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Intellectual Property Scholars Letter to Congress

Brian Love

Santa Clara University School of Law, blove@scu.edu

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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.

Samuel F. Ernst
Chapman University Fowler School of Law

Robin Feldman
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
University of Kentucky College of Law

William T. Gallagher
Golden Gate University School of Law

Shubha Ghosh
University of Wisconsin Law School

Eric Goldman
Santa Clara University School of Law

Umit G. Gurun
The University of Texas at Dallas Naveen Jindal School of Management

Bronwyn H. Hall
University of California Berkeley Department of Economics

Christian Helmers
Santa Clara University Leavey School of Business

Joachim Henkel
Technische Universität München School of Management

Cynthia Ho
Loyola University of Chicago School of Law

Herbert Hovenkamp
University of Iowa College of Law

Ben Klemens
U.S. Census Bureau

Scott Duke Kominers
Harvard University

Amy Landers
Drexel University Thomas R. Kline School of Law

Mark A. Lemley
Stanford Law School

David K. Levine
Washington University in St. Louis Department of Economics

Yvette Joy Liebesman
Saint Louis University School of Law

Brian J. Love
Santa Clara University School of Law

Phil Malone
Stanford Law School

Michael J. Meurer
Boston University School of Law

Joseph S. Miller
University of Georgia School of Law

Ira Steven Nathenson
St. Thomas University School of Law

Jacob H. Rooksby
Duquesne University School of Law

Pamela Samuelson
University of California Berkeley School of Law

Sharon K. Sandeen
Hamline University School of Law

F.M. Scherer
Harvard University John F. Kennedy School of Government

Roger Smeets
Rutgers Business School

Talha Syed
University of California Berkeley School of Law

Alexander Tabarrok
George Mason University Department of Economics

Toshiko Takenaka
University of Washington School of Law

John L. Turner
University of Georgia Terry College of Business & Department of Economics

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

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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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