



ELECTRONIC FRONTIER FOUNDATION

Written Testimony of the Electronic Frontier Foundation Submitted to the House Judiciary Subcommittee on Courts, Intellectual Property and the Internet

“Abusive Patent Litigation: The Impact on American Innovation & Jobs, And Potential Solutions”

March 14, 2013

The Electronic Frontier Foundation (“EFF”) welcomes the Committee’s interest in abusive patent litigation and its impact on innovation. We are grateful for this opportunity to comment. 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. Founded in 1990, EFF represents more than 20,000 contributing members. EFF and its members have a strong interest in promoting balanced intellectual property policy that serves both public and private interests. Through litigation, the legislative process, and administrative advocacy, EFF seeks to promote a patent system that facilitates, and does not impede, “the Progress of Science and useful Arts.”

The last few years have seen an explosion in abusive patent litigation brought by patent trolls. These companies, also known as patent assertion entities (PAEs) or non-practicing entities (NPEs), neither make nor sell anything but use patents to sue, and threaten lawsuits on, unsuspecting businesses. As Judge Posner of the Seventh Circuit Court of Appeals explains, patent trolls “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 And, even more recently, President Obama said about patent trolls: “They don’t actually produce anything themselves. They’re just trying to essentially leverage and hijack somebody else’s idea and see if they can extort some money out of them.”²

Patent trolls are causing enormous harm to innovators and job creators. Companies that actually create products, services, and jobs are under siege by trolls who purchase vague and overbroad patents to launch lawsuits. Since 2002, patent troll litigation has grown from just 5 percent of patent litigation to a majority of all patent cases.³ Moreover, patent trolls are targeting

¹ Richard A. Posner, *Why There Are Too Many Patents in America*, The Atlantic (July 12, 2012), available at: <http://www.theatlantic.com/business/archive/2012/07/why-there-are-too-many-patents-in-america/259725/>.

² <https://www.eff.org/deeplinks/2013/02/obama-calls-patent-reform-topple-trolls>

³ See James Bessen, Jennifer Ford and Michael Meurer, *The Private and Social Costs of Patent Trolls*, (“Bessen 2011”), at 7, available at:

smaller companies, such as startups, that lack the resources to defend against a patent suit (which can cost well over \$1 million) and thus have no choice but to pay extortionate settlement demands.⁴

Importantly, the patent troll problem is a software patent problem. Software patents are an attractive tool for patent trolls because they are notoriously difficult to interpret—giving unscrupulous patent owners the ability to claim that their patent covers a wide range of technology.⁵ Litigation involving software patents has increased dramatically—from fewer than 200 per year prior in 1997 to the current rate of over 1,000 per year.⁶ Many of these suits are brought by patent trolls. In fact, more than 80 percent of troll-filed suits assert high-tech patents, and more than 65 percent have software-related claims.⁷

This escalation of patent troll litigation has been very costly. The research shows that “NPE lawsuits are associated with half a trillion dollars of lost wealth to defendants from 1990 through 2010. During the last four years the lost wealth has averaged over \$80 billion per year.”⁸ The burden of patent troll litigation falls particularly hard on small companies. Professor Colleen Chien recently found that at least 55 percent of unique defendants in patent troll suits make under \$10 million per year.⁹ In a small company, key management and engineers must set aside many productive hours to deal with a patent troll claim. Even worse, litigation-based legal expenses can kill small startups entirely, and the mere threat of those expenses can chill innovation and job

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1930272; Colleen V. Chien, *Patent Assertion Entities*, presentation to the December 10, 2012 DOJ/FTC Hearing on PAEs, slides 23-24, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2187314.

⁴ Colleen V. Chien, *Startups and Patent Trolls* (Santa Clara Univ. Sch. of Law Legal Studies Research Paper Series, Accepted Paper No. 90-12, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2146251 (“Chien 2012”).

⁵ In other words, “software patents have ‘fuzzy boundaries’: they have unpredictable claim interpretation and unclear scope . . . and the huge number of software patents granted makes thorough search to clear rights infeasible, especially when the patent applicants hide claims for many years by filing continuations. This gives rise to many situations where technology firms inadvertently infringe.” Bessen 2011 at 23.

⁶ James Bessen, *A Generation of Software Patents*, 18 B.U. J. Sci. & Tech. L. 241, 259 (2012) (Figure 3).

⁷ See Brian J. Love, *An Empirical Study of Patent Litigation Timing: Could a Patent Term Reduction Decimate Trolls Without Harming Innovators?* (August 30, 2011), at 39, available at <http://ssrn.com/abstract=1917709> (forthcoming in University of Pennsylvania Law Review).

⁸ Bessen 2011, at 2.

⁹ Chien 2010, at 1-2.

creation. Without startups, there would have been no net job growth in the United States over the last two decades.¹⁰

Certainly, the problem is not just the litigation costs. The patent troll business model has spawned some particularly egregious actors—those who claim infringement, demand licenses and threaten lawsuits without any intention of ever actually filing a suit. Take for instance the patent troll who claims to own the technology that allows for scanning documents to email, who has sent letters demanding payment from at least hundreds of business who use this basic technology.¹¹ Indeed, the research shows that patent trolls send out hundreds of demand letters for each suit actually filed.¹²

It's no wonder: patent litigation is notoriously expensive, often costing a party accused of infringement well into the millions of dollars, along with the attendant costs of being party to a lawsuit. In other words, even if a party decides to take its fight to court, it faces years of litigation and millions of dollars in legal fees—and even then, if it wins, it has little to show for it. Because parties accused of infringement have such little incentive to fight back, we have found ourselves in a vicious cycle where the patent trolls are repeatedly emboldened to continue with their business model, which—in many cases—amounts to little more than garden-variety extortion.

The rise of patent trolls has lead many to search for answers. It is clear that the America Invents Act of 2011 was not sufficient to deal with the problem. (Again, something President Obama has publicly acknowledged.¹³) One proposal is the bipartisan Saving High-Tech Innovators from Egregious Legal Disputes Act (H.R. 845) (“SHIELD Act”) recently introduced by Reps. Peter DeFazio (D-Ore.) and Jason Chaffetz (R-Utah). This “fee-shifting” bill would make it so that patent trolls pay the legal fees if a patent in a lawsuit is invalid or if there’s no actual infringement.

¹⁰ Tim Kane “The Importance of Startups in Job Creation and Job Destruction” *Kauffman Foundation Research Series: Firm Formation and Economic Growth*, July 2010, available at http://www.kauffman.org/uploadedfiles/firmFormation_importance_of_startups.pdf

¹¹ <https://www.eff.org/deeplinks/2013/01/scanning-documents-patent-trolls-want-you-pay>

¹² <http://bgr.com/2012/12/10/patent-trolls-lawsuits-u-s/>

¹³ <https://www.eff.org/deeplinks/2013/02/obama-calls-patent-reform-topple-trolls>

We have seen an overwhelming public response in support of the SHIELD Act and patent reform more generally. More than 12,000 people contacted their members of Congress through EFF's website to support the Act. In addition, a coalition of entrepreneurs, investors, and innovators—including investor Mark Cuban and Reddit co-founder Alexis Ohanian—joined EFF and Engine Advocacy in sending an open letter to the House Committee on the Judiciary explaining that patent trolls are chilling innovation, which in turn stifles job growth in the expanding tech sector. That letter is attached to these comments.

Again, we thank the Committee for taking up this matter. We urge the Committee and Congress to take action and fix the patent troll problem.

Respectfully submitted,

/s/

Electronic Frontier Foundation

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Staff Attorney and The Mark Cuban Chair to Eliminate Stupid Patents

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March 14, 2013



February 27, 2013

The Honorable Bob Goodlatte
Chair
Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515

The Honorable John Conyers, Jr.
Ranking Member
Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Goodlatte and Ranking Member Conyers,

We, the undersigned, write today as entrepreneurs, investors, and innovators in support of the Saving High-tech Innovators from Egregious Legal Disputes (SHIELD) Act and other legislative measures aimed at reducing costly litigation created by non-practicing entities, often referred to as patent trolls. Congress should consider measures that shift incentives away from those who game the system and toward an innovative economy and competitive market.

As President Obama acknowledged earlier this month, patent trolls, “essentially leverage and hijack” patents originally issued to others in an effort to “extort” money through litigation. Young, innovative companies are increasingly targets of these lawsuits. While big companies paid much of the \$29 billion in direct costs resulting from activities by patent trolls in 2011, the costs made up a larger share of small companies’ revenue.¹ In fact, the majority of companies targeted by patent trolls have less than \$10 million in revenue.²

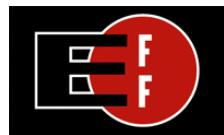
Without startups, there would have been no net job growth in the United States over the last two decades.³ Congress needs to make measures like the SHIELD Act a priority in 2013 so that innovative companies and entrepreneurs can continue to grow without the threats posed by non-practicing entities. Congress must take action and fix the patent troll problem. We urge the committee to call hearings on patent troll litigation and to solicit information from the innovation community at-large.

Sincerely,

¹ James E. Bessen & Michael J. Meurer “The Direct Costs from NPE Disputes” Boston University School of Law, *Law and Economics Research Paper No. 12-34*, June 2012
<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2091210>

² Colleen V. Chien “Startups and Patent Trolls” Santa Clara University Legal Studies Research Paper No. 09-12, September 2012 <https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2146251>

³ Tim Kane “The Importance of Startups in Job Creation and Job Destruction” Kauffman Foundation Research Series: *Firm Formation and Economic Growth*, July 2010
<http://www.kauffman.org/uploadedfiles/firmFormation_importance_of_startups.pdf>



Nathan Allen
Four First Names

Mark Cuban
Dallas Mavericks

Erick Hitter
Automattic Inc

Luis Arbulu
Hattery

Rutul Davè
Bright Funds, Inc.

Trenidad Hubbard
Game Face Sports
International, LLC

Joen Asmussen
Automattic Inc.

Pete Davies
Automattic Inc

Terry Floyd Johnson
Showdown Royal

Seth Bannon
Amicus

Christian Dawson
Internet Infrastructure
Coalition

Jeevan Kalanithi
Sifteo

James R Bazet
Cobra Electronics
Corporation

Derek Dukes
Dipity

Seth Levine
Foundary Group

Matthew Bellows
Yesware, Inc

Mat Ellis
Cloudability

John Levisay
Sympoz Inc.

Paul Berberian
Orbotix, Inc.

Edward Engler
Pittsburgh Equity Partners

Benjamin Lewis
The MadCelt Studios

Aaron N. Block
BayRu LLC

Tim Enwall
Mobiplug Networks, Inc

David Mandell
PivotDesk

Matthew Y. Blumberg
Return Path, Inc.

Brad Feld
Foundry Group

Michael Masnick
Floor64, Inc.

Brad Burnham
Union Square Ventures

Rand Fishkin
SEOMoz

Ryan McIntyre
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David Cohen
TechStars

Chris Franks
Moblify

Josh Mendelsohn
Hattery

Jessica Cole
Roammeo, Inc.

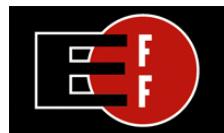
William Randolph Fry
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Joshua To
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Ethan Rishon Oberman
SpiderOak, Inc.

Max Uhlenhuth
SilviaTerra

Alexis Ohanian
reddit

Elizabeth Urello
Automattic Inc

Scott Petry
Authentic8

Alexander Shalek White
Next Big Sound

Daniel Pidgeon
Starpower

Victor Wong
PaperG

Lamar Porter
CIKI, Inc.

Skylar Woodward
Trumo, Inc.

Ian C Rogers
Daisy, A Beats by Dre
Company

Adam Wooley
Brute Labs

Toni Schneider
Automattic Inc.

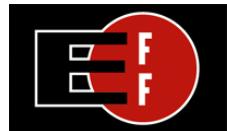
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cc: The House Committee on the Judiciary



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