



Consumer Federation of America

March 26, 2014

The Honorable Patrick Leahy
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Chuck Grassley
Ranking Member, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Mr. Chairman Leahy, Ranking Member Grassley,

The Consumer Federation of America (CFA) is one of the nation's largest consumer groups, an association of non-profit consumer organizations that was established in 1968 to advance the consumer interest through research, advocacy, and education. Today, nearly 300 of these groups participate in CFA and govern it through their representatives on the organization's Board of Directors and the annual Consumer Assembly.

The Problem: Abuse of the patent system has undermined its ability to fulfill its positive function and has rendered it a barrier to innovation and progress

CFA believes that the framework of Intellectual property rights established in Article 8 of the U.S. Constitution is one of the pillars on which the economic success of the United States rests. Article I, Section 8 empowers the Congress to enact legislation with the primary purpose of striking a balance between providing the incentive to invent and innovate and promoting the public interest in the free flow of ideas. Over the course of the past two centuries, Congress has recognized when changes in the economy or developments in the implementation of the Intellectual property rights regime requires modifications in the statute.

CFA believes that this is such a moment. Congress must act swiftly and aggressively to reign in and eliminate the pernicious, abuse of intellectual property rights by patent trolls and those who seek overbroad patents. These practices, impeded, rather than “promote the progress of sciences and the useful arts.” Frivolous, unjustified and overbroad patent claims chill innovation and deny consumers the benefit or raise the price of valuable goods and services.

The harm that results from abusive patent claims is particularly great as the digital economy becomes the engine of economic growth. One of the most important characteristics of the digital economy is the close and strong complementarity between layers of networks and platforms. By facilitating rapid incremental innovation that builds on the existing economic infrastructure, entry and competition are encouraged. Patent claims that can “hold up” the flow of innovation impose severe costs, placing a tax on those who can afford to pay the claims to clear the rights, and becoming an absolute barrier to those who cannot.

The most stunning innovations in the digital age have come from those “outside” the system, who see opportunities that dominant firms either cannot see or resist exploiting because change threatens their incumbent business model. Abusive patent claims fall most heavily on these powerless “outsiders,” who lack the resources to fight unfounded infringement claims or pay the tax. Ultimately, it is consumers who bear the burden of forgone innovation.

The Solution: Comprehensive reform that eliminates abusive practices

The patent regime has become dysfunctional, unable to perform its proper role, both because the economy has changed dramatically and patent abusers have found new ways to exploit its weaknesses. Comprehensive reform of the manner in which patents are granted and enforced is needed to restore the patent system to its proper role in the economy.

Drawing Patent Boundaries:

- The boundaries of patents must be carefully drawn to recognize the “democratization of innovation” in the digital economy and to avoid inadvertent infringement. For both of these purposes, the patenting of abstract ideas is particularly harmful, as it cordons off wide areas of activity and makes the infringement of patents unpredictable. As a result, the chilling effect of overbroad patents and bogus infringement claims by patent trolls on innovation is particularly severe.

- Patents should be restricted to the scope of new knowledge and not extended to innovation that builds on that knowledge.
- Questionable patents should be invalidated under a rigorous cost benefit analysis, where the costs of asserting and enforcing patents should be weighed against the benefit of the patent.
- Timely, efficient public disclosure of the details of patents should be required to avoid both inadvertent infringement and overbroad claims.

Patent Enforcement:

- Patent enforcement should avoid surprises, hold-up and extortion.
- Deceptive demand letters should be discouraged by requiring full disclosure of who holds the patent for specific elements of specific products and precise statement of the basis for the claim of infringement.
- The burden that patent adjudication places on innovation should be reduced by narrowing the issues that are subject to infringement claims and shifting the cost of discovery onto the party making the claim of infringement.
- Consumers and end users, who generally lack the ability to research infringement claims, and are not involved in the development or marketing of the product should not be accountable for infringement in the purchase and use of products.

Sincerely,

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(The Clinic has served as CFA counsel in several intellectual property cases including *MGM Studios v. Grokster*, *American Broadcasting v. Aereo*, and *Fox v. Dish Network*)