

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,*

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A Selection of Recent Empirical Research on Patent Litigation**

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** This list is intended to be illustrative, not exhaustive. Inclusion does not necessarily imply the authors' endorsement of this letter.

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