



ELECTRONIC FRONTIER FOUNDATION

Protecting Rights and Promoting Freedom on the Electronic Frontier

October 30, 2013

Senator Orrin Hatch
104 Hart Office Building
Washington, D.C. 20510

Re: Electronic Frontier Foundation Support of Patent Litigation Integrity Act (S. 1612)

Dear Senator Hatch,

We submit this letter in support of the Patent Litigation Integrity Act (S. 1612).

The Electronic Frontier Foundation (“EFF”) is a non-profit civil liberties organization that has worked for more than 20 years to protect consumer interests, innovation, and free expression in the digital world. EFF and its more than 24,000 active members have a strong interest in helping the courts and policy-makers in striking the appropriate balance between intellectual property and the public interest. Many of those members are small innovators and tinkerers who often find themselves facing the threat of patent litigation.

In recent years, we have seen an unfortunate explosion in litigation by non-practicing entities (NPEs), often called patent trolls. As Judge Posner of the Seventh Circuit Court of Appeals put it, NPEs “are companies that acquire patents not to protect their market for a product they want to produce—patent trolls are not producers—but to lay traps for producers, for a patentee can sue for infringement even if it doesn’t make the product that it holds a patent on.”¹

NPEs accounted for only about five percent of patent litigation in 2000-2002.² This figure increased to about 22 percent in 2007, and then to almost 40 percent in 2011.³ In 2012, *61 percent* of new patent actions were brought by NPEs.⁴

The NPE business is one of litigation and licensing, not creating and providing products and services. Thus, the high costs of litigation are baked into their very business model. This is not true of the productive businesses targeted by NPEs, particularly smaller ones. And, in fact, it is these smaller businesses that bear the brunt of NPE litigation. More than half of the defendants in NPE suits make under \$10 million annually.⁵

¹ See <http://www.theatlantic.com/business/archive/2012/07/why-there-are-too-many-patents-in-america/259725/>.

² See http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1930272.

³ See http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2158455.

⁴ See https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2187314.

⁵ See <http://ssrn.com/abstract=2146251>.

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This problem will not be fixed until those facing threats from NPEs can fight back. Currently, the costs associated with taking up that fight in federal court are staggering. If taken to verdict, defending a lawsuit can easily cost nearly \$3 million, according to findings by the American Intellectual Property Law Association.⁶ And when these cases make it to judgment, the NPE only wins a shockingly low 9.2 percent of the time.⁷

The Patent Litigation Integrity Act would remedy a core component of the patent troll problem. It would give those facing NPE threats the tools necessary to fight back while also giving NPEs a disincentive to bring harassment suits. Importantly, the bill would not affect any party bringing a meritorious suit. Currently, the system is skewed heavily in favor of the NPEs; the Patent Litigation Integrity Act would rectify this problem.

For these reasons, EFF strongly supports the Patent Litigation Integrity Act. Thank you, Senator Hatch, for being a leader on this important issue.

Sincerely,



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Daniel Nazer, Esq.
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⁶ See http://news.cnet.com/8301-32973_3-57409792-296/how-much-is-that-patent-lawsuit-going-to-cost-you.

⁷ See https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=1677785.