These party contentions and supporting documentation, and limited discovery relating thereto, would form a “default” body of information that would need to be developed initially, unless the judge decides otherwise or the parties agree otherwise.

In most cases, we believe such a process could be concluded within 6 months from the time the defendant first appears; the parties would then have enough information to negotiate a joint proposed claim construction, and identify claim terms that must be construed. This process would also often be helpful in getting cases in a posture for summary judgment soon after a claim construction order is issued.

We've also given some thought to discovery that may fall outside these default categories. Ordinarily, we would expect that most cases should initially be focused on the fundamental threshold issues (how is there infringement; what are the defendant's affirmative defenses). For this purpose, the judge or magistrate is going to take a close look at whether all discoverable information is equally necessary. For example, a plaintiff doesn't necessarily, in every case, need evidence of willfulness before he even knows whether he can prove infringement. The same may be true for damages discovery (unless, maybe, if it helps the plaintiff to decide whether to drop the case), or discovery relating to customers, licensees, or business partners of the defendant (unless it is relevant to establish liability for inducement or contributory infringement). Similarly, a defendant that defends on grounds of invalidity or non-infringement may not need discovery on inequitable conduct to do so. In any event there should be sufficient flexibility to account for instances where parties need additional discovery, for example if there is ongoing competitive harm or another reason for urgency that would make it fair and efficient to take additional discovery.

There may also be instances where a party seeking additional discovery would offer to pay the costs of production, or be ordered to do so. BIO would be open to conversations about how to keep the parties' appetite for discovery focused on the threshold issues (and how to give judges the tools to limit excess discovery requests to what is proportional to the needs of the case).

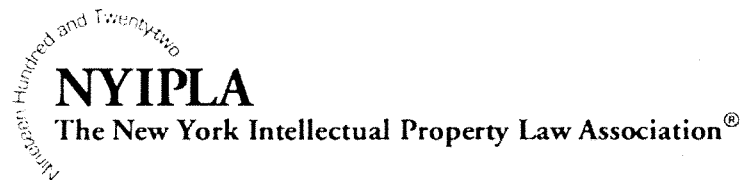
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I want to thank you again for the opportunity to further elaborate on my testimony, and I hope these answers are helpful to you. If you or your staff have any additional questions, please do not hesitate to contact me.

Respectfully submitted,

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**ANTICIPATED EFFECT OF FEDERAL JUDICIARY RECOMMENDED CHANGES  
TO PLEADING REQUIREMENTS IN PATENT CASES**

This paper addresses the pleading requirements in patent infringement cases following enactment of the Federal Judicial Conference recommendation to abrogate Form 18 of Fed. R. Civ. P. 84, governing pleadings of direct infringement in patent infringement cases.

In 2007 and 2009, the Supreme Court in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), substantially raised the bar for the details that must be pled in civil actions. In particular, under *Twombly/Iqbal*, a complaint must contain sufficient factual matters, which, if accepted as true, state a claim for relief that is plausible on its face. Threadbare recitals of elements of a cause of action, supported by mere conclusory statements, do not suffice.

Although this heightened standard applies to all pleadings in federal civil litigation, including pleadings in patent cases, it does not apply to pleadings that are governed by Fed. R. Civ. P. 84, which provides a “limited number of official forms, which may serve as guides in pleading.” Included among the forms is Form 18, for complaints alleging direct patent infringement under 35 USC § 271(a). In practice, this means that pleadings of direct infringement under 35 USC § 271(a) require a lower threshold of pleading than other pleadings in patent infringement cases, such as pleadings of indirect infringement under 35 USC §§ 271(b) and (c). Those pleadings are subject to the heightened pleading standard of *Twombly/Iqbal*. See, e.g., *In re Bill of Ladings Transmission*, 681 F.3d 1323 (Fed. Cir. 2012).

In September 2014, the Federal Judicial Conference Committee on Rules of Practice and Procedure recommended abrogation of Rule 84, including Form 18. If approved by the United States Supreme Court, the Judicial Conference recommendation will be effective as of December 15, 2015. In the absence of Form 18, the *Twombly/Iqbal* pleadings standard will apply to all pleadings in patent cases, including pleadings for direct infringement under 35 U.S.C. § 271(a).

Under *Twombly/Iqbal*, a complaint must reflect “facial plausibility”, which means “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678. This pleading standard is significantly higher than the mere notice required by Form 18. It will require more than merely averring the elements of the cause of action; it will also require pleadings of “factual content” to support a plausible cause of action.

To date, when Fed. R. Civ. P. 84 does not apply, courts have routinely construed *Twombly/Iqbal* to require detailed pleadings with specific factual assertions. For example, in pleadings alleging indirect infringement, courts have required under *Twombly/Iqbal* more than merely pleading in a conclusory fashion that a defendant “has infringed and continued to infringe . . . indirectly by was of inducing infringement or contributory infringement. . . .” Rather, additional allegations are necessary to show, *inter alia*, that the accused infringer (1) knew of the patents at the time of the alleged inducement, (2) knew that the induced acts constituted patent infringement, and (3) had a specific intent to encourage infringement by a third party. See, e.g., *mQube, Inc. v. Delta Airlines, Inc.*, 2-12-cv-08624, ECF 12 (C.D. Cal. Nov. 1, 2012); see also, e.g., *PTT. LLC v. Gimme Games*, 2014 WL 5798148, at \*9 (D.N.J., Nov. 6, 2014).

Similarly, where the complaint “merely rehash[ed] cause-of-action elements” and failed to include specific facts to infer that defendants sold or offered for sale plaintiff’s patented method or product, or that the patented method or product had no substantial non-infringing uses (as required for contributory infringement), courts have dismissed claims for contributory infringement under *Twombly/Iqbal*. See, e.g., *Select Retrieval, LLC v. LL Beam*, No. 2:12-cv-00003-NT, Order, at 7 ECF 21 (D. Me. Oct. 31, 2012).

Courts have also used *Twombly/Iqbal* on their own initiative to demand more of plaintiffs whose pleadings they deem insufficient. See, e.g., *Eclipse IP LLC v. Flywheel Software*, CV 13-06371 SJO (JCx) (Master Case), ECF No. 11 (C.D. Cal. Oct. 8, 2013) (plaintiff required to provide greater specificity in pleading indirect infringement and willfulness). Courts in the Eastern District of Texas have also used *Twombly/Iqbal* to dismiss claims on similar grounds. See, e.g., *Babbage Holdings, LLC v. Activision Blizzard, Inc.*, 2:13-cv-00750-JRG, ECF 43 (E.D. Tex. May 15, 2014) (dismissing claims for indirect infringement, where plaintiff did not plead facts showing defendants knew of the patent before the complaint was filed).

Statistics on district courts’ rulings on motions to dismiss pleadings in indirect infringement cases show that, in 75% of the cases decided since the Federal Circuit in 2012 confirmed that *Twombly/Iqbal* applies to claims for indirect infringement, courts have granted, either in whole or in part, motions to dismiss complaints that do not include detailed factual allegations of the bases for the indirect infringement claim. (See Appendix A.)

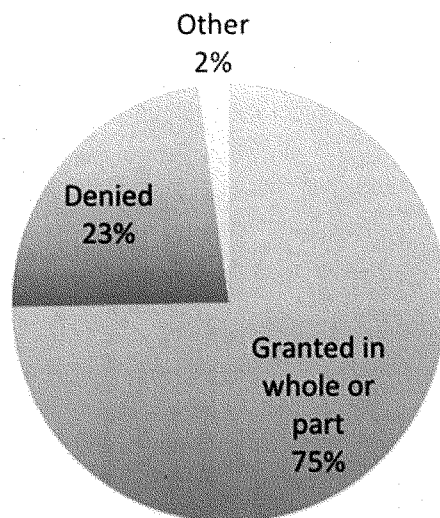
Prior to 2012, district courts that applied *Twombly/Iqbal* to claims for direct infringement required:

- (1) more than merely asserting “one or more claims” of the patent are infringed, but rather identification of infringed claims (*compare* H.R. 9, § 281A(a)(1) & (2)). See, e.g., *Ingeniador, LLC v. Interwoven*, 874 F.Supp.2d 56, 69 (D.P.R. 2012); *Bender v. LG Electronics U.S.A., Inc.*, 2010 WL 889541, at \*23 (N.D.Cal. March 11, 2010);
- (2) more than a “general description of a product sold by each Defendant,” but rather identification of the accused infringing product, including name and/or number of such product (*compare* H.R. 9, § 281A(a)(3) & (4)). See, e.g., *Ingeniador*, 874 F.Supp.2d at 69; *Bender*, 2010 WL 889541, at \*23; *California Institute of Computer Assisted Surgery, Inc. v. Med-Surgical Services, Inc.*, 2010 WL 3063132, at \*2 (N.D.Cal., Aug. 3, 2010);
- (3) not only naming the allegedly infringing product, but describing how it infringes the asserted claims (*compare* H.R. 9, § 281A(5)). See, e.g., *California Institute of Computer Assisted Surgery, Inc. v. Med-Surgical Services, Inc.*, 2010 WL 3063132, at \*2 (N.D.Cal., Aug. 3, 2010) (failed to identify which product allegedly infringed and how it allegedly infringed); *Medsquire LLC v. Spring Medical Systems Inc.*, 2011 WL 4101093, at \*3 (C.D.Cal., Aug. 31, 2011) (failed to identify what aspect of accused product infringed); *Li Ming Tseng v. Marukai Corp. U.S.A.*, 2009 WL 3841933, at \*1 (C.D.Cal., Nov. 13, 2009) (merely showed sales receipt of accused product, without explaining how transaction relates to assertion of patent infringement).

We expect that if Form 18 is abrogated and the *Twombly/Iqbal* plausibility standard is applied to complaints alleging direct infringement, courts will require similar heightened pleadings for direct infringement as they have for indirect infringement.

## APPENDIX A

**Results of Motion to Dismiss under *Twombly/Iqbal*  
for Indirect infringement from 2012-2014**



| Disposition              | Total | 2012 | 2013 | 2014 |
|--------------------------|-------|------|------|------|
| Granted in whole or part | 65    | 26   | 23   | 16   |
| Denied                   | 20    | 9    | 4    | 7    |
| Other                    | 2     | 0    | 1    | 1    |
| Total                    | 87    | 35   | 28   | 24   |

**Source:** DocketNavigator.com, search of results of Sufficiency of Pleadings (Indirect infringement subcategory) for all Patent Cases from 2012-2014 as categorized by Docket Navigator



FOR IMMEDIATE RELEASE  
March 3, 2015

Contact: Ben Veghte  
Phone: 202-864-5923

### **NVCA Announces Support for STRONG Patents Act of 2015**

**WASHINGTON, DC** – The National Venture Capital Association (NVCA) today announced its support for the STRONG Patents Act of 2015 after the legislation was introduced in the Senate by Senators Chris Coons (D-DE), Dick Durbin (D-IL) and Mazie Hirono (D-HI).

“The right to protect one’s ideas is a bedrock principle of our country and a vital component to the health and well-being of the entrepreneurial ecosystem. I commend Senator Coons and his colleagues for introducing legislation that will bring appropriate reforms to our patent system,” said Bobby Franklin, President & CEO of NVCA. “The venture community is a strong advocate for patent reform and believes steps should be taken to curb abusive behavior while also maintaining a robust patent protection system so that small startup entrepreneurs can defend themselves and their patent rights. While we look forward to working with lawmakers to help improve the legislation as it makes its way through Congress, we believe this is a good start and are supportive of the STRONG Patents Act.”

###

Venture capitalists are committed to funding America’s most innovative entrepreneurs, working closely with them to transform breakthrough ideas into emerging growth companies that drive U.S. job creation and economic growth. As the voice of the U.S. venture capital community, the National Venture Capital Association empowers its members and the entrepreneurs they fund by advocating for policies that encourage innovation and reward long-term investment. As the venture community’s preeminent trade association, the NVCA serves as the definitive resource for venture capital data and unites its nearly 400 members through a full range of professional services. For more information about the NVCA, please visit [www.nvca.org](http://www.nvca.org).

# ASSOCIATION OF AMERICAN UNIVERSITIES



**FOR RELEASE UPON BILL INTRODUCTION**

**March 2, 2015**

**barry.toiv@aaup.edu**

**CONTACT: Barry Toiv**

**202-408-7500,**

## **AAU EXPRESSES SUPPORT FOR STRONG PATENTS ACT OF 2015**

*Following is a statement by Hunter Rawlings, President of the Association of American Universities, on the introduction of the STRONG Patents Act of 2015 by Sen. Chris Coons (D-DE).*

---

We thank Senator Coons for introducing the STRONG Patents Act of 2015. AAU supports this legislation because it targets the abusive practices of patent trolls through judicious, carefully calibrated measures that would not make it more difficult and costly for all patent holders to enforce their patents and thus diminish the overall strength of the U.S. patent system. Universities' ability to move their discoveries to the private sector for the benefit of the public through technology transfer depends on a strong patent system. It is our hope that Congress will take up this legislation in the coming weeks.

###

---

*The Association of American Universities (AAU) is an association of 60 U.S. and two Canadian public and private research universities. It focuses on issues such as funding for research, research policy issues, and graduate and undergraduate education. AAU member universities are on the leading edge of innovation, scholarship, and solutions that contribute to the nation's economy, security, and wellbeing. AAU's 60 U.S. universities award nearly one-half of all U.S. doctoral degrees and 55 percent of those in STEM fields.*

*Follow AAU on Twitter at @AAUniversities.*

For Immediate Release:  
March 3, 2015

Contact: Jeff Lieberman  
202-478-6073 (office)  
202-236-2372 (cell)

**Association of Public and Land-grant Universities' Statement  
on Introduction of STRONG Patents Act of 2015**

*Washington, D.C. – Association of Public and Land-grant Universities (APLU) President Peter McPherson today released the following statement regarding the introduction of the STRONG Patents Act of 2015.*

“The STRONG Patents Act of 2015 is a straightforward bill that would effectively crack down on the abusive practices of so-called patent trolls without weakening the U.S. patent system. Universities rely on a strong patent system to ensure that research discoveries can be transitioned to private sector entities, which can scale-up and develop marketable products that improve quality of life and fuel the economy. This measure would help ensure the strength of this technology transfer process, which significantly contributes to our nation’s leadership in science and technology.”

###

*Representing 238 public research universities, land-grant institutions, state university systems, and related organizations, APLU is the nation's oldest higher education association with member institutions in all 50 states, the District of Columbia, four U.S. territories, Canada, and Mexico. Annually, APLU member campuses enroll 4.8 million undergraduates and 1.3 million graduate students, award 1.2 million degrees, employ 1.4 million faculty and staff, and conduct \$41.4 billion in university-based research.*



**Biotechnology  
Industry  
Organization**

## News Release

1201 Maryland Avenue, SW • Ste. 900 • Washington, D.C. • 20024 • 202-962-9200  
 Web: [www.bio.org](http://www.bio.org) Blog: [www.biotech-now.org](http://www.biotech-now.org) Twitter: [@IAmBiotech](https://twitter.com/IAmBiotech)

For Immediate Release

Contact: [George Goodno](#)  
 202-962-6660

### **BIO Statement of Support for the Introduction of the STRONG Patents Act of 2015**

Washington, D.C. (March 3, 2015) – The following statement on the introduction of the STRONG Patents Act of 2015 by Senator Chris Coons (D-DE) may be attributed to BIO President and CEO Jim Greenwood:

“BIO supports balanced reforms to reduce abusive patent practices, while maintaining the strong incentives necessary to sustain our nation’s global leadership in biotechnology innovation and the creation of high-wage, high-value jobs throughout our country. The STRONG Patents Act of 2015 achieves this critical balance.

“I commend Senators Coons, Durbin and Hirono for their leadership in introducing legislation that cracks down on false or deceptive patent demand letters, re-balances post-grant proceedings to ensure fairness for both patent owners and challengers, eliminates diversion of PTO user fees and protects the rights of American entrepreneurial businesses.

“Strong patents are the lifeblood of the biotechnology industry. They are critical in ensuring a steady stream of capital to biotechnology companies developing innovative medicines, alternative energy sources and insect- and drought-resistant crops. And they are essential to the technology transfer process that leads from inventions in the lab to products on the shelves.

“The majority of biotechnology companies are small companies that have no products on the market, and thus their research and development activities are funded through massive amounts of private sector investment over many years, sometimes even decades. Without strong, predictable and enforceable protections for patented inventions, investors will shy away from investing in biotech innovation, degrading the ability to provide solutions to the most pressing medical, agricultural, industrial and environmental challenges facing our nation and the world.

“BIO supports the STRONG Patents Act of 2015 and will continue to advocate for passage of legislation to curb abusive patent practices, while not undermining the ability of patent owners to defend their inventions and businesses against infringement.”

## **MDMA Statement on Introduction of the “STRONG Patents Act”**

*Legislation provides a balanced, targeted approach to end abuse, support innovation*

**Washington, D.C.** – Mark Leahey, President and CEO of the Medical Device Manufacturers Association (MDMA), issued the following statement today regarding legislation introduced in the Senate, the “STRONG Patents Act,” which is designed to thwart frivolous patent lawsuits while leveling the playing field for inventors:

**“MDMA applauds the introduction of the ‘STRONG Patents Act’ for its measured approach to address issues facing our nation’s patent system. We commend the leadership of Senator Coons for his support of entrepreneurs and start-ups across America’s innovation ecosystem.**

**“While MDMA supports efforts to deal with patent litigation abuse, we must ensure that any legislation to address this problem does not have the unintended consequences of weakening one’s patent rights. The ‘STRONG Patents Act’ targets the concerns of patent holders to end abusive practices, while establishing balance in post-grant proceedings at the PTO and eliminating fee diversion.**

**“A vibrant and strong patent system is the cornerstone of U.S. innovation, and all stakeholders must continue working together to maintain this delicate balance to protect inventors and future economic growth. MDMA looks forward to working with Senator Coons and all elected officials to ensure America’s innovation economy remains the envy of the world.”**

**###**

**STATEMENT****FOR IMMEDIATE RELEASE**

Contact: Tina Stow ,  
(202) 835-3581  
tstow@phrma.org

**PhRMA Statement on Introduction of STRONG Patents Act of 2015**

**Washington, D.C. (March 3, 2015)** — Pharmaceutical Research and Manufacturers of America (PhRMA) senior vice president, Chuck Clapton, provided the following statement in response to introduction of the Support Technology and Research for Our Nation's Growth Patents Act of 2015 ("STRONG Patents Act"):

"PhRMA commends Senator Coons for his recognition of the critical role that patents play in driving innovation, including in the biopharmaceutical industry, by enabling our companies to invest in the research and development needed to discover new treatments and cures. We appreciate Senator Coons' willingness to draft legislation that seeks both to ensure fairness in post-grant proceedings at the Patent and Trademark Office, and to minimize abusive patent litigation where it exists. We look forward to working with Senator Coons and other members of the Senate Judiciary Committee on legislation to address abusive practices in patent enforcement without inadvertently weakening the ability of legitimate patent holders to protect and enforce legitimate patent rights."

###

**About PhRMA**

The Pharmaceutical Research and Manufacturers of America (PhRMA) represents the country's leading innovative biopharmaceutical research companies, which are devoted to discovering and developing medicines that enable patients to live longer, healthier, and more productive lives. Since 2000, PhRMA member companies have invested more than \$550 billion in the search for new treatments and cures, including an estimated \$51.1 billion in 2013 alone.

**Connect with PhRMA**

For information on how innovative medicines save lives, please visit:



For Immediate Release  
March 3, 2015

Contact: Kat Maramba, (202) 827-9678, [Kathrina@BlueEngineMedia.com](mailto:Kathrina@BlueEngineMedia.com)

### **Innovation Alliance Supports STRONG Patent Act**

WASHINGTON - The Innovation Alliance commends Senator Chris Coons (D-DE) for introducing the Support Technology and Research for Our Nation's Growth (STRONG) Patent Act. The STRONG Patent Act represents balanced and thoughtful legislation that will strengthen America's patent system without undermining our nation's innovation economy.

If enacted, this legislation will crack down on abusive demand letters; maintain the low-cost and expeditious nature of post-grant proceedings at the U.S. Patent and Trademark Office (USPTO) while ensuring fairness and minimizing unwarranted litigation. This legislation will also eliminate USPTO fee diversion to ensure the USPTO can properly and adequately staff and train patent examiners while also providing patent filers with timely and high-quality patents. Finally, the STRONG Patent Act will greatly assist and help small businesses to navigate the patent system.

The Innovation Alliance urges Congress to take up and pass the STRONG Patent Act to ensure that the U.S. continues to be the global leader in innovation.

###

#### **ABOUT THE INNOVATION ALLIANCE**

The Innovation Alliance represents innovators, patent owners and stakeholders from a diverse range of industries that believe in the critical importance of maintaining a strong patent system that supports innovative enterprises of all sizes. Innovation Alliance members can be found in large and small communities across the country, helping to fuel the innovation pipeline and drive the 21st century economy. Learn more at [www.innovationalliance.net](http://www.innovationalliance.net).



3138 10th Street North  
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P: 703.842.2234  
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chunt@nafcu.org

National Association of Federal Credit Unions | [www.nafcu.org](http://www.nafcu.org)

**Carrie R. Hunt**  
Senior Vice President of Government Affairs  
and General Counsel

March 17, 2015

The Honorable Chuck Grassley  
Chairman  
Committee on the Judiciary  
United States Senate  
Washington, D.C. 20510

The Honorable Patrick J. Leahy  
Ranking Member  
Committee on the Judiciary  
United States Senate  
Washington, D.C. 20510

**Re: Tomorrow's Hearing: "The Impact of Abusive Patent Litigation Practices on the American Economy"**

Dear Chairman Grassley and Ranking Member Leahy:

On behalf of the National Association of Federal Credit Unions (NAFCU), the only trade association exclusively representing the interests of our nation's federal credit unions, I write today in advance of tomorrow's hearing, "The Impact of Abusive Patent Litigation Practices on the American Economy." On behalf of NAFCU member credit unions and the 100 million credit union members across the country, we appreciate the committee's continued attention to this matter.

A growing number of credit unions are reporting receipt of demand letters from law firms representing patent assertion entities, claiming patent infringement, with the option to settle or face litigation. These deceptive letters are confusing and misleading as they often allege that the use of everyday technology violates the patent holders' rights. Further, these letters typically state vague or hypothetical theories of infringement, and often overstate or misinterpret the patent in question. Because the cost of litigation is often more expensive than paying a settlement amount, these "patent trolls" use the threat of litigation as leverage to extract payment from the recipient business who settles in lieu of running the risk of a complex and lengthy legal battle.

NAFCU believes a legislative solution is necessary to alter the intimidating business model used by these patent assertion entities and will continue to be supportive of any Congressional effort to curb these practices. As you consider broader patent reform, we urge you to address this issue.

Again, thank you for holding this important hearing. If my staff or I can be of assistance to you, or if you have any questions regarding the impact of patent trolls on credit unions, please feel free to contact myself, or NAFCU's Director of Legislative Affairs, Jillian Pevo, at 703-842-2836.

Sincerely,

Carrie R. Hunt

cc: Members of the Senate Judiciary Committee



March 12, 2015

**Free-Market Groups Support House Patent Reform Legislation**

The Honorable Bob Goodlatte  
The Honorable John Conyers, Jr.  
United States House Judiciary Committee  
Washington, DC 20515

Dear Committee Members,

On behalf of the undersigned free-market organizations, we write to express our strong support for your committee's ongoing efforts on patent reform. As advocates for a healthy innovation economy with a strong and effective patent system, we urge you to support the important litigation reforms in H.R. 9, also known as the Innovation Act, sponsored by Chairman Bob Goodlatte.

Last year, an identical version of this legislation passed through your committee and then passed the House of Representatives with broad bipartisan support and an overwhelming margin of 325-91. Republicans support was even more decisive, with a margin of more than seven to one.

While efforts were stalled in the Senate last year, we firmly believe these reforms are essential to buttress the structure of our patent system against predatory litigation, and in so doing, create more clarity and better protections for legitimate intellectual property rights.

The Progress Clause in Article I, Section 8 of the United States Constitution establishes a patent system, first and foremost, with a mandate to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Though many other provisions of the document drafted at the Constitutional Convention were controversial, this language was agreed to unanimously and without debate. This reflects the foundational importance our nation's framers placed on a robust legal structure that could protect inventors' rights in their existing creations and, at the same time, foster new inventions and innovations.

Sadly, it has become clear that the current litigation environment surrounding our patent system has become an immense burden on the very innovators and innovations that the Constitution sought to encourage and protect. Each year, abusive patent litigation drains tens of billions of dollars from the economy, creating tremendous deadweight losses as well as a great deal of uncertainty. This, in turn, dramatically reduces spending on research and development, venture capital investment and other essential business activities.

These assertion entities, otherwise known as "patent trolls," don't just go after big tech companies. About half the defendants in these lawsuits are small businesses, which make easier targets since they are less well-positioned financially to defend themselves in court. Most of these businesses choose to settle, because patent litigation is risky, time-intensive and can cost millions of dollars in legal fees. Even when they know a claim against them is spurious, small businesses know it's seldom a sensible business decision to put their entire enterprise on hold and risk bankruptcy in an extended legal battle.

We agree, of course, that patent-asserting entities do play a valued role in creating healthy secondary markets. However, the current civil-litigation environment amounts to an Achilles' heel that invites abuse and exploitation from a multitude of bad actors.

The Innovation Act would address these problems by implementing several important reforms to the litigation process. These reforms include allowing judges more discretion in fee shifting; adopting pleading standards that appropriately identify alleged infringements; and reducing abuse of the discovery process. Together, these reforms would reduce the cost of defending spurious patent claims, and therefore make companies less likely to resolve such disputes by paying out extortion in the form of nuisance settlements.

With these changes, H.R. 9 would help reduce the economic harm associated with expensive and frivolous patent troll suits, while improving the overall strength and quality of America's patent system, in accordance with what the founders intended. In other words, it would create a system that promotes the freedom to innovate, rather than one that promotes increased business for trial lawyers and windfall revenues for patent-holders who are not themselves adding to innovation and economic growth.

Thus we urge you to support this package of reforms once again, to better align our patent system with its constitutional mandate and to send a message that bad actors can no longer hold the innovation economy hostage.

Sincerely,

R Street Institute  
 Americans for Tax Reform  
 Digital Liberty  
 Competitive Enterprise Institute  
 Independent Women's Forum  
 American Consumer Institute  
 Frontiers of Freedom  
 Institute for Liberty  
 Hispanic Leadership Fund  
 Latino Coalition  
 Minnesota Center-Right Coalition  
 Citizen Outreach



March 17, 2015

Chairman Grassley  
United States Senate  
Committee on the Judiciary  
224 Dirksen Senate Office Building  
Washington, D.C. 20510

Ranking Member Leahy  
United States Senate  
Committee on the Judiciary  
437 Russell Senate Building  
Washington, DC 20510

Dear Chairman Grassley and Ranking Member Leahy:

On behalf of BSA | The Software Alliance<sup>1</sup>, I applaud your leadership and unshakable commitment to making much needed improvements in our patent system. We urge you to move quickly to introduce and enact legislation to end abuses that occur in patent litigation.

Despite the important and beneficial reforms made by the 2011 America Invents Act, there remains an urgent need for changes that recalibrate certain distorted financial incentives that fuel abusive practices in patent litigation. Bad actors continue to take advantage of the specialized nature and unique asymmetries in costs between plaintiffs and defendants that often characterize patent cases.

BSA member companies have a singular perspective on our patent system. As some of the nation's leading innovators and largest patent holders, we have a vested interest in ensuring that the patent system functions effectively and remains the envy of the rest of the world. However, we also are some of the hardest hit victims of abusive patent litigation.

Some have begun to argue that no changes are needed because the Supreme Court has ruled on several patent cases in last the few years. We disagree. The Supreme Court's rulings, while touching on a few of the issues contributing to the abuse, are either constrained by the language of the patent statute or make only incremental changes. As a result, the rulings, even taken together, are not sufficient to alter behavior and curb abuse. The gross imbalance in costs and information that are exploited in unprincipled litigation persist. The abuses have not ended, and they will not end without Congressional action.

We strongly support your efforts to introduce and pass a truly strong, pro-innovation bill to end patent abuse. We look forward to working closely with you and other members of the Committee as you move legislation forward.

Sincerely,

Victoria A. Espinel  
President and CEO

cc: Members of the Senate Judiciary Committee

<sup>1</sup> BSA's members include: Adobe, Altium, ANSYS, Apple, Autodesk, Bentley Systems, CA Technologies, CNC/Mastercam, Dell, IBM, Intuit, Microsoft, Minitab, Oracle, salesforce.com, Siemens PLM Software, Symantec, Tekla, The MathWorks, and Trend Micro.



140 South 68th Street, West Des Moines, IA 50266

March 1, 2015

The Honorable Charles E. Grassley  
United States Senate  
135 Hart Senate Office Building  
Washington, D.C. 20510

Dear Senator Grassley:

Over the past few years, businesses like ours have worked hard to succeed in a tough economic climate. Many of us had to make difficult decisions, cutting back when we would rather have been growing. Only recently have businesses started to feel comfortable expanding again. But this fragile growth is put at risk by patent assertion entities (PAE's) – companies that do not make or produce anything, instead they use purchased patents to threaten small businesses like mine.

Capital Financial Partners has never been the target of a patent assertion entity, but understand other Iowa companies in the financial industry have been. Patent assertion entities are both damaging financially, and time-consuming to those targeted.

We at Capital Financial Partners are proud of what we have started and continue to grow here in the heart of Iowa. We would encourage you and your colleagues in Washington D.C. to recognize and address the growing problems with patent assertion entities. We ask you to protect growing business in Iowa and across this country by passing legislation that will negate the efforts of the patent assertion entities.

Sincerely,

A handwritten signature in dark ink that reads "LOREN SHERMAN". The signature is written in a cursive, slightly slanted style.

Loren Sherman  
Capital Financial Services  
Partner & Financial Services Professional



**CASEY'S GENERAL STORES, INC.**

P.O. Box 3001 • One Convenience Blvd., Ankeny, Iowa 50021-8045 • 515-965-6100

March 23, 2015

The Honorable Charles E. Grassley  
Chairman  
Senate Judiciary Committee  
135 Hart Senate Office Building  
Washington, DC 20510

Dear Senator Grassley:

Casey's General Stores, Inc. ("Casey's") wanted to clearly communicate to you our views on the U.S. patent system and patent reform. Like other companies in our industry, we have been victims of patent trolls on more than one occasion. This has included the receipt of demand letters that were misleading and abusive. We have also had to pay fees to settle cases that should never have been brought – at least against Casey's. Unfortunately, patent trolls have in many instances twisted our patent system nearly beyond recognition. The U.S. patent system simply was not created so that trial lawyers could make a living shaking down legitimate businesses with the threat of large legal fees and years of distracting lawsuits.

Real, strong reforms are needed to overcome the mess that patent trolls have created. No one wants to scrap the patent system. But aspects of how the system is enforced through the courts have been broken by the trolls and need to be repaired. That is why our trade association, the National Association of Convenience Stores, helped form the United for Patent Reform Coalition. We support its work to try to achieve strong reforms.

We deeply appreciate the work that you have done to try to remedy these problems over the years and urge continued hard work to overcome resistance to change. We are ready to do our part to work with you in any way that would be helpful to achieving that goal.

Thank you for your work on this important issue and for all you do in representing the citizens of Iowa.

Sincerely,

Robert J. Myers  
Chairman and Chief Executive Officer



www.deltadentalia.com

Jeff Russell  
President & CEO

March 10, 2015

Senator Charles E. Grassley  
135 Hart Senate Office Building  
Washington, DC 20510

Dear Senator Grassley:

Over the past few years, businesses like Delta Dental of Iowa have worked hard to succeed in a changing regulatory and economic climate. This work is put at risk by patent assertion entities (PAEs) – groups that do not make or produce anything of value. Instead, these entities purchase patents to threaten businesses like ours.

I support a patent process that protects and rewards individuals and companies for true innovations. This is a hallmark of American business. However, our current patent system allows owners of patents, many of which should never have been issued, to pursue litigation against companies that amounts to extortion. Companies must choose between costly legal defense bills or a settlement, in effect rewarding the so-called “patent trolls” for their litigious business model. We need federal patent reform to protect both the rights of true innovators and those who are caught in these expensive lawsuits.

A threat from a PAE costs businesses like Delta Dental crucial resources – in time, focus and money. Often PAEs send vague and threatening demand letters to businesses, without ever making it clear why they are threatening a lawsuit. Our employees’ efforts are aimed at improving the health and smiles of the Iowans we serve. As a not-for-profit insurance company, shifting resources to defend ourselves against a PAE not only harms our organization’s viability, it reduces our ability to serve Iowans.

I encourage you to support legislation to address this problem, including reforms such as making patent litigation more efficient and providing less-expensive alternatives to lawsuits. In addition, demand letters should be required to include basic, truthful information that clearly explains their claims in detail.

We can’t afford to put our hard-won gains at risk by continuing to allow these unscrupulous companies to threaten businesses. My concern isn’t about trying to limit competition; I fully support a competitive marketplace. My concern is about allowing PAEs – organizations that don’t add value to our economy – the freedom to damage the growth of companies that are productive and create jobs.

I urge you to advocate for comprehensive patent reform legislation that addresses these crucial issues.

Sincerely,

Jeff Russell  
President & CEO

Delta Dental of Iowa  
9000 Northpark Drive  
Johnston, IA 50131

Telephone 515-261-5522  
Toll Free 877-423-3582 ext. 15522  
Facsimile 888-558-9216

WE LOVE TO SEE *your* SMILE®



March 10, 2015

Senator Charles Grassley  
135 Hart Senate Office Building  
Washington, D.C. 20510

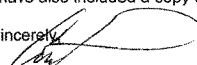
Dear Senator Grassley,

Enclosed you will find an article I penned over a year ago on the subject of Patent Trolls. Since that time, one of our highest growth clients in rural Eastern Iowa has had the great misfortune to have been attacked by one of these Patent Trolls, threatening to impact the growth of this company and related jobs and wealth creation.

I am writing you directly in hopes that you can help our State's and our Nation's entrepreneurs create the vitality our economy so desperately needs without the negative impact of these harmful predators. I would be happy to discuss this issue with you or someone on your staff at any time.

I have also included a copy of the 2014 EDC Stakeholder report for your review.

Sincerely,

  
Curtis R. Nelson  
President & CEO

p: 319.369.4955 • f: 319.832.1481  
230 Second St. SE, Suite 212 • Cedar Rapids, IA 52401  
316 E. Court Street • Iowa City, IA 52240

## **‘Patent trolls’ stifling business with lawsuits**

By Curtis R. Nelson

Most of us are familiar with the famous Norwegian fairy tale, "Three Billy Goats Gruff," where three hungry goats must cross a bridge to find more grass to eat. The problem is, underneath that bridge is a ferocious troll who wants to eat each one as it passes by.

In the end, each goat figures out a way to trick the troll and make it over to the other side.

In this modern-day world of small business development and technology start-ups, there's a real troll lurking. Unfortunately, not all of today's "goats" make it to the other side. This new threat is called a "patent troll" and it is having a profound and extremely costly effect on small business and technology growth.

Patent trolls do not develop or sell new technologies, and they exist only to prey on others who do. These trolls amass large patent portfolios through licensing, then, using broad patent language, assert and, if necessary, litigate unsuspecting businesses for infringement. Affected businesses must then spend significant sums settling or defending with a company whose only revenue stream comes from this practice.

These patent trolls are dragging down our economy, costing us jobs, and putting a tax on our most innovative products and services.

Solving this serious problem requires action by Congress and the Obama Administration.

According to one estimate, patent trolls have cost the U.S. economy half a trillion dollars in the last 20 years, with more than \$320 billion of that economic loss occurring in just the last four years. More than half of the 2012 patent-related lawsuits filed in the United States came from such patent firms. Most troubling: A majority of companies targeted by trolls have annual revenues of less than \$10 million, breaking the backs of those who can least afford it and those our country needs most.

The patent system is intended "to promote progress of science and the useful arts" that would not otherwise occur. However, in the fast-moving Internet and software-driven economy, we are witnessing the opposite: Patents are slowing innovation and serving the interests of exploitative trolls.

Software patents are often vague, overbroad and overlapping. It would be prohibitively expensive and practically impossible for an innovative company to determine whether it may be infringing on any one of the 1 million active software patents.

Growing, innovative technology companies have been forced to shift resources and spend billions on defensive patenting that they otherwise would not do. Meanwhile, start-ups and other small firms, which don't have high-paid patent lawyers on retainer, risk their businesses and livelihoods when faced with a demand letter from a patent troll. Even worse, the problem is spreading beyond the high-tech economy, affecting brick and mortar businesses like grocery stores that have even the simplest presence online.

There is no simple fix to the increasing troll problem. But there are encouraging signs that policymakers understand the magnitude of the patent troll problem, and want to help.

Rep. Bob Goodlatte, who chairs the House Judiciary Committee in Congress, acknowledged last month that trolls are a "drag" on the U.S. economy. President Obama, in a conversation with constituents in February, spoke out against trolls that "extort" businesses and called for "smarter" patent laws to address their harmful practices. Additionally, the Federal Trade Commission and the U.S. Patent and Trademark Office (PTO) have held a series of discussions on patent trolls.

On the legislative side, the proposed SHIELD Act would force patent trolls to pay for the defendant's legal costs, forcing trolls to think long and hard before filing frivolous lawsuits against companies. Congress and industry agree that legislation requiring more transparency into patent ownership could help stem the tide of patent trolls.

The U.S. Senate and House and the Obama Administration must act quickly to halt these bad actors from further burdening our economy, limiting consumer choice, and negatively impacting America's future.

**Curtis R. Nelson is president and CEO of the Entrepreneurial Development Center Inc. in Cedar Rapids. Comments: [cnelson@edcinc.org](mailto:cnelson@edcinc.org)**



EDC's Mission: To provide economic growth through the creation and expansion of high-impact Iowa businesses.

## EDC 2014 Stakeholder Report





## EDC Stakeholder Report 2014

As we wrap up EDC's 11th (and my seventh) year working with Iowa entrepreneurs, our mission remains clear: To improve the economic vitality of our region through the creation and growth of high-impact, scalable entrepreneurial enterprise. We continue to grow our capabilities while broadening our reach and impact on the region's entrepreneurial ecosystem.

As national and local interest in entrepreneurialism increases, we see more prospective entrepreneurs coming through our door seeking support, with 2014 marking the busiest year in EDC history. We are happy to serve a diversified group of entrepreneurs, with strong representation from students, women and minority entrepreneurs.

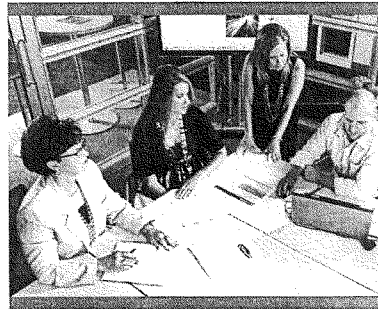
New organizations recently launched in our community to cultivate start-up businesses, such as the University of Iowa Venture School, 1 Million Cups, Ascent and the Iowa Start Up Accelerator, have helped to encourage new entrepreneurs. Graduates / participants in these programs are then seeking our assistance as they navigate from start-up idea to scalable businesses. We welcome these new individuals and organizations and work closely to support their activities, and the entrepreneurs involved.

Our unique model of providing hands-on support through all the stages of a business' life, coupled with education and networking, is proving increasingly valuable in this burgeoning ecosystem. If I have learned anything in working with entrepreneurs, it is that they apparently share a gene which leads them from idea to action in seconds! And without this bias for action, bundled within a high tolerance for risk, excellent creative problem-solving skills, and positive belief in what is possible, we would have far fewer entrepreneurial businesses in our state. Because many of these entrepreneurs are starting their first business without business training or experience, our task at EDC is to provide timely advice and guidance, through proven methodologies, at all points in the growth cycle.

We are grateful to our supporters, old and new, who have given of their time and resources to enable EDC to extend its network of support. On behalf of the entire EDC team, we thank each and every contributor, individuals and organizations alike, for your contribution to our area's continued entrepreneurial and economic vitality.

Sincerely,

Julie Zielinski  
Vice President of Marketing and Strategy



## 2014 EDC BOARD

Charles Rohde, President,  
King's Material (Chair)

Jon Dusek, President & CEO,  
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Executive Director and Clinical  
Professor, University of Iowa

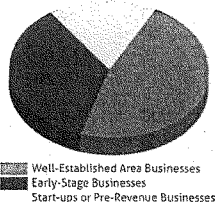
## 2014 Impact

EDC engaged with 85 area businesses this past year; helping with expansion/creation funding, strategic direction, marketing planning and execution and overall business growth.

### Active Clients

EDC currently supports thirty-four (34) clients at the following stages:

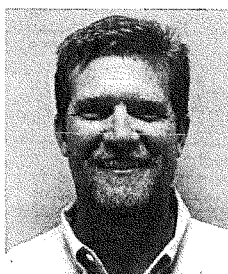
- Sixteen (16) of the clients are well-established area businesses seeking growth or restructuring assistance.
- Twelve (12) of the clients are early-stage businesses seeking growth and capital assistance.
- Six (6) of the clients are start-ups or pre-revenue businesses seeking assistance with market research/validation, business planning and capital raising.



### Client Recognition

Several EDC client companies were recognized in 2014 for their impact and growth:

- Three (3) clients made Inc. Magazine's 500/5000 list of fastest growing private companies:
  - Involta (#2437)
  - Clickstop (#3254)
  - Ready Wireless (#4375)
- As previously reported in the Mid-Year Report, four (4) EDC clients were recognized at the Corridor Business Journal's Fastest Growing Companies breakfast:
  - #8 Involta
  - #15 Ready Wireless
  - #16 Inteconnex
  - #23 Cedar Ridge Vineyards



"In 2014, after careful consideration, we undertook the development of a new product. Throughout this process, we have used EDC as a sounding board to develop a roll-out plan and go-to-market strategy. I also appreciate the team's feedback and guidance on various marketing tactics. It is invaluable to have experienced advisors on call to help as our company grows and navigates new opportunities."

Greg Edwards, Founder and CEO,  
WatchPoint Data

### Client Funding

EDC continues to assist clients in securing critical funding needed for the growth of their businesses. In 2014, a total of \$67M was secured in equity, debt and federal/state/regional programs.

EDC has a proven track record for assisting clients with funding applications, securing 90% of the state and regional funds applied for in 2014. EDC assisted 8 clients who secured funding from the following programs:

|                                                     |                    |
|-----------------------------------------------------|--------------------|
| IEDA Demonstration Fund.....                        | \$100,000          |
| IEDA Innovation, Acceleration, Launch & Propel..... | \$225,000          |
| ECICOG Revolving Loan Fund.....                     | \$806,250          |
| John Pappajohn Business Plan Competition .....      | \$25,000           |
| IEDA Domestic Trade Show Assistance .....           | \$4,000            |
| <b>Total.....</b>                                   | <b>\$1,160,250</b> |

### EDC Client Impact

The table below provides information on the economic impact of EDC's clients for 2014 as well as results since the program's launch in 2003.

| Impact                         | Annual (2014) | Program to Date (2003-2014) |
|--------------------------------|---------------|-----------------------------|
| Number of businesses supported | 85            | 672                         |
| New revenue generated          | \$176M        | \$914M                      |
| Capital raised                 | \$67M         | \$260M                      |
| Net direct jobs added          | 44            | -1,550                      |
| Average wage                   | \$48k         | \$48k                       |
| New payroll created            | \$40M         | \$305M                      |
| Total impact                   | \$283M        | \$1.479B                    |



"The last year with them has been the greatest growth for us as a small family business. We all feel more confident to handle rapid growth working with EDC. We are all convinced that EDC really cares about our company and us personally. We not only highly respect their expertise, but each of them as caring people. They know answers to our problems, before we even can identify what the problem is. And their solutions are logical and user friendly for us as a small company. The EDC is very easy to deal with. They do not talk down to us, they listen intently."

Freda Sojka, Founder and CEO, Simply Soothing

"The EDC has been a valuable resource to my team and I as we were mapping out our expansion strategy and building our sales. We have also relied on the EDC time and again for help navigating the various funding options in the state and beyond. The EDC is a critical part of growing the local economy and entrepreneurial ecosystem. They have real-world business experience to provide guidance and resources to help entrepreneurs succeed."

Bruce Lehrman, CEO, Involta

"Working with EDC has been instrumental in setting up our business for growth in 2015. After working with their staff on our business plan and financial processes, we have a much clearer path to success. We feel very fortunate to work with this team."

Beth Scott, Co-Founder, AD RescueWear

"The value that top tier business schools provide to the aspiring, or serial entrepreneur, pales in comparison to that of the team at the EDC. From introductions into private and public funding sources to product marketing strategy, the EDC team has the collective experience to see successful companies from inception to scale. Punctil Health evolved via weekly meetings with Curt and his team from a baseline idea into a venture-backed digital health company based in Iowa."

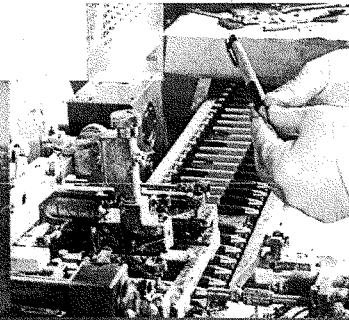
Ben Picard, President and COO, Punctil Health

"For a scientist, the commercial world is a confusing and ferocious mayhem, EDC staff tame this world and make it a real opportunity. Without EDC my inventions and benefit to the public will stay at ground level, with EDC we will soar into a successful enterprise."

Dr. Joe Assouline, Founder, NanoMedTriX

"In 2014, EDC helped Stone Medical with talent and leadership team development, our capital raise and virtually all aspects of our business plan: sales, marketing, operations, and financial. The advice from EDC has been very specific and comprehensive which has led to great progress in several key areas. Additionally, the events sponsored by EDC have been excellent. We plan to continue to work with EDC in 2015 and focus on sales team recruiting and management, operations management and acquisition and exit planning."

Benjamin Stone, CEO, Stone Medical



"The EDC helped us apply for and successfully win a loan from Iowa's IEDA Launch fund. They also helped us prepare for several investor pitches. Finally, they advised us about our business plan and in how to approach potential channel partners.

I always know that my pitch is going to get 100 times better after I practice for the EDC. Curt and Pete give us clear, honest feedback but at the same time I feel like they truly understand and value our product and company. The result is that I fully trust their advice and feel like I have a personal cheerleading squad.

With our previous company, we never bothered applying to IEDA because the process was so long and complex. This time, we decided to seek the help of the EDC and during the process, Jane was very attentive; I never worried about meeting deadlines or requirements because I knew she was on top of it and would make sure we got everything done."

Michal Eynon-Lynch, Co-Founder, Pear Deck



Accelerating Iowa Business

230 2nd St. SE, Suite 212  
Cedar Rapids, IA 52401

319-369-4955  
www.edcinc.org

316 E. Court Street  
Iowa City, IA 52240



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Join us Wednesday,  
October 21st at the  
Coralville Marriott



To get more information and register, visit  
<http://innovationexpo2015.eventbrite.com>



March 17, 2015

The Honorable Charles E. Grassley  
Chairman  
Committee on the Judiciary  
United States Senate  
224 Dirksen Senate Office Building  
Washington, D.C. 20510-6050

The Honorable Patrick J. Leahy  
Ranking Member  
Committee on the Judiciary  
United States Senate  
224 Dirksen Senate Office Building  
Washington, D.C. 20510-6050

Dear Chairman Grassley and Ranking Member Leahy:

I am writing to thank you for considering the important issue of patent reform in the Senate Judiciary Committee. Facebook has more than 1.3 billion active users across the world and, notably, has a new data center in the Chairman's home state, in Altoona, Iowa. Passage of a strong patent reform bill would be a relief not only to our company, but also to our users, who themselves fall victim to abusive litigation tactics.

Abusive patent litigation impacts individuals and businesses of all sizes throughout the country. Companies and individuals who innovate and create jobs depend on a fair, well-functioning patent system that advances innovation and protects legitimate patent rights, but also curbs abuse.

Facebook's mission is to give people the power to share and to make the world more open and connected. Individuals and businesses both large and small have used Facebook to create marketplaces, provide services, and organize communities in ways that would not have been possible without the Internet. The Internet has also been a critically important forum for conversations on issues of national importance. But the high volume and cost of patent litigation threaten to curtail

## facebook

these successes and more like them – by increasing the cost of innovation and placing new and creative opportunities in the cross-hairs of so-called “patent trolls.”

For the last several years – ever since we publicly announced that we were cash flow positive – Facebook has incurred approximately \$50 million annually in costs generated by litigation brought by non-practicing entities. These cases are overwhelmingly without merit. Indeed, in our relatively short history, we have faced 78 cases brought by non-practicing entities, not a single one of which has resulted in a judgment against Facebook. Yet we are nonetheless forced to spend tens of millions of dollars every year to defend ourselves. That expense is a significant tax – on innovation, jobs, and progress.

Our goal in supporting patent litigation reform is to reduce that tax by reducing the ability of litigants to create excessive, one-sided defense costs as a means to pressure companies to settle non-meritorious cases. The system today allows for open-ended complaints, which are inevitably followed by unbridled demands for discovery. Non-practicing entities, which have no operations of their own and are therefore not subject to meaningful discovery, use this one-sided process to impose as many costs as they can, for the purpose of creating financial pressure that they hope will force a settlement. It is really that simple.

The America Invents Act (AIA) made important improvements to the patent system that must not be undone by current reform efforts. For example, through AIA post-grant procedures such as *inter partes* review, parties are able to litigate the scope and validity of patent claims under set time frames and predictable costs. A critical part of *inter partes* review is its “Broadest Reasonable Interpretation” standard for evaluating the scope of patent claims. Often, in patent litigation, plaintiffs seize upon ambiguities in claim language to argue that technology not covered by their patent disclosures nevertheless fall within the scope of their claims. This zone of ambiguity heightens cost and uncertainty in patent litigation. The “Broadest Reasonable Interpretation” standard, however, enables the Patent Trial and Appeal Board to clarify the scope of patent claims and helps

The Facebook logo, consisting of the word "facebook" in a white, lowercase, sans-serif font, is centered on a solid black rectangular background.

curb this abuse. Any comprehensive patent reform must maintain the "Broadest Reasonable Interpretation" standard.

One additional point bears emphasis. Although Facebook and other large technology companies bear much of the brunt of the current litigation abuses due to our size, the companies that are most threatened by those abuses are small businesses, including start ups. These companies often cannot afford the tax of abusive litigation practices, so they are forced instead to settle non-meritorious cases, with funds that would be better spent hiring employees and investing in innovation.


We write to express our strong support for meaningful patent reform that will ensure that our patent system continues to serve its intended purpose of encouraging real innovation and is not exploited by those who seek only financial gain without any true contribution to advancing the useful arts in our country.

To achieve this objective, patent reform should do the following:

- Discourage frivolous suits by creating a presumption in favor of fee shifting in litigation;
- Reduce the costs associated with weak suits by heightening the pleading standards necessary to maintain a patent suit in Federal court;
- Control discovery abuse in patent litigation by limiting the scope and costs of discovery;
- Maintain the successes of the AIA by retaining the "Broadest Reasonable Interpretation" standard of review in post-grant proceedings.

These changes will help curb abusive patent litigation and ensure that our system rewards and protects real innovation.

Sincerely,

A handwritten signature in black ink, appearing to read "Colin Stretch", is written over a circular stamp or seal.

Colin Stretch  
Vice President & General Counsel  
Facebook, Inc.

March 13, 2015

**The Honorable Charles Grassley**  
United States Senate  
135 Hart  
Washington, D.C. 20510

**The Honorable Steve King**  
United States Congress  
2210 Rayburn  
Washington, D.C. 20515

**The Honorable Dave Loebsack**  
United States Congress  
1527 Longworth  
Washington D.C. 20515

**The Honorable Joni Ernst**  
United States Senate  
825 Hart  
Washington, D.C. 20510

**The Honorable David Young**  
United States Congress  
515 Cannon  
Washington, D.C. 20515

**The Honorable Rod Blum**  
United States Congress  
213 Cannon  
Washington, D.C. 20515

**Dear Senator Grassley, Senator Ernst, Congressman King, Congressman Young, Congressman Loebsack and Congressman Blum:**

We, the undersigned Iowa associations, organizations, and businesses, strongly encourage renewed Congressional efforts to address abuses of the legal system by patent assertion entities, commonly referred to as patent trolls.

Patent trolls manipulate and exploit shortcomings in the patent system. When encountered by patent trolls, businesses have little choice but to divert limited resources and tremendous amounts of time and energy responding to vague demands and combatting frivolous and burdensome lawsuits. Safeguards need to be established to protect inventors, entrepreneurs, and companies, small and large, from the devastating and destructive impacts of patent trolls.

It is indisputable that patent troll activity is growing at alarming rates and costing our economy billions. In fact, patent infringement lawsuits have risen by an average of 22% per year since 2005. Furthermore, the number of patent cases filed grew rapidly in 2013 by 25% (to almost 6,500 cases). A detailed 2013 analysis found that in 2013 nonpracticing entities (NPEs) filed 67% of all new patent infringement cases; over double the 28% that were filed just four years earlier in 2009.

There is a growing, bi-partisan consensus that the time to address the patent trolls' abuses is now. We are pleased to see President Obama support patent troll reform and we are encouraged by the active roles that prominent Senate and House Judiciary Committee members are playing to bring forward legislative solutions. Meaningful reforms that make it difficult for patent trolls to continue their destructive business models, by improving patent quality, streamlining litigation, enhancing discovery protections and pleading requirements, as well as increasing transparency, will drastically reduce costs for Iowa businesses and entrepreneurs.

We are strongly encouraged by the bi-partisan momentum on this issue and we ask for the House and Senate to continue to work across the aisle and across chambers on this important industry-wide issue.

As Iowans, we look forward to working with you and your colleagues to pass needed legislation this year.

Sincerely,

Iowa Gaming Association

Iowa Restaurant Association

Iowa Lodging Association

Iowa Bankers Association

Iowa Retail Federation

Iowa Credit Union League

Home Builders Association of Iowa

Iowa Communications Alliance

Iowa Realtors Association

Iowa Grocery Industry Association

## Reinvesting in Iowa

Ameristar  
 Casino Hotel  
*Council Bluffs*  
 Catfish Bend Casino  
*Burlington*  
 Diamond Jo Casino  
*Dubuque*  
 Diamond Jo Worth  
 Casino  
*Northwood*  
 Grand Falls Casino  
 Resort  
*Lakeview*  
 Hard Rock Hotel &  
 Casino  
*Sioux City*  
 Harrah's Council  
 Bluffs Casino &  
 Hotel  
*Council Bluffs*  
 Horseshoe Casino &  
 Bluffs Run  
 Greyhound Park  
*Council Bluffs*  
 Isle Casino Hotel  
 Bettendorf  
*Bettendorf*  
 Isle Casino Hotel  
 Waterloo  
*Waterloo*  
 Lady Luck Casino  
 Marquette  
*Marquette*  
 Lakeside Hotel Casino  
*Owasa*  
 Mystic  
*Dubuque*  
 Prairie Meadows  
*Albia*  
 Rhythm City Casino  
*Davenport*  
 Riverside Casino  
 and Golf Resort  
*Riverside*  
 Wild Rose Casino  
 Resort  
*Clinton*  
 Wild Rose Casino  
 Resort  
*Franklinburg*



Iowa Gaming Association

March 16, 2015

Honorable Charles Grassley  
 135 Hart Senate Office Building  
 Washington, DC 20510

Dear Senator Grassley:

On behalf of the Iowa Gaming Association (IGA), representing 18 commercial casinos in Iowa, I want to thank you for dedicating time to meet last month in Des Moines with several Iowa businesses and organizations to learn more about the abuses of the legal system by patent assertion entities, commonly referred to as patent trolls.


As you heard from those providing input, fighting frivolous and burdensome patent lawsuits threatened and filed by patent trolls is an expensive distraction for a large cross-section of Iowa companies. Rather than focus their efforts on important catalysts for innovation, job creation, and business growth; entrepreneurs and business owners from all industries and sizes are more frequently finding themselves diverting valuable attention and limited resources to defend expensive and unnecessary legal threats by these patent trolls.

For example, the casinos utilize a considerable amount of software services throughout their significant entertainment, lodging, dining and gaming complex. I thought you summarized it best when you said that our gaming industry and other entities are a magnet by these patent trolls' to go beyond the company creating the software, and pursue a seemingly endless barrage of legal threats and frivolous suits.

Meaningful reform needs to make it difficult for patent trolls to continue their destructive business models, improve patent quality, streamline patent infringement disputes, address discovery reform and heightened pleading requirements; which will drastically reduce costs for Iowa businesses.

The IGA joins many other associations and companies to support and strongly encourage Congressional efforts this year to address patent troll activity. Thank you for your hard work and leadership to craft and pass a workable solution with bipartisan support!

Sincerely,

  
 Wes Ehrecke, FASAE, CAE  
 President & CEO  
 Iowa Gaming Association

Thanks Senator!

**Letter to Congress**

March 2, 2015

To Members of the United States Congress:

We, the undersigned, are economics and legal scholars who study innovation, intellectual property law, and policy. We write to respond to lobbyists and others who claim there is little empirical evidence available to assess the performance of the American patent system. In fact, a large and increasing body of evidence indicates that the net effect of patent litigation is to raise the cost of innovation and inhibit technological progress, subverting the very purpose of the patent system. As members of Congress debate reforms to improve the patent system we hope they appreciate the failings of the current system, and implement salutary reforms.

Over the last five years, academic researchers have published over two dozen empirical studies on patent litigation and its economic impacts (see the attached bibliography for a selection). These studies have been conducted by researchers with diverse views and using different methodologies.

The preponderant economic picture these studies present is that patent litigation now imposes substantial costs, particularly on small and innovative firms, and that these costs have tended overall to reduce R&D, venture capital investment, and firm startups. Not one study of the economic impact of current patent litigation concludes that the effects are negligible.

The number of defendants in patent lawsuits filed in 2009 was five times the annual number during the 1980s. By most tallies, the majority of lawsuits are now filed by so-called “patent assertion entities” (PAEs), popularly known as patent trolls. Estimates based on surveys, on firm 10-K filings, and on stock prices suggest that PAE litigation has been costing firms tens of billions of dollars per year since 2007. Startups and venture-backed firms, especially, report significant operational impacts from PAE lawsuits in survey-based studies. An econometric analysis finds that the more R&D a firm performs, the more likely it is to be hit with a patent lawsuit, all else equal. Another study associates lawsuits from PAEs with a decline of billions of dollars of venture capital investment; another found that extensive lawsuits caused small firms to sharply reduce R&D spending; and yet another

found that costly lawsuits caused publicly listed defendant firms to substantially curtail R&D spending.

Although each of these studies has limitations and none is conclusive by itself, a consistent picture emerges: the patent system provides strong protection without excessive litigation in some sectors such as pharmaceuticals, but substantial evidence highlights serious problems with patent litigation in many other industries. Even if the patent system on the whole promotes innovation, it does so despite the social costs that result from this litigation, not because of it.

Congress, the courts, and the Patent and Trademark Office have all made changes in recent years that help mitigate this problem. The Inter Partes Review and Covered Business Method proceedings established by the America Invents Act of 2011 have helped remove hundreds of invalid patents, many already involved in litigation. Supreme Court decisions have strengthened patentability standards and have somewhat lowered the hurdles to fee-shifting in patent cases. Perhaps as a result, patent lawsuit filings declined modestly last year from the record setting level of 2013. While month-to-month comparisons are variable, 18% fewer patent lawsuits were filed last year than in 2013.

Nevertheless, patent litigation rates remain at detrimentally high levels. Indeed, much of the empirical research mentioned above covers periods prior to the last several record-breaking years for patent litigation. That is, the research demonstrates that patent lawsuits were already harming innovation when litigation rates were *significantly below current levels*. In this light we are not surprised that a growing chorus of high-tech entrepreneurs and state attorneys general has stepped forward to urge that the patent system should work for innovators and not against them. Though we understand that crafting and implementing effective reform will be difficult, we write to emphasize the rewards from effective reform could be great.

Sincerely,\*

Clark D. Asay  
Brigham Young University J. Reuben Clark Law School

Jonathan Askin  
Brooklyn Law School

Carliss Y. Baldwin  
Harvard Business School

James E. Bessen  
Boston University School of Law

Jeremy W. Bock  
The University of Memphis Cecil C. Humphreys School of Law

Michele Boldrin  
Washington University in St. Louis Department of Economics

Michael J. Burstein  
Yeshiva University Cardozo School of Law

Andrew Chin  
University of North Carolina School of Law

Lauren Cohen  
Harvard Business School

Wesley Cohen  
Duke University Fuqua School of Business

Kevin Collins  
Washington University in St. Louis School of Law

Jorge Contreras  
University of Utah S.J. Quinney College of Law & Department of Human Genetics

Robert Cook-Deegan  
Duke University Sanford School of Public Policy

Ben Depoorter  
University of California Hastings College of Law

---

\* This letter presents the views of the individual signers. Institutions are listed for identification purposes only.

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Chapman University Fowler School of Law

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University of California Hastings College of the Law

Lee Fleming  
University of California Berkeley

Roger Allan Ford  
University of New Hampshire School of Law

Brian L. Frye  
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William T. Gallagher  
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Shubha Ghosh  
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Ryan G. Vacca  
The University of Akron School of Law

Eric von Hippel  
Massachusetts Institute of Technology Sloan School of Management

Jonathan W. Williams  
University of Georgia Terry College of Business & Department of Economics

### A Selection of Recent Empirical Research on Patent Litigation\*\*

- Allison, John R., Emerson H. Tiller, Samantha Zyontz, and Tristan Bligh. "Patent Litigation and the Internet." Stanford Technology Law Review (2012): 3.
- Allison, John R., Mark A. Lemley, and Joshua Walker. "Patent Quality and Settlement Among Repeat Patent Litigants." Georgetown Law Review, 99 (2011): 677.
- Anderson, J. Jonas, and Peter S. Menell. "Informal Deference: A Historical, Empirical, and Normative Analysis of Patent Claim Construction." Northwestern University Law Review, 108 (2014): 1.
- Bessen, James. "The Evidence Is In: Patent Trolls Do Hurt Innovation." Harvard Business Review (July 2014).
- Bessen, James and Michael J. Meurer. "The Patent Litigation Explosion." Loyola University Chicago Law Journal, 45 (2013): 401.
- Bessen, James and Michael J. Meurer. "The Private Costs of Patent Litigation." Journal of Law, Economics and Policy, 9 (2012): 59.
- Bessen, James and Michael J. Meurer. "The Direct Costs from NPE Disputes." Cornell Law Review, 99 (2014): 387.
- Bessen, James, Jennifer Ford, and Michael J. Meurer. "The Private and Social Costs of Patent Trolls." Regulation 34(4) (2011): 26.
- Chien, Colleen V. "Of Trolls, Davids, Goliaths, and Kings: Narratives and Evidence in the Litigation of High-Tech Patents." North Carolina Law Review, 87 (2009): 1571.
- Chien, Colleen V. "Predicting Patent Litigation." Texas Law Review, 90 (2011): 283.
- Chien, Colleen V. "Startups and Patent Trolls." Stanford Technology Law Review, 17 (2014): 461.
- Chien, Colleen V. "Patent Assertion and Startup Innovation." New America Foundation (2013).
- Chien, Colleen V. "Patent Trolls by the Numbers." Santa Clara University Legal Studies Research Paper No. 08-13 (2013).
- Cohen, Lauren, Umit Gurun, and Scott Duke Kominers. "Patent Trolls: Evidence from Targeted Firms." No. w20322. National Bureau of Economic Research (2014).
- Cotropia, Christopher A., Jay P. Kesan, and David L. Schwartz. "Unpacking Patent Assertion Entities (PAEs)." Minnesota Law Review, 99 (2014): 649.

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\*\* This list is intended to be illustrative, not exhaustive. Inclusion does not necessarily imply the authors' endorsement of this letter.

- Ewing, Tom and Robin Feldman. "The Giants Among Us." Stanford Technology Law Review (2012): 1.
- Feldman, Robin, Tom Ewing, and Sara Jeruss. "The America Invents Act 500 Expanded: Effects of Patent Monetization Entities." UCLA Journal of Law & Technology, 17 (2013): 1.
- Feldman, Robin. "Patent Demands & Startup Companies: The View from the Venture Capital Community." Yale Journal of Law & Technology, 16 (2014): 236.
- Feldman, Robin, and Mark A. Lemley. "Does Patent Licensing Mean Innovation?" Working Paper (2015).
- Fischer, Timo, and Joachim Henkel. "Patent Trolls on Markets for Technology: An Empirical Analysis of NPEs' Patent Acquisitions." Research Policy, 41, no. 9 (2012): 1519.
- Helmers, Christian, Brian J. Love, and Luke McDonagh. "Is There a Patent Troll Problem in the U.K.?" 24 Fordham Intellectual Property Media and Entertainment Law Journal, 24 (2014): 509.
- Jeruss, Sara, Robin Feldman, and Joshua Walker. "America Invents Act 500: Effects of Patent Monetization Entities on US Litigation." Duke Law and Technology Review, 11 (2012): 357.
- Khan, Zorina. "Trolls and Other Patent Inventions: Economic History and the Patent Controversy in the Twenty-First Century." Working Paper (2013).
- Love, Brian J. "An Empirical Study of Patent Litigation Timing: Could a Patent Term Reduction Decimate Trolls Without Harming Innovators?" University of Pennsylvania Law Review, 161 (2013): 1309.
- Love, Brian J., and Shawn Ambwani. "Inter Partes Review: An Early Look at the Numbers." University of Chicago Law Review Dialogue, 81 (2014): 93.
- Miller, Shawn P. "What's the Connection Between Repeat Litigation and Patent Quality? A (Partial) Defense of the Most Litigated Patents." Stanford Technology Law Review, 16 (2013): 313.
- Miller, Shawn P. "Where's the Innovation: An Analysis of the Quantity and Qualities of Anticipated and Obvious Patents." Virginia Journal of Law and Technology, 18 (2013): 1.
- Reidenberg, Joel R., Jamela Debelak, Daniel Gross, and Elaine Mindrup. "The Impact of the Acquisition and Use of Patents on the Smartphone Industry." Center for Law and Information Policy, Fordham Law School (2012).
- Risch, Michael. "Patent Troll Myths." Seton Hall Law Review, 42 (2012): 457.

- Risch, Michael. "A Generation of Patent Litigation: Outcomes and Patent Quality." San Diego Law Review (2015), Forthcoming.
- Rooksby, Jacob H. "Innovation and Litigation: Tensions Between Universities and Patents and How to Fix Them." Yale Journal of Law and Technology, 15 (2013): 312.
- Schwartz, David L. "The Rise of Contingent Fee Representation in Patent Litigation." Alabama Law Review, 64 (2012): 335.
- Smeets, Roger. "Does Patent Litigation Reduce Corporate R&D? An Analysis of US Public Firms." Working Paper (2014).
- Tucker, Catherine. "Patent Trolls and Technology Diffusion." Working Paper (2011).
- Tucker, Catherine. "The Effect of Patent Litigation and Patent Assertion Entities on Entrepreneurial Activity." Working Paper (2014).
- Turner, John L., James Bessen, Peter Neühausler, and Jonathan W. Williams. "The Costs and Benefits of United States Patents." Working Paper (2014).
- U.S. Government Accountability Office, "Intellectual Property: Assessing Factors That Affect Patent Infringement Litigation Could Help Improve Patent Quality." Report to Congressional Committees GAO-13-465 (2013).



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March 12, 2015

Senator Chuck Grassley  
135 Hart Senate Office Building  
Washington, DC 20510

**Re: Support for Patent Reform from Iowa Wireless Services, LLC**

Dear Senator Grassley,

My name is Craven Shumaker, and I am the CEO of Iowa Wireless Services, LLC d/b/a i wireless (Iowa Wireless), a small wireless service provider serving the citizens of Iowa. I was fortunate to share my experience with you last month regarding the harmful effects to small business from Patent Assertion Entities' (PAEs). In light of the upcoming committee hearing next week, I wanted to write again to ask for your help in passing meaningful, comprehensive patent reform to help protect businesses like Iowa Wireless.

PAE litigation tactics have increased dramatically in the last few years. PAEs hamper innovation and investment, and increasingly have been targeting end-users, and not just the manufacturer. From my own experiences, PAEs typically target smaller entities like Iowa Wireless, who may not have the resources to challenge patent claims. Indeed, Iowa Wireless has been the target of PAEs on multiple occasions, including threatening demand letters and lawsuits.

In 2014, Iowa Wireless was sued by one of these PAEs, named Novo Transforma Technologies (Nova), in federal Court in Delaware. As is the usual modus operandi for PAEs, Nova first targeted small, state or regional companies in order to bankroll and facilitate its further litigation efforts against larger, national entities. In our case, a group of defendants was able to have the case dismissed because of vagueness (a standard defect in patent cases). But Nova re-filed the case, and Iowa Wireless simply did not have the financial resources to go through the extensive discovery process and long-term litigation required to fight these claims. We were compelled to settle the case.

We would urge you and the committee to pass legislation that tackles this problem, and that eliminates or mitigates the economic and other harm to small businesses from PAEs and associated patent litigation abuse.

Sincerely,

Craven Shumaker  
CEO, Iowa Wireless



Building Innovations.

March 16, 2015

Senator Chuck Grassley  
135 Hart Senate Office Building  
Washington, DC 20510

Dear Senator Grassley:

My name is Brad Lilienthal and I am the Vice President of Sales and Marketing for Kreg Tool Company located in Huxley, Iowa. Kreg is a 25 year old, 170 employee privately owned product design, marketer and manufacturer of woodworking tools and accessories. I attended the patent assertion entity (PAE) discussion in Des Moines on February 13<sup>th</sup> and briefly described Kreg's experiences with PAEs. I greatly appreciate the time you took out of your busy schedule to learn more about the difficulties Iowa companies are facing with regards to what we believe are frivolous patent litigations.

To reiterate what I spoke to on the 13<sup>th</sup>, there are two specific examples in my time at Kreg (15 years) where the business has been impacted directly by PAEs or what I call patent trolls.

The first instance fits the classic example of a patent troll case. A company informed us in 2001 that they believed that our e-commerce website infringed their patent for shopping cart technology. They demanded we pay a licensing fee of \$5,000 in order to use this technology. We were not alone as their approach seemed to be to target small companies in groups of 10, knowing that most would pay the licensing fee rather than face the unknown costs of fighting the claim. As a group, all 10 companies targeted including Kreg, agreed to fight the allegations together. As a result, the lawsuit was thrown out after we paid approximately \$9,000 to fight it. A moral victory if not a small financial one. The stated goal of this PAE was to continue to sue small companies that would be more willing to immediately pay in order to build up funding to be able to eventually go after larger companies such as Amazon.

Kreg's second and much more expensive experience with patent troll behavior was a result of an infringement lawsuit filed by an individual located in California. In 2001 this individual applied for a patent on a tool that would compete with one of our core products. In 2004 this patent was granted. In 2007 this individual sued us after we reached out to inquire about the status of his plan to commercialize. This lawsuit eventually went to trial after multiple efforts by Kreg to settle out of court. We ended up spending over \$2.6 million to go all the way through trial and eventually won the case. The most frustrating part of this effort was that at the trial in 2010 (9 years after the patent was filed) the plaintiff had not even built a prototype of his patented item or made any effort to commercialize it. If this minimum commercialization

KREG TOOL COMPANY

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A Division of Kreg Enterprises, Inc



Building Innovations.

threshold would have been achieved I am confident the case would have never gone to trial and we would have saved a lot of time, energy and dollars that could have been funneled back into true product innovation at Kreg as opposed to spent on this defense.

At the end of the day we respect the rights of individuals and companies to protect their ideas through patents. We do feel however that the entity must prove that their attempts to commercialize their invention has been substantially impeded by the company being sued.

A threat from a patent assertion entity has cost our business crucial resources – both in time and money. Along with other reforms, like making patent litigation more efficient and providing less expensive alternatives to lawsuits, these elements could make a big difference to small businesses and help us keep investments flowing into our own innovation initiatives that will help grow jobs and communities here in Iowa.

Thank you for your time in considering this issue and pushing for meaningful reform that will make a difference for businesses in Iowa.

Sincerely,

A handwritten signature in black ink, appearing to read "Brad Lilienthal". The signature is fluid and cursive, with the first and last names being more legible than the middle name.

Brad Lilienthal  
Kreg Tool Company

KREG TOOL COMPANY

201 Campus Drive • Huxley, IA 50124 • Tel. 515-597-6400 • Fax. 515-597-6401  
A Division of Kreg Enterprises, Inc



March 13, 2015

The Honorable Chuck Grassley  
United States Senate  
135 Hart Senate Office Building  
Washington, D.C. 20510

Dear Senator Grassley:

Patent troll abuse is an increasingly burdensome issue for businesses across Iowa. I am grateful the Senate Judiciary Committee will convene a hearing to examine how to protect businesses from this abusive practice.

Kum & Go has been a target of patent trolls. Recently, Hawk Technology Systems, LLC sued Kum & Go, L.C. in Federal District Court in Colorado claiming that its use of the March Networks DVR Video Surveillance System violates Hawk's patent. Kum & Go has been using the March Networks platform for over 10 years, and its use predates the reissue of Hawk's patent which occurred on June 12, 2012. Hawk was formed in 2012 and it appears that its sole business is directed to owning and enforcing United States Patent No. RE43,462 in litigation. Since 2012 it has filed approximately 70 lawsuits. Based upon the history uncovered to date, it would appear that Hawk's strategy is to file suit against a party and seek a quick settlement in an amount that approximates the defendants cost of defense with no real intention of seeing a lawsuit through trial.

Additionally, we received correspondence from U.S. Ethernet Innovations, LLC (USEI) claiming infringement with Ethernet technologies utilized in many of Kum & Go's day-to-day business activities. These activities include internet connections, security cameras, point of sale and inventory management systems, to name a few. In their letter, USEI stated that they had retained Robbins, Geller, Rudman & Dowd, LLC, "the largest and most successful plaintiff's law firm in the world" to assist in patent enforcement efforts. They claim to have filed a patent infringement lawsuit against 23 major corporations believed to infringing on Ethernet patents. In the interest of "avoiding protracted litigation," USEI offers to sell Kum & Go a Retail Operator License Agreement at a discounted pre-litigation fixed fee basis.

These claims have cost Kum & Go thousands of dollars in legal fees and corporate counsel has wasted numerous hours dealing with these frivolous claims – time and money that should have been spent on core business functions.

Again, I thank you for your attention to this matter. I look forward to a productive hearing, and the passage of much needed legislation to protect Iowa and the nation's businesses.

Sincerely,

Charley Campbell  
General Counsel and Corporate Secretary



**MATTHEW MITCHELL**  
Independent Insurance Agent

Matthew Mitchell  
1066 Belle Mar Drive  
West Des Moines, IA 50266

March 3, 2015

The Honorable Charles E. Grassley  
United States Senate  
135 Hart Senate Office Building  
Washington, D.C. 20510

Senator Grassley:

I am an independent insurance agent and while I have not directly impacted by what I consider patent trolls, I am concerned about the ability patent trolls have to attack Iowa companies.

As I understand patent trolls, they buy up hundreds if not thousands of patents and then in turn target businesses and threaten with litigation. These troll companies do not provide any service, do not produce a good. They solely prey on businesses that do have a positive impact in our society and our communities. They bog down companies behind the threat of a lawsuit that would require hundreds of hours in legal fees and in some cases you don't even know who is suing you.

I think it is important for Congress to address this growing problem. I believe in the patent system and the system is supposed to protect innovators. The solution needs to require that patent trolls provide ample proof of basic, truthful information and that they explain their claims clearly and in detail.

I ask you Chairman, to please support patent troll reform.

Thank you kindly,

Matthew Mitchell



Chris Polychron, CIPS, CRS, GRI  
2013 President

Dale A. Stinton  
Chief Executive Officer

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March 17, 2015

The Honorable Chuck Grassley  
Chairman  
U.S. Senate Committee on the Judiciary  
135 Hart Senate Office Building  
Washington, D.C. 20510

The Honorable Patrick Leahy  
Ranking Member  
U.S. Senate Committee on the Judiciary  
437 Russell Senate Office Building  
Washington, DC 20510

Dear Chairman Grassley and Ranking Member Leahy:

On behalf of the more than one million members of the National Association of REALTORS® (NAR), who facilitate nearly 5 million home sales, boosting the American economy, we urge your strong support for strong comprehensive patent litigation reform. Litigation and threatened litigation from abusive patent trolls divert resources away from more productive activities including property sales and investment in new technologies that enhance the consumer's real estate experience and lead to job creation.

NAR, whose members identify themselves as REALTORS®, represents a wide variety of real estate industry professionals. REALTORS® have been early adopters of technology and are industry innovators who understand that consumers today are seeking real estate information and services that are fast, convenient and comprehensive. Increasingly, technology innovations are driving the delivery of real estate services and the future of REALTORS® businesses.

We write to explain how the real estate sector has been impacted by specious infringement claims asserted by non-practicing entities (NPEs), or "patent trolls." We urge your committee to swiftly pass meaningful reform legislation to curtail abuses when NPEs claim intellectual property rights in "sham" patents that are overly broad and lack integrity; send poorly researched but threatening demand letters to extort licensing fees from business owners; and file vague and frivolous lawsuits.

In 2012, patent trolls sued more non-tech companies than tech companies, at an estimated cost to the U.S. economy of \$80 billion on court battles. The number of defendants in patent lawsuits increased roughly 129 percent over the four year period from 2007-2011, according to the U.S. Government Accountability Office. Real estate businesses, tenants, brokers and service providers have been threatened and targeted with spurious patent infringement claims, in contexts that include the following:

- Brokers implementing website technology to allow zooming in to located points of interest on a map and creating home search alert function
- Building owners and tenants that use standard, off-the-shelf routers to provide Wi-Fi access for hotspots in lobbies, restaurants, atriums, and other common areas of buildings;
- The Multiple Listing Service, a critical tool for real estate agents that uses location-based search capabilities to identify homes and other properties available for sale or lease; and
- Businesses that attach scanned documents to emails to execute contracts, closings, and other commonplace real estate transactions.



REALTOR® is a registered collective membership mark which may be used only by real estate professionals who are members of the NATIONAL ASSOCIATION OF REALTORS® and subscribe to its strict Code of Ethics.

Rather than researching and litigating patent infringement claims, our members wish to channel their resources to serve their core functions to satisfy the real estate needs of the American people – and create jobs in the process. To that end, we ask your committee to enact a package of common sense patent reform measures that includes:

**Reform abusive demand letters:** Require that patent demand letters include truthful, basic information. Patent trolls send vague and deceptive letters alleging patent infringement to demand unjustified payments from innocent individuals and businesses. Vague demand letters should not be used to bully innocent businesses into paying what amounts to protection money.

**Make trolls explain their claims:** Require patent owners to explain in detail the basis for the alleged infringement when they file a complaint. Current law does not require that a patent holder explain how a patent is infringed, or even identify the product involved, which makes it nearly impossible someone who has been sued to evaluate the case and decide how to proceed.

**Protect innocent customers:** Ensure that claims between a patent owner and a manufacturer proceed before claims between the patent owner and the manufacturer's end users. Under current law, anyone can be sued for infringement for simply using a product, system or method. We don't want to change that. Instead, it simply makes sense for cases against end users to be stayed in favor of cases involving the manufacturer.

**Make patent litigation more efficient:** Make patent litigation more efficient so that weak cases can be dismissed before expensive discovery. Requiring patentees to explain and judges to decide what a patent means at the beginning of a case—the Markman hearing—narrows the case to the actual legal issues in question, drives early resolutions and avoids unnecessary and expensive discovery.

**Stop discovery abuses:** Require trolls to pay for the discovery they request beyond core documents so that they cannot run up costs just to force a settlement. Since trolls don't actually make or create anything, they have few documents to produce and no incentive to be reasonable in their discovery requests. Making trolls responsible for the costs of their discovery requests that go beyond the core documents needed to decide most patent issues will stop unreasonable demands made for negotiation leverage.

**Make abusive trolls pay:** Require that a losing party who brings a frivolous case pay the other side's attorney's fees—and make sure the troll can pay. Trolls currently have few barriers to litigation with no significant costs. A stronger presumptive fee-shifting statute and a mechanism to ensure court ordered fee shifting is enforceable will deter nuisance suits.

**Provide less expensive alternatives:** Maintain and improve administrative alternatives to litigation. Ensuring access to efficient and fair mechanisms to re-examine questionable patents will reduce litigation abuses and strengthen the patent system.

To be clear, validly issued patents warrant full protection to spur American innovation and ensure that U.S. businesses thrive in increasingly competitive marketplaces at home and abroad. Our concerns are with patent trolls who have no interest in producing any goods or services, have not put the sweat equity into the innovations they purport to protect, and simply wish to sue or otherwise coerce payments from real estate and other companies. The reforms we suggest above would not have a chilling effect on inventors who legitimately seek to protect their hard-earned intellectual property. Our recommendations would provide the U.S. real estate sector with the freedom it needs to operate within a rebounding economy.

We look forward to working with you as patent reform legislation moves through your Committee and the full Senate.

Sincerely,



Chris Polychron  
2015 President, National Association of REALTORS®

cc: U.S. Senate Committee on the Judiciary



Statement of the  
**National Retail Federation**  
**National Council of Chain Restaurants**  
and  
**Shop.org**

submitted to the

**U.S. Senate**  
**Committee on Judiciary**

for its hearing on  
**"The Impact of Abusive Patent Litigation Practices on the American Economy"**  
held on

March 18, 2015

**David French**  
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### **Introduction**

Chairman Grassley, Ranking Member Leahy, and members of the Senate Judiciary Committee, on behalf of the National Retail Federation (NRF) and its communities, the National Council of Chain Restaurants and Shop.org, I appreciate the opportunity to submit this written statement to the Committee in connection with its hearing entitled, "The Impact of Abusive Patent Litigation Practices on the American Economy," held on March 18, 2015.

NRF is the world's largest retail trade association, representing discount and department stores; home goods and specialty stores; Main Street merchants; grocers; wholesalers; chain restaurants; and Internet retailers from the United States and more than 45 countries. Retail is the nation's largest private sector employer, supporting one in four U.S. jobs and 42 million working Americans. Retail contributes \$2.6 trillion to annual GDP and is a daily barometer for the nation's economy. Retailers create opportunities for life-long careers, strengthen communities, and play a critical role in driving innovation.

### **Retailers are Significantly Impacted by Abusive Patent Litigation Practices**

Members of the National Retail Federation appreciate the attention the Committee is paying to the issue of abusive patent litigation practices and their harmful effect on competitiveness and innovation. Many retailers are using capital resources to settle with or fight patent trolls' infringement claims that they would otherwise use to invest in their businesses, engage in their communities, and create jobs.

Retail, at its core, is a highly competitive industry, and many retailers are using cutting-edge innovative technology, especially in online and mobile retailing, to expand and grow their businesses. Patent trolls, who are not investing in technological innovation, providing jobs or giving back to their communities, employ tactics that target retailers and cut at the heart of this growth and ingenuity.

In recent years, hundreds of retailers have contacted NRF about this issue because they have been, or are currently, the target of patent trolls' abusive behavior. The threat typically comes from firms whose business model is buying obscure patents that are about to expire and then either licensing the patents to retailers through the threat of litigation or filing lawsuits in an effort to force a settlement. Often retailers will choose to pay the licensing fee because patent litigation is prohibitively expensive.

Patent trolls employ a strategy that focuses on businesses such as retailers and restaurants because businesses that "use" technology, but don't manufacture it, are more numerous. One manufacturer or vendor may supply a product or service to thousands of retail end users. Thus, there are many more entities from which to demand a royalty. End user retailers are also easy prey because they lack the legal resources and in-house expertise to fight complex patent infringement claims. Compared to high tech companies, retailers typically operate on thin profit margins. Patent trolls, knowing that retailers lack technical expertise; that retail stores operate on thin margins; and that patent litigation is exorbitantly expensive, will often price a settlement demand (which may still be in the millions) below the cost of litigating, effectively blackmailing a retailer into settlement.

In 2012, patent trolls sued more non-tech Main Street companies than tech companies.<sup>1</sup> In 2013, the number of patent cases filed continued to grow rapidly and increased by 25%.<sup>2</sup> On April 23, 2014, more new patent lawsuits were filed on a single day than on any other day in at least the last 14 years.<sup>3</sup> And so far in 2015, patent lawsuit filing has surged. Four hundred ninety-nine patent litigation cases were filed in February, marking the third straight month-on-month increase in patent lawsuit filing.<sup>4</sup> This is an abuse of the system. The time is now to take back the patent litigation system and return it to its original purpose: fostering innovation and investment that benefits the entire economy.

#### **Legislation is Needed to Protect Retailers from Patent Troll Abuses and Frivolous Lawsuits**

Legislation is necessary to curb patent trolls' abusive practices and protect retailers and other end users of technology from frivolous patent infringement lawsuits. In order for patent reform legislation to be effective, it must include several key provisions: to reform abusive demand letters; to make trolls explain their claims; to protect innocent customers; to make patent litigation more efficient; to stop discovery abuses; to make abusive trolls pay; and to provide less expensive alternatives. The incorporation of these key provisions will help ensure that Congress passes strong, common sense patent reform.

##### *Reform Abusive Demand Letters*

Patent trolls often assert infringement claims by sending reams of vague, misleading, or deceptive letters, targeting small and medium-sized businesses. Rather than taking the time and expense to appropriately file a proper lawsuit, patent trolls use these so-called "demand letters" to coerce these businesses into immediately purchasing expensive licenses of uncertain value or face the threat of protracted and costly patent litigation.

Demand letters, often sent to hundreds of businesses at once, are typically mass-produced form letters that have few or no facts about what alleged infringement has supposedly occurred. Not only do the demand letters fail to include information about the patent that is allegedly being infringed, but they also fail to disclose what the business being sued has done to infringe it. The only information that patent trolls strive to make clear in their demand letters is the threat of a costly lawsuit. While most recipients of patent troll demand letters are likely not infringing patent rights, they will often pay what amounts to extortion to the troll through expensive attorney fees for legal advice, exorbitant litigation costs in court, or hefty settlement sums because it is a practical business decision. It is more cost effective to settle rather than fight a

<sup>1</sup> Colleen Chien, "Patent Trolls by the Numbers," Patently-O, March 14, 2013, <http://www.patentlyo.com/patent/2013/03/chien-patent-trolls.html>

<sup>2</sup> Price Waterhouse Coopers, "2014 Patent Litigation Study," July 2014, <http://www.pwc.com/us/en/forensic-services/publications/2014-patent-litigation-study.jhtml>

<sup>3</sup> Ryan Davis, "Draft Patent Troll Bill Spurs Huge Spike in New Suits," Law360, May 2, 2014, <http://www.law360.com/articles/533893/draft-patent-troll-bill-spurs-huge-spike-in-new-suits>

<sup>4</sup> Michael Loney, "US Patent Litigation Surges in February, Driven by Software Cases," Managing Intellectual Property, March 10, 2015, <http://www.managingip.com/Article/3434536/US-patent-litigation-surges-in-February-driven-by-software-cases.html>

bogus claim. Retailers use not only capital resources to investigate and subsequently fight or settle these claims, but human resources are also diverted to address patent infringement claims. These are resources that retailers would prefer to invest in their businesses, engage in their communities, and create jobs.

Patent trolls target small businesses with demand letters that are usually not related to their primary business. Rather, the troll is often accusing retailers and other Main Street businesses of infringement for using a commercial product such as a printer, a Wi-Fi router, a machine tool, a piece of hardware, or a type of internet technology the business purchases from a commercial vendor to use in its own operations. Patent trolls' claims not only effect e-commerce and mobile retailing, but also the operations of traditional "brick and mortar" retail stores. These types of claims purport to cover the printing of receipts at cash registers, the sale of gift cards, and the connection of any device (such as a computer or printer) to an Ethernet network. Recently, patent trolls have sent demand letters to dozens of Main Street businesses about technology related to transportation, cargo shipment, and package tracking and delivery.

For new legislation to be effective, it must require that demand letters be more specific and transparent. Demand Letters must reveal the actual identity of the party with the financial interest who is making the demand, not just a web of shell companies. Any party with an ultimate financial interest in any recovery, excluding those owning less than ten percent of the voting shares of a publicly traded corporation, must be disclosed. Moreover, the letter must include the patent numbers of the allegedly infringed patents; the model numbers or trade names of accused products or services; the factual basis for the infringement claim; and whether the patent has been the subject of a RAND declaration or commitment to any standard setting organization.

#### *Make Patent Trolls Explain Their Claims*

Patent trolls, which produce no products or services themselves and instead only threaten and sue productive businesses that do, often file tens to hundreds of cookie-cutter lawsuits that include no real details. When a patent troll files a lawsuit today against a defendant alleging patent infringement, the patent troll does not have to explain in the lawsuit how their patent is supposedly infringed. Additionally, the patent troll is not required to identify the actual product that is allegedly committing patent infringement or how it infringes on the patent.

When a patent troll files an infringement claim that contains no details against a legitimate business, that business is left completely in the dark as to its actions or products that are allegedly infringing a patent. As a result, businesses cannot prepare an answer to the claim, design a defense strategy, or even figure out which documents need to be collected and produced. Patent trolls exploit this known inequity in the patent litigation system to target retailers, restaurants, and other Main Street businesses, making the discovery process an unfettered and expensive fishing expedition for some unknown and undefined alleged infringement.

Retailers support legislation that requires patent infringement claims include a clear statement containing basic information such as which patent has been infringed and what the

defendant has to do to allegedly infringe it. Moreover, patent lawsuits must identify the model number of each accused product or process and each party with any financial interest in any recovery, excluding those owning less than ten percent of the voting shares of a publicly traded corporation. Making patent trolls explain their claims is the only way to level the playing field and defend small American businesses from patent troll's extortive schemes.

#### *Protect Innocent Customers*

Traditionally, discussions about patent litigation focused on two parties—a patent holder and the manufacturer of a product that allegedly infringes the patent holder's patent. Under current law a third party, or the "end user," can also be sued for patent infringement simply for using a product in their day-to-day business. Increasingly, patent trolls are targeting end users, including retailers of all sizes, by suing them for patent infringement or demanding extortionate settlement payments.

Patent trolls target end users simply for their use of everyday commercial off-the-shelf products. In the real world, these targets have included retailers that offer their customers free Wi-Fi; restaurants that provide nutrition calculators to their customers; retailers that put a clickable shopping cart icon on their websites; grocers that use aisle scanners to keep track of where food is shelved in their stores; and retailers who link to their website within their mobile app. Patent trolls target businesses on Main Street, ranging from retail to restaurants to hotels to non-profits to realtors to homebuilders, because there are so many more end users than manufacturers.

Most end users operate in non-technical industries and therefore lack technical expertise with the patented subject matter because the patented technology is merely ancillary to their businesses, such as patented products like Wi-Fi routers. It follows that end users also lack familiarity with patent litigation and are not in an advantageous position to judge the merits of a patent troll's threat or lawsuit. All of these factors set end users apart from patentees and product manufacturers and make them particularly attractive victims to patent trolls who are looking for quick settlements. End users are more likely to avoid the costs and risk of litigation by settling claims, even if they are meritless.

For new legislation to be effective, Congress should ensure that when a product manufacturer and end user are both involved in infringement actions involving the same products and patents, the claims between the patent owner and manufacturer will proceed first—and the claims between the patent owner and the manufacturer's end users will be put on hold until the manufacturer case is resolved.

#### *Make Patent Litigation More Efficient*

In a patent or patent application, the invention for which the U.S. Patent and Trademark Office has granted permission is clearly defined. Conversely, claims on patents, particularly technology products, are overly broad and not clearly defined. With such a wide scope, patent litigation claims are drawn out and disputed while trying to determine the meaning behind the claim, significantly increasing legal costs.

Overly broad and unclear patent claims that are stretched far beyond the original invention lead to an extraordinarily expensive and inefficient discovery process for the victims of patent trolls. Locating, reviewing, and producing huge quantities of documents costs thousands, if not millions, of dollars. Because trolls have no operating business of their own and thus very few documents, they face no corresponding burden in litigation. Trolls use this to their advantage by attempting to make litigation so expensive that their victims just settle. Because trolls specialize in picking on smaller companies, this is usually a very successful tactic for trolls as their victims lack the resources to fight the claim in court, even when they have a valid case.

One way to help companies fight patent trolls is to delay discovery until the judge rules on the appropriate meaning of key words and phrases in these unclear and poorly defined patent claims, known as “Markman,” or a “claim construction ruling.” In many cases, Markman quickly resolves the dispute by establishing that the defendant does or does not infringe. Delaying discovery until after this point will save many innocent defendants from huge and unnecessary expense.

Requiring that patent trolls explain and that judges decide what a patent means at the outset of the case will allow patent litigation to be more efficient and remove some of the asymmetry from the system. Early Markman rulings will drive early resolutions, preserve scarce judicial resources, and avoid unnecessary and expensive discovery for the parties involved. This way, a patent troll will be forced to withdraw its case if its erroneous definition is rejected by the court. In the event that a patent troll’s definition is accepted by the court, an early Markman decision will allow courts to consider summary judgment motions, promoting settlement. A more efficient patent litigation process will greatly reduce the time and money wasted on discovery and litigation for baseless claims, while still preserving patent holders’ rights to pursue legitimate cases.

#### *Stop Discovery Abuses*

Patent litigation is notoriously expensive. A large portion of that expense comes from the costly discovery process when parties must disclose all of the relevant facts and documents to the other side prior to trial. In patent cases, only a small number of the thousands of produced documents are ever even relevant to liability determinations and most of those are core documents. While defendants are forced to waste significant resources producing non-core documents, patent trolls are largely unaffected by the cost and burden of discovery. Due to the fact that patent trolls, as Non-Practicing Entities (NPEs), do not produce or create goods or services, they therefore possess very few core and non-core documents. NPEs continue to play a growing role in patent litigation. In 2013, NPEs filed 67% of all new patent infringement cases, compared to 28% in 2009.<sup>5</sup> This inequity in the discovery process enables patent trolls to employ one of their most abusive tactics: seeking expansive discovery to impose significant expenses on defendants as early as possible in the legal process to force quick cash settlements.

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<sup>5</sup> Price Waterhouse Coopers, “2014 Patent Litigation Study,” July 2014, <http://www.pwc.com/us/en/forensic-services/publications/2014-patent-litigation-study.jhtml>

Courts have the power to limit excessive and abusive discovery requests by allowing only discovery that is proportional to the value of the case. Requiring all parties to pay for the discovery they request beyond core documents in no way interferes with a court's discretion. The court will still set the schedule, decide what motions to follow, and make all decisions regarding which documents should be subject to discovery. Judges can retain discretion to waive the requirement of paying for requested discovery when the interest of justice requires it. A discovery cost-shifting provision does no more than incentivize both parties to be judicious in their discovery requests by only asking for information that is useful, relevant, and necessary.

For new legislation to be effective, it must require that the party seeking discovery beyond core documents pays for any associated costs, including reasonable attorney's fees. This will stop unreasonable patent troll demands and make litigation more efficient. The involved parties would still be able to obtain the documents they need, but trolls will not be able to abuse the discovery process to force innocent parties to pay settlements just to avoid crushing legal fees. Altering the incentive of the parties in this way will actually lessen the number of discovery disputes and free judges to focus on more fruitful and substantive aspects of case management and dispute resolution.

#### *Make Abusive Trolls Pay*

Patent trolls are often just shell companies with no assets established for the sole purpose of being immune from judgment if faced with sanctions or fee demands by a court. This setup enables patent trolls to often file dozens, and in some cases, hundreds of lawsuits in a single day even though they likely know the cases have little or no merit. Even though this behavior wastes the court's time and costs the businesses they sue thousands in legal fees, the patent trolls do not care because there is no penalty for this behavior under current law.

Trolls leverage the significant expense of patent litigation to force defendants to settle to avoid the millions of dollars required to defend a suit. Even successfully defending against a meritless patent suit can cost over \$1 million in legal fees for a small business and an average of over \$6 million for a larger company. Under current law, patent trolls face no similar costs or downside risk. Given how costly it is to go to court, many defendants, even those who know they have not committed any patent infringement, therefore simply choose to settle the case and pay the patent troll off. It is the inequities in current law that force legitimate businesses to choose the lesser of two evils and pay the trolls that make the patent troll business model profitable and attractive. Winning parties in truly frivolous patent cases should be awarded reasonable fees and expenses by the losing party. This solution would make the patent troll business model less attractive and less profitable.

#### *Provide Less Expensive Alternatives*

Patents have been an important part of the American economy and legal system since the country was founded. The framers of the Constitution thought it so important to protect the rights of inventors that they gave Congress the power to create the patent system in order "to promote the progress of science and useful arts." The system has served us well, and set the stage for the innovation that has made our country successful and innovative for more than two centuries.

Unfortunately, in the past decades individuals and companies have found ways to exploit the patent system, leeching money from it without contributing any innovation or invention whatsoever. Patent trolls acquire vague or overly broad patents not to invent or sell products but to sue and shake down American job creators. It would be prohibitively expensive and practically impossible for a productive company to determine whether it may be infringing every one of the one million active U.S. patents. As a result, companies are hit with lawsuits covering the fundamental backbone technologies that enable the e-commerce we all take for granted—such as transacting business over the Internet, displaying product images, or the icons we click on web pages.

The granting of poor quality patents has fueled patent trolls and has led to numerous lawsuits and demands for royalty payments. Patent trolls have few assets, other than the patents themselves, sustaining themselves through litigation and sucking millions of dollars out of the pockets of consumers and the businesses they target each year.

Congress needs to protect and improve existing administrative alternatives at the U.S. Patent and Trademark Office (PTO) as a less expensive alternative to litigation for businesses to combat patent trolls. Any reforms made by Congress to the patent litigation system must, minimally, preserve, if not strengthen, the PTO's existing procedures for preventing litigation abuses.

### **Conclusion**

The exorbitant costs associated with seeing a court case through to final adjudication are startling for retailers. We have heard from our members that they spend as much as one million dollars or more annually on patent troll-related expenses and settlement agreements. These expenditures and the employee hours diverted to fighting patent trolls are precious capital resources that retailers would rather reinvest in their businesses. Because many retailers do not have these types of resources to redirect to fight patent trolls, they often will settle the claim when they receive their first demand letter to make the problem go away.

Addressing this abusive and growing patent litigation problem with common sense reform will help release retailers from the controlling grip on their industry that patent trolls currently enjoy. Because the retail industry contributes \$2.6 trillion to our nation's annual GDP, removing or even loosening this grip on retailers will allow innovation and growth to flourish, and undoubtedly benefit the overall U.S. economy.

Multi-faceted patent litigation reform needs to include provisions that reform abusive demand letters; make trolls explain their claims; protect innocent customers; make patent litigation more efficient; stop discovery abuses; make abusive trolls pay; and provide less expensive alternatives to costly litigation. Effective legislation is about stopping the lucrative business model used by patent trolls of asserting meritless patents and getting shakedown settlements. Only Congress can pass reform needed to put them out of business for good.

We appreciate your leadership, and NRF looks forward to working with you to address this growing and costly problem.

**Prepared Testimony of  
David F. Snively, General Counsel, Monsanto  
Senate Committee on the Judiciary Hearing on  
“The Impact of Abusive Patent Litigation Practices on the American Economy.”  
March 18, 2015**

Chairman Grassley, Ranking Member Leahy, and Members of the Senate Committee on the Judiciary:

Thank you for affording Monsanto the opportunity to share its views on the topic of “The Impact of Abusive Patent Litigation Practices on the American Economy.” Given the importance of a strong patent system to American agriculture and our economy as a whole, we respectfully request the Committee proceed with caution and strive for balance as the legislative process continues.

Monsanto is an innovation company with a total focus on agriculture. We develop row crop and vegetable seeds, biotechnology traits, and crop protection chemicals that help farmers around the world produce more while reducing their input costs and conserving invaluable natural resources such as water. To do so, we invest over \$1.5 billion annually – over \$4 million per day - in research and development to maximize the potential of seeds using conventional and advanced breeding techniques and biotechnology. In fact, among our more than 1,600 Iowa employees are researchers who are working to develop new germplasm and beneficial traits for corn and other crops at facilities in Ankeny, Dayton, Huxley, Independence, and Williamsburg. Additionally, as we invest in research and development we partner with universities, including Iowa State University.

We also are making substantial investments in areas like digital agriculture and the use of microbes that have the potential to help farmers enjoy still higher yields in an even more sustainable fashion. We recently acquired The Climate Corporation, a San Francisco-based technology services company, and through it are offering uniquely powerful software, hardware, and insurance solutions that help farmers improve profitability by making better informed operating and financing decisions.

Put simply, intellectual property and patents are the lifeblood of our company, as they are for many American businesses and sectors of the U.S. economy. Enforceable patents are necessary to ensure that we are paid for our products and for the significant investments in developing new products for farmers. Without enforceable patents, there would be little incentive for privately-owned companies to pursue and reinvest in innovation.

Monsanto has been exposed to the full spectrum of intellectual property litigation – as a defendant against our competitors, defending against patent trolls, and as a plaintiff protecting our own patents. As such, we have a unique and balanced perspective on the current debate surrounding abusive patent litigation practices. In fact, just two years ago the United States Supreme Court upheld our intellectual property practices to balance innovation within the present legislative framework. In that case, we were joined by a vast coalition of universities, pharmaceutical and academic interests to maintain a functional system.

We operate on a global basis and know that many nations watch the United States for leadership in economic and intellectual property issues. If our Nation were to make a radical shift in its intellectual property laws, it would allow free access to those who do not innovate to the detriment of America's greatest asset – its intellectual capital; the immense value of this asset is why others seek to steal or obtain access to inventions without investment. Jobs and the free enterprise of our society depend upon balance, investment, and some practical measure of predictable protection.

There is general agreement that patent litigation that involves the use - or threatened use - of court proceedings to press unfounded or dubious patent claims or defenses for the purpose of coercing settlements driven solely by the desire to avoid litigation costs is abusive and should be curbed. However, it must be recognized that such practices can be perpetrated by any litigant who is so inclined. While the effectiveness of the tactic will vary based upon the parties' circumstances and means, the identification of the abuser turns not on the business model of the party, but rather on how he or she behaves. Accordingly, as U.S. Patent and Trademark Office ("USPTO") Director Michelle Lee noted in testimony during her December confirmation hearing before this Committee, Congress should "focus on abusive behavior" as it addresses patent litigation reform issues.

The distinction between conduct and business model is important to note because the vast majority of patent litigation in the federal courts is not abusive litigation brought by "patent trolls" and entities who do not manufacture products themselves nevertheless often make great contributions to innovation and the U.S. economy. This is particularly true in agriculture where new technologies are broadly licensed by innovators like Monsanto for incorporation into various seeds, allowing farmers the opportunity to choose from a variety of germplasm and trait options. However, the broad changes in law under consideration by the Congress, if enacted, will apply to all patent owners in all industries.

If Congress goes too far in its efforts to address abusive patent litigation practices, it will create a new, even more complex patent enforcement regime that will make litigation and licensing more protracted and costly for patent owners. In trying to prevent some from gaming the litigation system in enforcing their patents, we will create new opportunities for infringers to game the system to avoid appropriately rewarding innovators. Innovators - including startups, universities, biotechnology companies, small inventors, and those who invest in all such endeavors - will be left with a system that, by making patent enforcement more difficult, diminishes the value of patents, discourages licensing, and makes patent infringement less risky.

Patent litigation abuse is not a new challenge for the patent system, the courts, or to this Committee. With the enactment of the Leahy-Smith America Invents Act ("AIA"), Congress has already provided courts and the USPTO with additional tools to address the problem. Steps have been taken recently using those tools to address abusive patent litigation that have undeniably changed the landscape:

- Judges are now granting 80% of all motions to stay patent litigation if the patent is also involved in a parallel Inter Partes Review (“IPR”) or Covered Business Method (“CBM”) proceeding. In just the two years since the USPTO implemented the new AIA procedures, petitioners have challenged claims of more than 2,300 patents, and, in concluded proceedings, fully 75% of the involved claims have been found unpatentable, and only about 20% of patents have survived the proceeding with no changes.
- The Judicial Branch has adopted changes to the Federal Rules of Civil Procedure that will ensure that patent cases meet the heightened pleading standards required of all other federal cases and ensure that discovery in patent litigation will be “proportional to the needs of the case,” reducing the ability of patent plaintiffs to use unnecessary discovery requests to drive up costs for defendants in an effort to force unwarranted settlements.
- The Federal Trade Commission (“FTC”) and state attorneys general are aggressively using their authority to combat abusive patent demand letters and protect small businesses and consumers from unscrupulous practices.

The U.S. Supreme Court has issued opinions in six patent cases that make it easier to defeat patents and have fee-shifting awarded in appropriate cases; narrow the scope of patentability; and discourage the pursuit of meritless claims. These cases involved, among other issues, the scope of patentability and fee-shifting. In part as a result of these rulings and other developments, new patent lawsuit filings have decreased significantly – 18 percent in one year, from 2013 to 2014.

This is not to say that everything that can be done to stop abusive patent litigation practices has been done. But, all of these considerations must be taken into account and we must proceed cautiously as we consider changes to our patent system, long considered the world’s “gold standard.” They also warrant narrowly-drawn and balanced legislation that clearly targets the practices of those parties abusing the system while avoiding disruptions to licensing and maintaining the right of legitimate patent holders to assert their intellectual property rights in court.

Monsanto has specific concerns with some of the provisions being discussed. For instance, we believe the imposition of a *de facto* prohibition on all non-merits discovery prior to the Markman hearing will significantly delay the resolution of cases and increase costs and risk for patent owners. It simply does not make sense to impose such a regime on all patent owners as a matter of course and deny judges the ability to grant relief in appropriate cases.

Additionally, it is important to ensure that any joinder provisions are workable. They should not unfairly force those with rights to a patent to disavow their interest or pay for the litigation costs of other parties. For example, one patent may be licensed for use by different parties on different crops. It would not make sense for someone with an interest in a patent for corn to be forced to disavow that interest to avoid paying for the litigation costs involving another, unrelated party’s interest to use the same patent for rice.

When it comes to abusive demand letters, Monsanto supports the approach that is taken in 2014 by the so-called TROL Act, which was reported by the House Energy and Commerce Committee's Subcommittee on Commerce, Manufacturing and Trade and has also been included in the STRONG Patents Act of 2015. The TROL Act clearly defines abusive behavior, clarifying that the FTC has authority to punish unscrupulous actors, and preempts state legislation on demand letters to prevent companies from having to comply with a patchwork of state regulatory regimes in this complex area.

While we agree that Form 18 in the Appendix Federal Rule of Civil Procedure should be discarded in favor of heightened pleadings, we believe that some of the provisions under consideration are overly prescriptive and will create opportunities for defendants to game the system with motions practice on whether a complaint is sufficient, increasing costs and delays. For instance, provisions that require certain information to be included in a complaint either "if known" or if the information could have been known with "reasonable diligence" will create opportunities for side litigation and motions practice on whether and when the plaintiff knew a fact, or whether the defendant performed a sufficiently diligent search to uncover a fact, and therefore whether the case should proceed.

As Congress considers the appropriate legislative response to abusive litigation practices, we believe it should avail itself of the opportunity to strengthen our patent system. Specifically, we believe it should consider some of the provisions from the STRONG Patents Act of 2015. Particularly important provisions include those clarifying and strengthening Post Grant Proceedings and eliminating USPTO fee diversion.

Thank you for the opportunity to share our perspective on these important issues. We look forward to working with you further.

# RAYGUN

DES MOINES . IOWA CITY . KANSAS CITY

Dear Senator Grassley,

Thank you for all your work on the issue of patent trolls. As a small company that deals regularly with intellectual property, I think patent trolls are a drag on the economy and innovation. I support reforms to our legal system to make patent trolling more difficult.

Let me know if you have any questions, and thanks for your time.

Sincerely,



Mike Draper  
Owner/Founder  
RAYGUN  
400 East Locust  
Des Moines, IA 50309  
515 288 1323  
[mike@raygunsite.com](mailto:mike@raygunsite.com)

**Testimony for the Record  
Senate Judiciary Hearing**

**“The Impact of Abusive Patent Litigation Practices on the American Economy”**

**March 18, 2015**

On behalf of the thousands of financial institutions of all sizes and charters represented by the undersigned trade associations, we are writing to commend you for your leadership in holding a hearing entitled, “The Impact of Abusive Patent Litigation Practices on the American Economy.” We respectfully request that this testimony be included as part of the hearing record.

The financial services industry, like many other sectors of the economy, has faced deceptive demand letters and frivolous litigation from patent trolls asserting low-quality patents.

We have serious concerns about the current patent litigation environment as well as the quality of patents granted by the Patent and Trademark Office (PTO). In addition, patent trolls continue to assert low-quality patents through vaguely-worded demand letters with the full knowledge that their targets, our members, are more likely to pay unnecessary licensing agreements than engage in lengthy, costly litigation. The deadweight cost of compliance with demand letters and the threat of litigation are ultimately born by our customers.

To that end, the financial services industry has coalesced around a set of key principles needed to address this critical issue. These principles fall into three distinct yet interrelated baskets that, if enacted, would improve the patent system, promote innovation and discourage the assertion of low-quality patents as a legitimate business model.

- 1) Efficiency of the Litigation Process: improvements need to be made to make the cost and burdens of patent litigation equitable and more efficient.
- 2) Enhanced Transparency: abuse of the patent system through the use of vaguely-worded demand letters must be ended by requiring such letters to provide more details about the patent and who claims to assert it.
- 3) Patent quality: improvements are needed in the post-grant review of patents such as making the Covered Business Method (CBM) permanent and more useable for smaller entities.

Collectively, these principles will go a long way in protecting the financial services sector and the millions of customers our members interact with on a daily basis from the harm wrought by patent trolls. As the issue of patent reform unfolds in the 114<sup>th</sup> Congress, we look forward to working with you to advance these core principles.

The following summarizes a set of principles that the financial services sector is advocating for inclusion in any patent reform legislation during the 114<sup>th</sup> Congress:

**LITIGATION EFFICIENCY**

- **Contribution Doctrine:** Patent trolls target financial services companies as end-users of a product or service, leaving our members vulnerable and liable for products and services outside of their control. Adding a right of contribution to the patent law would enable a more equitable distribution of liability between end users and vendors. Under common law and certain federal statutes, there is right of contribution (e.g., a tortfeasor, or defendant, has a right to seek contribution from other joint tortfeasors where one tortfeasor has paid more than its fair share of damages to the plaintiff). In the patent context, a right of contribution could arise where a Patent Assertion Entity (PAE) sues the end user of a system, not the upstream supplier of components of the system. Unfortunately, no right of contribution exists under the patent law and state law claims for contribution are preempted.
- **End-User Protections:** End users should be protected from patent troll lawsuits based on infringements by manufacturers and producers. Trolls should be required to sue the party that is actually responsible for infringement, and end users should be protected by having their cases consistently stayed when the manufacturer is best positioned to fight the patent troll. Definitions should ensure that the stay adequately shields business from all corners of “Main Street” America, including financial services.
- **Limitation to Core Discovery Documents:** Each party is to pay for the discovery it requests beyond “core” documents. Any discovery requested beyond the “core” documents is at the expense of the party requesting such discovery.

**ENHANCED TRANSPARENCY**

- **Demand Letter Reform:** Vaguely-worded demand letters have been used by patent trolls to entice licensing agreements and the payment of royalties even though the facts around infringement may not be compelling. Demand letters should contain greater specificity. This enhanced transparency will help curb abusive lawsuits. Further, demand letters should be filed with regulators and recorded in a public, searchable database. In addition, a demand letter should be sufficient to enable a covered business method review, and State laws that have been enacted to curb abusive demand letters by patent trolls should be viewed as a complement to any federal protections, and not be preempted.
- **Enhanced Pleading Standards:** Complaints for patent infringement should specifically identify the accused product, the asserted claims and factual basis for infringement.
- **Close Marking Loophole:** Under current law, a company practicing a patent can only collect past damages if it marks its products, meaning it labels the product as a patented

product. Conversely, a patent troll is entitled to past damages because they have nothing to mark. It is unfair that an entity that does not practice a patent is entitled to more damages than a company that actually employs people and contributes to the economy by selling products and services. To fix this loophole and put operating companies and patent trolls on a level playing field, a plaintiff should only be able to collect damages from the date it provided notice of infringement. Marking a product should be considered adequate notice of infringement.

- Recordation of Patent Sales: Establish public record of patent sales, analogous to the sale of real estate. Each sales record should include: (1) Real Parties in Interest – clear identification of purchaser, parent companies of purchaser, as well as identification of companies and individuals that retain a financial interest in the patents; and (2) Purchase Price. P-patent brokers should have licensing and other oversight requirements to ensure that the market is a level playing field and brokers have the requisite expertise and adhere to ethical business practices. As part of the sales process, an objective, third-party valuation should be required. In addition, there should be a transaction fee to cover the costs associated with licensing brokers and maintaining public sales records.

#### **PATENT QUALITY**

- Permanent Covered Business Method program and Improvements to other Post-Grant programs: Post-grant review should be available to all practitioners including those who do not generally possess prior art in the form of patents and printed publications. Congress validated this assertion in the American Invents Act when they created the CBM program. Unfortunately, without intervening action, the CBM program will expire in 2020 once again leaving certain industries exposed to low quality business method patents. The CBM program should be made permanent as it has proven to be a successful low-cost alternative to litigation of covered business method patents. However, additional modifications should be made to inter partes review to ensure that it can be accessed by all practitioners using the very best prior art available. Safeguards should ensure that post-grant proceedings cannot be used to harass patent holders and not so restrictive as to protect low-quality patents from review.
- Language to make CBM Program permanent, include the ability for the PTO to waive or reduce the fee for small entities.
- Lift the prior art bar for inter partes and remove the estoppel bar.

Thank you again for your leadership on patent reform and for allowing us to submit testimony for the record. We look forward to working together on this important issue.

Sincerely,

American Bankers Association

American Insurance Association

The Clearing House

Credit Union National Association

The Financial Services Roundtable

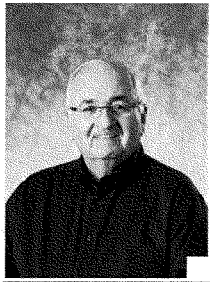
Independent Community Bankers of America

National Association of Federal Credit Unions

The National Association of Mutual Insurance Companies

## Stop patent trolls from preying on innovation

Jon Kinzenbaw 11:03 p.m. CDT March 15, 2015



2  
COMMENT EMAIL MORE

As a boy I could fix almost anything — and even make things better than new. In 1965 I put this skill to work when I opened a small welding shop in Ladora, where I began repairing tools and equipment.

Today that shop has become one of the largest agricultural equipment companies in America, employing nearly 1,000 people. This success happened by inventing and delivering better

equipment to America's farmers. Our innovations are protected with patents, and our employees, our dealers, and our customers benefit from this protection.

In agriculture, innovation fuels efficiency and creates opportunity. Patents promote and protect innovation, and the U.S. Patent Office and the courts work together to make sure patents are only given to true innovations.

In those early years, I saw the patent system work well. Patents covered equipment, and patent examiners and judges could easily decide if a product was innovative and deserved a patent. More recently, I have seen our patent system struggle to deal with new types of inventions, like software programs. As a result, thousands of patents have been awarded based on reviews that even the Patent Office has expressed doubts about.

I have also seen a new type of patent business, one that succeeds by taking money from innovative manufacturers. Some call these companies "patent assertion entities," and others call them "patent trolls." These companies do not make products or offer services. They make money by using questionable patents to threaten and sue operating companies like Kinze.

Trolls force businesses to make a difficult decision: righteously fight back but pay lawyers millions of dollars over several years, or pay hundreds of thousands of dollars as a "license" to make the troll go away. Kinze faced this situation in 2012 when we were sued by a company that owned patents titled "Electronic Proposal Preparation System" and "Electronic Proposal Preparation System for Selling Computer Equipment and Copying Systems." We managed to reach a solution that kept legal bills low while not giving in to demands.

Many companies are not as fortunate. There are thousands of patents for "processing data" or "distributing data." One patent owner has sued dozens of restaurant and hotel chains for infringing its patent on distributing menu data over a network. Another has sued restaurant chains for displaying nutrition information on digital signs and websites.

For our innovative company that believes in and relies on patents, the most troubling aspect of our lawsuit is the story these patents tell: that there may be separate "electronic proposal preparation system" patents related to buying land, buildings, lawn equipment, office supplies, shipping, data processing, and document storage — virtually any product or service one can imagine. And these patents that should never

have been issued are weapons when they are owned by patent trolls.

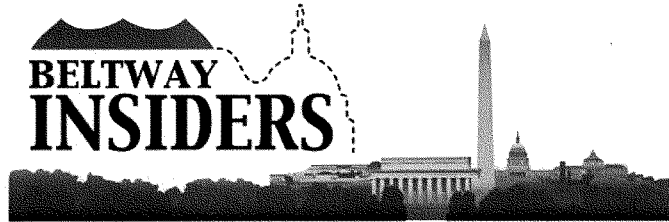
Fortunately Congress is considering legislation that could reduce abusive lawsuits and help eliminate low-quality patents. Sen. Chuck Grassley is a senior member of the committee that will develop these reforms, so we hope he is paying close attention to both the broken parts of the system which must be fixed, and the good parts of the system that should be left alone.

As one who owns and believes in patents (and has sued infringers), but has also experienced the system's failures, I am confident that Congress can strike the right balance. Legislation should:

- Require patent owners to spell out specific infringing activity in demand letters and lawsuit complaints;
- Reduce lawsuit costs by placing reasonable limits on the how much information must be exchanged by the parties;
- Require companies that abuse our court system to fix the damage they cause by paying the defendant's legal fees;
- Expand Patent Office authority to review previously issued patents.

Senator Grassley and Congress have an opportunity to right our previously great patent system by cleaning out poor patents and making it harder for patent trolls to abuse America's real innovators. Hopefully, when Congress is done, our patent system will once again be the great validator of inventions and the promoter of America's ingenuity.

**JON KINZENBAW** is president and CEO of Kinze Manufacturing in Williamsburg.  
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## The STRONG Patents Act Is a Death Squad for Innovation | Commentary

By Special to Roll Call  
Posted at 5 a.m. on March 17

By Charles Duan

When I was 7 years old, I found a wallet on the sidewalk on my way home from the park. My mother told me I had to return it to the lost and found. When I asked why I couldn't keep it, she responded, "Just because you happened to get it, doesn't mean it belongs to you."

A refresher in this lesson is in order for those supporting Sen. Chris Coons's, D-Del., STRONG Patents Act, a bill that eviscerates the new America Invents Act post-grant proceedings for reconsidering patents. Though the bill masquerades as "balanced reforms," it in fact is the opposite of reform, insulating owners of bad patents from challenges.

By all accounts, the new post-grant proceedings are a major improvement for a patent system plagued by bad patents that never should have been issued. Ordinary patent litigation is ineffective for dealing with this slew of bad patents partly because cases are decided by non-expert judges and juries. The new proceedings fix this by having skilled patent examiners decide whether patents were correctly issued.

The proceedings are also an order of magnitude cheaper than litigation, but they are by no means a walk in the park. The filing costs are more than \$20,000, attorney fees have been estimated at half a million, and an adverse decision carries preclusive legal ramifications for the patent challenger. So you can imagine that challengers only go after the most questionable patents. The data bears this out: 77 percent of patents sent through the process are fully revoked.

But a key, unexpected benefit of the America Invents Act is that it creates avenues for small entities to deal with problematic patents. Many people can't afford \$5 million litigation but can pool resources to bring an America Invents Act review proceeding. Groups such as the Electronic Frontier Foundation and Unified Patents have already coordinated such resource-pooling to take on patents on downloading Web pages or distributing podcasts. This is crowdsourcing the patent quality problem, something that the White House and others agree is a good thing.

So I am astonished that the STRONG Patents bill would undo these good things. Specifically, the bill does the following:

1. It cuts off almost the entire public from using the AIA procedures, and in particular those groups like EFF and Unified, allowing only those "charged with infringement" to use them.
2. It upends the rules for reviewing challenged patents, imposing a "presumption of validity" and then applying notoriously complex rules of patent interpretation rather than the much simpler rules the Patent Office has used for more than a century, thus unduly raising the costs.
3. It allows patent owners to freely move the goalposts by allowing them to change the text of the patents substantially,

and it gives patent owners (but not challengers) extra rounds of response filings.

4. It requires the Patent Office to allocate two panels of judges for every proceeding, doubling the number of people who need to learn the facts of the case and raising administrative costs to boot.

None of these "reforms" improve the quality of examination or effectiveness of the procedures. Instead, these proposals purely make the America Invents Act proceedings harder to use, regardless of whether the challenged patents are valid (as 77 percent apparently were). This effectively keeps bad patents alive and well, free to threaten the public and drag down the economy.

What is perhaps most disturbing is how the patent-insiders community, the strongest supporters of this new bill, perceive these America Invents Act proceedings. Former Chief Judge Randall Rader, notorious for his coziness with patent attorneys, claimed the high invalidation rate proved flaws in the post-grant proceedings, calling these proceedings a "death squad for patents."

Never mind that selection bias explains the high rate. The proceedings are not a death squad for patents any more than cardiologists are a "death squad for hearts" because most of their patients are diagnosed with heart disease. Expecting that a procedure intended for diseased patents should grant any large fraction of them a clean bill of health is just wishful thinking. Demanding legislation to hamper the procedure and change the results, though, is the patent special-interest community's bald attempt to protect patents they never should have received.

When I was seven, I picked up a wallet that wasn't given to me and had to give it back. If I received a patent that shouldn't have been given to me, I should give it back as well. So why do patent owners so fiercely resist this, demanding legislation to help them hold onto things not rightfully theirs? Whether it be narrow-mindedness, or delusion, or greed, the result comes at the expense of all of us.

*Charles Duan is director of the Patent Reform Project at Public Knowledge.*

## UNITED *for* PATENT REFORM

March 16, 2015

The Honorable Christopher Coons  
United States Senate  
127A Russell Senate Office Building  
Washington, DC 20510

Dear Senator Coons:

The undersigned members of United for Patent Reform (UPR) have formed a broad coalition of diverse American businesses to pursue comprehensive solutions to abusive patent litigation. We write this letter to express our concern that the recently introduced STRONG Patents Act of 2015 will undermine reforms enacted in 2011, distract Congress from addressing the urgent problems caused by patent trolls, and, in fact, will make it easier for trolls to bring frivolous litigation.

In 2011, after years of efforts, Congress brought new strength to our nation's patent system and new vigor to the Patent and Trademark Office's administration of that system when it passed the America Invents Act (AIA) with overwhelming bipartisan support. Among the most significant improvements made possible by the AIA was the creation of post-grant review procedures at the PTO. Now, the validity of claims can be challenged directly before the PTO, using the depth and breadth of the PTO's expertise in an efficient and cost-effective administrative proceeding. These streamlined procedures can—and do—eliminate, narrow, or clarify ambiguous or otherwise flawed patents, and have already proven to be highly effective weapons in the battle against the poor quality patents that are the delight of patent trolls.

Congress has successfully completed the hard work of updating and strengthening the PTO. The AIA was many years in the making, but the salutary effects of its enactment are finally being enjoyed across our economy. Now that the modernization of the PTO and its practices is done, Congress has turned its focus to the next step in protecting and improving our innovation economy—stopping abusive patent litigation in the federal courts. UPR welcomes these efforts—including those of Senators Leahy, Schumer, Grassley, and Cornyn—to address the entirely different, but dire, problem of patent trolls. As someone with strong interest and expertise in the U.S. patent system, UPR encourages your engagement on this issue as well. UPR cannot, however, support the STRONG Act.

The STRONG Act fails to address the critical problem of patent trolls. Instead, it makes drastic and unwarranted changes to the successful new post-grant administrative procedures created by the AIA. The STRONG Act—if adopted—would aid patent trolls by neutralizing some of the valuable tools Congress has created to challenge the poor quality patents on which trolls rely. By undermining these effective administrative procedures for challenging poor quality patents, the STRONG Act would be a significant step backwards for the U.S. patent system.

UPR supports legislation that addresses litigation abuse, takes back a patent system increasingly held hostage by patent trolls, and returns it to its original purpose: fostering innovation and investment that benefits the entire American economy. The provisions of the STRONG Act do not support that goal, and in fact, undermine patent reform in several critical ways. UPR expressly opposes the following provisions of the STRONG Act:

- Eliminating the BRI Standard: For over 90 years, the PTO has applied the “broadest reasonable interpretation” standard for claim construction at all stages of patent examination and reexamination to protect real innovation and to prevent needless litigation.<sup>1</sup> The STRONG Act will replace that time-honored and well-established standard with the one used during litigation. That litigation standard—crafted to protect patentees in a litigation environment where they can no longer amend their claims—is fundamentally incompatible with administrative proceedings where the patent owner faces a lower burden of proof and retains the ability to amend claims. UPR expressly opposes this change which will only perpetuate the vague and overly-broad patents often asserted by patent trolls.
- Allowing Amendments to Claims as a Matter of Right: The AIA allows patent owners to make a motion to amend their claims during an AIA proceeding, but wisely leaves the decision of whether a particular amendment is appropriate to the discretion of the PTO. The PTO has allowed claims to be amended during inter-parties review (IPR), and it is currently reviewing its regulations on when amendments should be allowed. The STRONG Act strips this discretion and allows amendments as a matter of right. This standard is unworkable within the limited time frame allowed by the AIA and the narrow issues presented to the PTO during an IPR. If enacted, the STRONG Act will allow trolls to game the system and change their litigation attacks mid-course.
- Raising the Challenger’s Burden of Proof: Under the STRONG Act, invalidating a patent claim in a post-grant procedure will require a challenger to overcome a presumption of validity and to prove invalidity by clear and convincing evidence instead of the current requirement of a preponderance of the evidence. This new higher standard—which would be inconsistent with the standard applied by the PTO in every other proceeding—will make it more difficult to successfully challenge bad patents and will not further the goal of improving patent quality. It would also take a standard meant to be used by judges to show deference to an administrative agency’s (the PTO’s) decisions and apply that standard to the agency itself, reflecting a clear misunderstanding of its purpose.

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<sup>1</sup> *In re Carr*, 297 F. 542, 544 (D.C. Cir. 1924) (“[W]e have uniformly ruled that claims will be given the broadest interpretation of which they reasonably are susceptible.”).

- Limiting Who Can Challenge Patent Claims Before the PTO: Under the STRONG Act, only parties who have been sued for patent infringement will be allowed to challenge patent claims before the PTO. This change lets trolls game who will be eligible to challenge their patents before the PTO. All members of the public are harmed by poor quality patents and should be permitted to challenge them before the PTO.
- Allowing the Patentee to Submit New Evidence: Under the STRONG Act, the patentee will be allowed a second bite at the apple by submitting new evidence on appeal during post-grant review that was not previously submitted to the PTO during the IPR or PGR. This change will only increase the cost and duration of the proceedings, which contradicts the goals of the AIA.

These provisions—by no means a comprehensive list of the problematic proposals in the STRONG Act to which we object—contradict UPR’s goal of enacting legislative reform that will reduce litigation abuses and strengthen the patent system by ensuring access to efficient and fair mechanisms to reexamine questionable patents. The new administrative proceedings created by Congress in the AIA have proven to be powerful and effective tools for achieving one of Congress’s top priorities—ensuring the quality of U.S. patents. The AIA gave the American public an efficient and cost-effective means of challenging the vague and overly broad patents that patent trolls assert in their lawsuits.

In addition to undermining those effective post-grant procedures at the PTO, the STRONG Act also undermines other protections against patent trolls. Among other concerns the bill raises, it would explicitly overturn the recent Supreme Court case in *Limelight Networks v. Akamai Technologies*, which held that a defendant cannot be liable for induced infringement when no one has directly infringed the patent. By eliminating this rule, the STRONG Act would allow trolls to sue companies that merely provide general purpose goods and services for actions allegedly taken by their customers, over whom the companies have no control. Similarly, the STRONG Act would upset settled case law and dramatically lower the standard for willful infringement from a finding of intentional conduct to simply bad faith. By making it easier for trolls to be awarded treble damages, the STRONG Act provides an economic incentive that will lead to an explosion of new willful infringement claims from patent troll. And while the STRONG Act includes provisions providing the FTC with authority to regulate bad faith assertions of patent infringement, those provisions do not address the abusive demand letters sent by patent trolls. The STRONG Act limits the FTC’s authority, prevents state attorneys general from protecting their citizens from abusive patent trolls, and creates numerous loopholes that will allow trolls to escape liability. These changes will aid, rather than prevent, the abusive litigation tactics favored by trolls.

The introduction of the STRONG Act—which negates many of the salutary changes the AIA made at the PTO and undermines other important protections—will only distract Congress from the real problem facing the U.S. patent system: abusive patent litigation by patent trolls. Rather than revisit the battles fought during the passage of the AIA, UPR urges Congress to develop reforms that return the American patent system to one that fosters entrepreneurial activity rather than abusive litigation.

Sincerely,

*4A's (American Association of Advertising Agencies)*

*Adobe Systems, Inc.*

*Amazon.com, Inc.*

*Alliance of Automobile Manufacturers*

*American Hotel & Lodging Association*

*Application Developers Alliance*

*Association of Global Automakers*

*Birch Studio Graphics*

*Callware Technologies*

*Capstone Photography*

*Carlson Rezidor Hotel Group*

*Carlson Wagonlit Travel*

*Cisco Systems, Inc.*

*Computer & Communications Industry Association*

*Dell Inc.*

*Electronic Transaction Association*

*FCA (Fiat Chrysler Automobiles)*

*Engine Advocacy*

*Food Marketing Institute*

*Goby LLC*

*Google Inc.*

*Greater New Britain Chamber of Commerce*

*Greater Providence Chamber of Commerce*

*Heirloom Foods*

*Homes Eyewear*

*HTC America, Inc.*

*The Internet Association*

*Intuit Inc.*

*JCPenney*

*The Latino Coalition*

*Listrak*

*Macy's*

*MPA-The Association of Magazine Media*

*National Association of Convenience Stores*

*National Association of Home Builders*

*National Association of Realtors*

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|---------------------------------------------------|------------------------------------------------------|
| <i>National Council of Chain Restaurants</i>      | <i>Retailers Association of Nevada</i>               |
| <i>National Grocers Association</i>               | <i>Rhode Island Retail Federation</i>                |
| <i>National Restaurant Association</i>            | <i>Sabre</i>                                         |
| <i>National Retail Federation</i>                 | <i>Salesforce.com Inc.</i>                           |
| <i>National Council of Chain Restaurants</i>      | <i>Samsung</i>                                       |
| <i>Net App</i>                                    | <i>SAS</i>                                           |
| <i>New York Association of Convenience Stores</i> | <i>Software and Information Industry Association</i> |
| <i>Newspaper Association of America</i>           | <i>South County Tourism Council (RI)</i>             |
| <i>Oracle Corporation</i>                         | <i>Starwood Hotels &amp; Resorts Worldwide, Inc.</i> |
| <i>R Street Institute</i>                         | <i>U.S. Travel Association</i>                       |
| <i>Rackspace</i>                                  | <i>Verizon Communications Inc.</i>                   |
| <i>Red Hat</i>                                    | <i>Virginia Retail Association</i>                   |
| <i>Reno-Sparks-Northern Nevada Chamber</i>        | <i>Vizio</i>                                         |
| <i>Retail Industry Leaders Association</i>        |                                                      |

## **Startup Investors Nationwide Support Broad Patent Reform**

17 March 2015

Dear Congress:

Each year, we invest hundreds of millions of dollars in software and information technology businesses and other emerging technologies. Together with other investors, we commit more than \$1 billion annually in angel and venture capital that ensures continuing growth of young, high-tech companies employing 1.4 million people. Collectively, we have invested in companies such as Netflix, Twitter, Facebook, Dropbox, Palantir, Kickstarter, and countless other technologies that power American businesses everywhere.

This investment has spurred a startup ecosystem that has created world-changing technologies, and is responsible for all net new job growth in the United States. Despite this, we find our portfolio companies facing a dangerous patent troll problem. When a troll sues, or even threatens, a small startup, the results can be disastrous. Many of us have seen young companies fail in the face of such threats. In fact, a recent survey found that 70% of VCs have portfolio companies that have received patent demands, the majority of which come from so-called patent trolls. This is not sustainable.

To promote continuing growth in our startup economy, we need comprehensive patent reform legislation that will provide small companies the tools to fight back against patent trolls and will curb the worst behavior of the most egregious actors. Specifically, legislation should:

- Increase transparency by requiring patent trolls to specify, in complaints and demand letters, which patent and what claims are infringed, specifically how the offending product or technology infringes, and who is the real owner of the patent(s) at issue.
- Limit the scope of expensive litigation discovery, which pushes companies to pay unjustified settlements priced cheaper than defending against spurious claims.
- Allow courts to use their discretion to require patent trolls to pay legal fees and other costs incurred by prevailing defendants.
- Protect end users of technology (e.g., wi-fi, printers and scanners, and APIs) from being liable for infringements by technology providers.

Many of our companies own patents, and we believe in a robust patent system. We do not want to undermine legitimate enforcement of properly-issued patents by responsible patent owners. Moreover, we are encouraged by recent changes to the system. However, tens of thousands of patents are still issued every year in the high-tech space alone, many of which will end up being exploited by trolls during their 20 years of life. Litigation by non-practice entities has increased tenfold in the last decade and only comprehensive legislation will effectively reverse that trend.

Our Constitution favored a patent system to incentivize innovation and benefit all Americans. Unfortunately that system has been hijacked by some intent on exploiting Patent Office weakness, and all too frequently it now hinders innovation and chills investment, harming the new companies it was designed to foster and imposing a patent troll tax on new technologies. We urge Congress to immediately pass comprehensive patent reform legislation that will restore balance to the system.

The undersigned:

Andrew Ackerman  
Managing Director, DreamIt NY

Steve Anderson  
Founder, Baseline Ventures

Michael Arrington  
Founder, TechCrunch & Partner, CrunchFund

Jack Balletto  
Founder, Sunrise Capital

Anamitra Banerji  
Partner, Foundation Capital

Luke Beatty  
Angel Investor

Thatcher Bell  
Managing Partner, CoVenture

Morgan Beller  
Partner, Andreessen Horowitz

Greg Bettinelli  
Partner, Upfront Ventures

Trevor Blackwell  
Co-Founder and Partner, Y Combinator

Zachary Bogue  
Managing Partner, Data Collective

Brady Bohrmann  
General Partner, Avalon Ventures

David Bradbury  
Vermont Center for Emerging Technologies

Bill Brady  
Vice Chairman, Credit Suisse

Mike Brown Jr.  
General Partner, Bowery Capital

John Burbank  
Founder, Passport Capital

David Lee  
General Partner, SV Angel

Greg Lee  
Venture Capitalist

John Lee  
Partner, SparkLabs Global Ventures

Peter Lee  
Managing Partner, Baroda Ventures

Mark Leslie  
Managing Director, Leslie Ventures

John Lilly  
Partner, Greylock Partners

Jessica Livingston  
Co-Founder, Y Combinator

Joe Lonsdale  
Co-Founder, Palantir

Trevor Loy  
Flywheel Ventures

Ralph Mack  
CEO, Mack Capital

John Malloy  
General Partner and Co-Founder,  
Blue Run Ventures

Chris Marks  
High Country Venture

Jim Marshall  
Managing Director, SVB

Tom Mawhinney  
General Partner, Icon Ventures

Matt McCall  
Pritzker Venture Capital Group

Jay McCarthy  
Partner, SparkLabs Global Ventures

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| John Buttrick<br>Partner, Union Square Ventures                         | Andrew McLaughlin<br>BetaWorks and Digg                               |
| Kellan Carter<br>Associate, Ignition Partners                           | Joe Medved<br>Partner, SoftBank Capital                               |
| Steve Case<br>Chairman and CEO, Revolution                              | Frank Meehan<br>Partner, SparkLabs Global Ventures                    |
| Peter Chang<br>Partner, SparkLabs Global Ventures                       | Josh Mendelsohn<br>Hattery                                            |
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| Jeff Clavier<br>SoftTechVC                                              | Jeb Miller<br>General Partner, Icon Ventures                          |
| Andrew Cleland<br>Managing Director, Comcast Ventures                   | Zachary Miller<br>[A] Capital                                         |
| Jeremy Conrad<br>Founding Partner, Lemnos Labs                          | Bernard Moon<br>Partner, SparkLabs Global Ventures                    |
| Ron Conway<br>Founder and Managing Partner, SV Angel                    | Howard Morgan<br>Partner, First Round Capital                         |
| Topher Conway<br>General Partner, SV Angel                              | Dave Morin<br>Slow Ventures                                           |
| Ronny Conway<br>[A] Capital                                             | Bubba Murarka<br>Partner, DFJ Venture                                 |
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| Rafael Corrales<br>Venture Capitalist                                   | Kevin O'Connor<br>Startup Founder & CEO/Angel Investor                |
| Mark Cranney<br>Partner, Andreessen Horowitz                            | Charlie O'Donnell<br>Brooklyn Bridge Ventures                         |

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Investor in over 70 startups

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Partner, SparkLabs Global Ventures

Satish Dharmaraj  
Partner, Redpoint Ventures

Chris Dixon  
General Partner, Andreessen Horowitz

Peter Esperago  
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Brad Feld  
Co-Founder and Managing Director,  
Foundry Group

Josh Felser  
Venture Capitalist

Peter Fenton  
General Partner, Benchmark

Chris Fralic  
Partner, First Round Capital

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Co-Founder and Operating Partner,  
Crosscut Ventures

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General Partner, Thrive Capital

Nicole Glaros  
Partner, Techstars Ventures

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Managing Director, DFJ Growth

David Gold  
Access Venture Partners

Kent Goldman  
Founder, Upside Partnership

Matt Ocko  
Managing Partner, Data Collective

Alexis Ohanian  
Co-Founder & Executive Chair of reddit

Eric Paley  
Managing Partner, Founder Collective

Stephanie Palmeri  
Principal, SoftTech VC

Brian Pokorny  
General Partner, SV Angel

Shauntel Poulson  
Principal, NewSchools Venture Fund

Megan Quinn  
Partner, Kleiner Perkins Caufield & Byers

Jeff Richards  
Managing Partner, GGV Capital

James D. Robinson  
Managing Partner, RRE Ventures

Brett Rockkind  
Managing Director, General Atlantic

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Partner, Commerce Ventures

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Managing Partner, Raine Ventures

Kevin Ryan  
Alleycorp

Chris Sacca  
Lowercase Capital

David Samuel  
Co-Founder, Freestyle Capital

Dave Shen  
West Coast Director, LaunchCapital

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| Dave Hanna<br>Hanna Ventures                                                | Hemant Taneja<br>Managing Director, General Catalyst Partners              |
| David Hehman<br>Co-Founder, Spartina                                        | Brett Topche<br>MentorTech Ventures                                        |
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| Jim Hornthal<br>Chairman, M34 Capital                                       | Hunter Walk<br>Homebrew                                                    |
| Joe Horowitz<br>Managing General Partner, Icon Ventures                     | Maynard Webb<br>Founder, Webb Investment Network                           |
| Net Jacobsson<br>Partner, SparkLabs Global Ventures                         | David E. Weekly<br>drone.vc                                                |
| Len Jordan<br>Madrona Venture Group                                         | Paul Weinstein<br>Founding General Partner, Azure Capital<br>Partners      |

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Alan Knitowski  
Angel Investor

Jordan Kong  
Investor, Institutional Venture Partners

Josh Kopelman  
Partner, First Round

Mo Koyfman  
General Partner, Spark Capital

Paul La Londe  
Investor, SV Angel

Andy Weissman  
Partner, Union Square Ventures

Albert Wenger  
Partner, Union Square Ventures

Maurice Werdegarr  
Partner and CEO,  
Western Technology Investment

Steve Westly  
Managing Partner, The Westly Group

Fred Wilson  
Partner, Union Square Ventures

Qasar Younis  
Partner, Y Combinator

Brad Zions  
Structure Partners

## Patent Attorney Robert Taylor Represents NVCA at Congressional Hearing on Patent Litigation Reform

**Raises Concerns with Innovation Act and Emphasizes Importance  
of Maintaining Strong Patent Protections for Entrepreneurs**

**WASHINGTON, DC** – Robert Taylor, Founder and Owner of RPT Legal Strategies PC, an intellectual consulting firm in San Francisco and Silicon Valley, testified today on behalf of the National Venture Capital Association (NVCA) before the House Judiciary Subcommittee on the Courts, Intellectual Property, and the Internet at a hearing to discuss recent Supreme Court cases related to patent enforcement.

“Let me say frankly at the outset, we are concerned that H.R. 9, if enacted as written, will have a chilling effect on investment in patent intensive companies, which in turn will have a depressing effect on innovation in general,” said Taylor in his written testimony. “At the very least, the legislation will make it far more difficult, risky and expensive for emerging companies to enforce their patents, which is an essential part of the patent right. Equally important, H.R. 9 also will raise the cost and risk confronting smaller companies trying to defend against patent litigation brought by their larger, incumbent competitors.”