



**Committee on the Judiciary
U.S. Senate**

Hearing

The Impact of Abusive Patent Litigation Practices on the American Economy

**Testimony of Krish Gupta
Senior Vice President and Deputy General Counsel
EMC Corporation**

March 18, 2015



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Chairman Grassley, Ranking Member Leahy, and Members of the Committee, my name is Krish Gupta, and I am Senior Vice President and Deputy General Counsel for EMC Corporation (EMC). I appreciate the opportunity to testify on the impact of abusive patent litigation practices on EMC. We applaud the Committee's bipartisan efforts to address this issue and believe strongly that legislative reforms are necessary to protect the patent system and spur innovation and competition.

I am a registered patent attorney with 20 years of experience in patent law. At EMC, I have worldwide responsibility for intellectual property (IP) law and technology licensing matters, including IP policy, patent and trademark prosecution, and IP litigation. I will discuss the importance of patents to EMC, the current state of the patent litigation system, EMC's experience as a target of abusive litigation practices, and the continued and urgent need for patent litigation legislation despite recent Supreme Court decisions and related developments.

Abusive litigation has become so prevalent in our current patent system that it threatens to undermine the benefits that the system was created to provide. A legislative solution is necessary to rebalance the patent system and to help ensure it serves its intended purpose: to provide the incentives and protections necessary for innovators to invest in the next new technology that will benefit the American consumer and our economy.

About EMC

EMC was founded in Newton, Massachusetts, in 1979. Today, EMC is a global leader in enabling businesses and service providers to transform their operations and deliver information technology as a service. Through innovative products and services, EMC accelerates the journey to cloud computing, thereby helping businesses store, manage, protect, and analyze their most valuable asset—information—in a more agile, trusted, and cost-efficient way.

Since 2003, EMC has invested approximately \$42 billion in research and development, as well as in acquisition of technologies that have revolutionized the world of information technology. EMC currently has an annual R&D investment of approximately \$3 billion, and our investments have enabled us to broaden its product portfolio, enter new market segments, and expand its market opportunity.



Headquartered in Hopkinton, Massachusetts, with additional concentrations of employees in California, North Carolina, Utah, and Washington State, EMC employs approximately 68,000 people in 86 countries around the world. We rank 128th on the Fortune 500, based on 2014 revenues of \$24.4 billion.

Importance of Patents to EMC

EMC's position of market leadership is the result of pioneering innovation, hard work, and substantial investment in new technologies. Innovation and intellectual property are our lifeblood, our keys to survival, and our future. We have a 36-year track record of anticipating future needs and building and acquiring technology solutions to solve problems in new and innovative ways.

We at EMC rely greatly on patents to establish and maintain our proprietary rights in our technology and products. EMC and its majority-owned businesses hold more than 5,100 issued U.S. patents. EMC's patent portfolio is regularly recognized as one of the strongest and most impactful in the information technology business. In fact, the Wall Street Journal and the Patent Board recently ranked EMC as the 8th most innovative information technology company based on the quality and quantity of its patents.¹ These patents cover EMC's many innovations, including the hardware and software technologies used in our diverse products and offerings. In short, EMC is an advocate of a strong patent system; however, we want a system that protects and promotes innovation rather than inhibiting it, and we want a system that cannot be exploited by those who would use abusive tactics.

Abusive Patent Litigation is a Serious Problem

In 2014 alone, more than 5,000 new patent lawsuits were filed.² That is nearly twice as many as were filed only four years earlier, when Congress passed the Leahy-Smith America Invents Act (AIA).³ The number of patent lawsuits filed last year was the third highest ever.⁴ After adding in patent disputes filed in administrative agencies, the total number increases to more than 6,600 patent disputes—the second highest level in history.⁵

Some claim that recent Supreme Court decisions, and procedures introduced by the America Invents Act, have led to a decline in the number of new patent suits, thereby

¹ THE PATENT BOARD, <http://www.patentboard.com/> (last visited February 9, 2015).

² *Unified Patents 2014 Litigation Report*, UNIFIEDPATENTS (January 8, 2015), <http://unifiedpatents.com/unified-patents-2014-litigation-report/>.

³ *Id.*

⁴ *Id.*

⁵ *2014 Patent Dispute Report and Analytics*, UNIFIEDPATENTS (January 26, 2015), <http://unifiedpatents.com/2014-patent-dispute-report-and-analytics/>.

eliminating the need for patent litigation reform. We disagree that there has been a lasting decline in new patent suits. We did see a dip in new patent litigation filings in 2014, but recent data suggests that this may have been only a temporary aberration. In fact, February 2015 marked the third month in a row of increased patent litigation filings as compared to the same period a year earlier.⁶ Specifically, as compared to the same month the previous year, new patent cases were up by 4% in December 2014;⁷ by 36% in January 2015;⁸ and by 10% in February 2015.⁹ While one should not draw too many conclusions from three months of data, there is significant reason to be skeptical of assertions that recent Supreme Court case law and new Patent Office procedures have fundamentally reduced the number of new patent suits.¹⁰

In 2011, litigation costs arising from cases filed by so-called “patent assertion entities” (or “PAEs”) were estimated at \$29 billion in direct out-of-pocket costs.¹¹ At that time, commentators estimated the total costs, direct and indirect, associated with abusive patent litigation by PAEs at \$80 billion per year,¹² and those numbers certainly have gone up since then. Abusive patent litigation is a costly problem that is stifling American innovation and impeding job creation each and every day.

While legitimate patent litigation is a necessary part of a robust patent system, small, medium, and large enterprises are all adversely affected by abusive patent litigation. According to a 2013 survey, startup companies and venture capitalists overwhelmingly believe that the threat of patent litigation has a negative impact on their businesses.¹³ Survey respondents cited monetary costs, as well as distraction to management, engineers, and other employees. Respondents also described the human toll that these threats have taken on entrepreneurs, citing not only the impact on morale, but also the overall fear of losing a business. Further, the surveyed venture capitalists stated that if a company had an

⁶ Daniel Nazer, “Innovation Act Needed More Than Ever As Patent Trolls Roll On,” ELECTRONIC FRONTIER FOUNDATION (Feb. 18, 2015), at <https://www.eff.org/deeplinks/2015/02/innovation-act-needed-more-ever-patent-trolls-roll>.

⁷ *Patent Case Filings Up 32% in December But Down 18% for 2014*, LEX MACHINA (January 12, 2015), <https://lexmachina.com/2015/01/patent-case-filings-28-december-20-2014/>.

⁸ *January 2015 Patent Dispute Report*, UNIFIEDPATENTS (January 2015), <http://unifiedpatents.com/january-2015-patent-dispute-report/>.

⁹ *February 2015 Patent Dispute Report*, UNIFIEDPATENTS (February 2015), <http://unifiedpatents.com/february-2015-patent-dispute-report/>.

¹⁰ See generally Nazer, *supra* n.6.

¹¹ James E. Bessen & Michael J. Meurer, *The Direct Costs from NPE Disputes*, 99 CORNELL L. REV. 387 (2014), available at <http://ssrn.com/abstract=2091210>; see also *Litigations Over Time*, PATENT FREEDOM, <https://www.patentfreedom.com/about-npes/litigations/> (last visited February 8, 2015); Robin Feldman, Tom Ewing, & Sara Jeruss, *The AIA 500 Expanded: Effects of Patent Monetization Entities*, UC HASTINGS RESEARCH PAPER NO. 45, April 9, 2013, at 7, <http://ssrn.com/abstract=2247195> (patent monetization entities filed 58.7 percent of patent lawsuits in 2012).

¹² James E. Bessen, Jennifer Ford & Michael J. Meurer, *The Private and Social Costs of Patent Trolls*, REGULATION, Winter 2011-2012, at 26.

¹³ Robin Feldman, *Patent Demands & Startup Companies: The View from the Venture Capital Community*, UC HASTINGS RESEARCH PAPER NO. 75, October 28, 2013, <http://ssrn.com/abstract=2346338>.

existing patent litigation threat against it, that fact could potentially be a major deterrent in deciding whether to invest. The survey succinctly summarized the responses on the impact of patent demands on startups: “[w]hen companies spend money protecting their intellectual property position, they are not expanding; and when companies spend time thinking about patent demands, they are not inventing.”¹⁴

Other commentators echo this core conclusion: abusive patent litigation harms innovation.¹⁵ While Congress hears a lot from large companies like EMC, in fact, the biggest impact is on smaller firms, including startup firms.¹⁶ Most of the cases filed by abusive litigants are targeted at companies with revenues of less than \$100 million per year,¹⁷ although such litigants do try to target cash-rich entities.¹⁸ A study conducted at the Massachusetts Institute of Technology concluded that frequent litigants caused a decline of \$22 billion in venture investing over a five-year period.¹⁹ A Rutgers University study concluded that small companies that were hit with abusive lawsuits significantly decreased their spending on research and development.²⁰ Likewise, researchers at Harvard University and the University of Texas found a substantial decline in research and development spending following protracted patent litigation initiated by patent assertion entities.²¹

In 2013, litigation by PAEs accounted for 67% of all new patent cases,²² yet only 20% of issued decisions in the same year involved PAEs.²³ This confirms the belief that defendants targeted by PAEs find it more economical to settle rather than to try to defend themselves in expensive litigation. PAE litigation has cost “tens of billions of dollars per year since 2007,” with startups and venture-backed companies being particularly hard-hit.²⁴

¹⁴ *Id.*

¹⁵ James Bessen, *The Evidence Is In: Patent Trolls Do Hurt Innovation*, HARV. BUS. REV., July 2014, available at <https://hbr.org/2014/07/the-evidence-is-in-patent-trolls-do-hurt-innovation>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ See Lauren Cohen, Umit G. Gurun, and Scott Duke Kominers, *Patent Trolls: Evidence from Targeted Firms* HARVARD BUSINESS SCHOOL FINANCE WORKING PAPER NO. 15-002, August 7, 2014, <http://ssrn.com/abstract=2464303>, at 2-3.

¹⁹ Catherine Tucker, *The Effect of Patent Litigation and Patent Assertion Entities on Entrepreneurial Activity*, MIT SLOAN SCHOOL WORKING PAPER 5095-14, June 22, 2014, at 31, <http://ssrn.com/abstract=2457611>.

²⁰ Roger Smeets, *Does Patent Litigation Reduce Corporate R&D? An Analysis of US Public Firms*, April 28, 2014, <http://ssrn.com/abstract=2443048>.

²¹ Cohen et al., *supra* n.18.

²² 2014 Patent Litigation Study, PRICE WATERHOUSECOOPERS (July 2014), at http://www.pwc.com/en_US/us/forensic-services/publications/assets/2014-patent-litigation-study.pdf; 2013 NPE Litigation Report, RPX (January 2014) at 2, <http://www.rpxcorp.com/wp-content/uploads/2014/01/RPX-2013-NPE-Litigation-Report.pdf>.

²³ 2014 Patent Litigation Study, *supra* n.22, at 2.

²⁴ Letter from 51 Economics and Legal Scholars to United States Congress (March 2, 2015), available at <http://www.unitedforpatentreform.com/files/ip-scholars--letter-to-congress1554891030.pdf>.

Especially telling is the fact that “the more R&D a firm performs, the more likely it is to be hit with a patent lawsuit, all else equal.”²⁵

It is often said that PAEs support small inventors. But small inventors only receive from PAEs about 5% of the proceeds of successful enforcement of the inventors’ patents. Lawyers and the PAEs and their investors get the vast majority of the proceeds.²⁶

This data does not come from just one or two studies, researchers, or institutions. As reflected in a recent letter to Congress signed by 51 economics and intellectual property scholars, “academic researchers have published over two dozen empirical studies on patent litigation and its economic impacts.”²⁷ The letter explains that “[t]hese studies have been conducted by researchers with diverse views and using different methodologies.”²⁸ According to the studies, “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.”²⁹ Significantly, “[n]ot one study of the economic impact of current patent litigation concludes that the effects are negligible.”³⁰

Thus, the evidence is clear: frivolous and abusive patent litigation results in less innovation and less investment in cutting-edge technologies and companies.

We at EMC wholeheartedly agree with these conclusions. While a healthy patent system benefits innovators and the economy, public confidence in our nation’s patent system suffers, justifiably, when that system allows low-quality patents to be asserted in litigation and allows abusive litigation practices to be used. Baseless patent litigation distracts innovators, preventing them from spending their time productively contributing to technological progress and to our economy.

The staggering costs of such abusive patent litigation are borne by innovative companies in all industries. While 63% of the patent lawsuits filed last year were in the high-tech field,³¹ a recent article suggested that patent assertion entities may soon increase lawsuits targeting biotech and pharmaceutical companies.³² In short, the patent system that was created to promote innovation, has, in far too many instances, actually had a detrimental

²⁵ *Id.*

²⁶ See Bessen & Meurer, *supra* n.11, at 4; see also *Patent Trolls: Why No One Likes Them*, THE ECONOMIST (March 3, 2015), available at <http://www.economist.com/news/business-and-finance/21645604>.

²⁷ Letter from 51 Economics and Legal Scholars to United States Congress, *supra* n.24.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Unified Patent’s 2014 Litigation Report*, UNIFIED PATENTS (January 8, 2015), <http://unifiedpatents.com/2015/01/08/unified-patents-2014-litigation-report/>.

³² Robin Feldman & W. Nicholson Price, *Patent Trolling — Why Bio & Pharmaceuticals Are at Risk*, UC HASTINGS RESEARCH PAPER NO. 93. Feb. 14, 2014, <http://ssrn.com/abstract=2395987>.



impact on innovation by taking money and resources from those who innovate and handing it over to those who do not.

EMC's Experience

EMC is a frequent target of unscrupulous patentees with low-quality patents. Since 2005, EMC has faced dubious patent lawsuits more than thirty five times, and has never been found to have infringed. As a matter of principle, EMC does not settle unmeritorious suits. For us, doing so would be tantamount to giving in to extortion, and only encourage more such suits. Yet defending against abusive litigation has cost us millions of dollars that could have been invested in growing our workforce or furthering innovation. In 2014 alone, EMC spent more than \$10 million in defending frivolous patent actions.

Typically, abusive patentees provide very little information about their allegations until months into the case. EMC is forced to devote significant time, resources, and manpower to analyzing vague complaints that are directed at very diverse technology areas and complex systems. This effort is needed because we must speculate about what will be the subject of the plaintiff's infringement argument. And in the process, we waste the time of our engineers—the driving force of our company—studying technical details of features that ultimately are not at issue in the case.

At the beginning of a lawsuit, EMC spends between \$100,000 and \$150,000 per month in outside legal fees for routine investigation and administration of a patent suit. Once a case becomes more active with discovery, depositions, expert reports, and Markman hearings, the fees typically range from \$150,000 to \$300,000 per month, and often can be even higher. Added to such costs are expenses for outside vendors, experts, and prior art searching, which may cost several hundred thousand dollars each.

Further, we often challenge the validity of low-quality patents through a Petition for Inter Partes Review (IPR). These petitions—highly beneficial proceedings introduced by the AIA—are filed with the Patent and Appeals Board of the U.S. Patent and Trademark Office, an expert agency that is often better situated to evaluate patent validity than a court. Although EMC is a great proponent of this new proceeding, an IPR can cost between \$500,000 and \$1,000,000 per patent. In instances in which the district court does not stay its proceedings, this expense may need to be borne simultaneously with the above-described litigation costs.

In total, we can easily spend several million dollars to reach a resolution on the merits of each case. With the expenses associated with such litigation, it is understandable how unscrupulous plaintiffs use the leverage associated with these costs to extort unreasonable settlements from defendants. This tactic is especially effective against startups and small companies that may not have the capital for a robust defense. Indeed, some patentees negotiate scores of cost-of-litigation settlements with the majority of defendants, then

simply dismiss the rest rather than proceeding with litigation. Although this tactic demonstrates the frivolous nature of the lawsuit, defendants rarely have any recourse, much less a cost effective one, against patentees who conduct no business aside from filing meritless cases.

Discovery is a major contributor to the overall cost of litigation. Discovery costs in intellectual property cases are almost 62 percent higher than in other cases.³³ In a case brought by a patent assertion entity, these discovery costs are borne almost exclusively by defendants. This sort of plaintiff typically has few documents and fewer employees. No matter how many discovery requests they are served, they can often simply produce all their documents in a single banker's box. There is a significant incentive for a patent assertion entity to drown a large company defendant in discovery requests, seeking to force its engineers, its IT department, and its legal staff to unearth tens of thousands of requested documents. Such discovery costs are particularly troubling because they are unpredictable. Judges across the country, abetted by the lack of uniform national patent rules, have very different views on the proper scope of discovery.

Making matters worse, excessive discovery burdens are unnecessary and unwarranted. According to one estimate, less than one document in ten thousand produced in discovery is actually introduced at trial.³⁴ Email appears even more rarely.³⁵ Yet despite the irrelevance of most documents produced in discovery, some plaintiffs still use the threat of exorbitant discovery costs to increase the pressure and incentives to settle.

One of the lawsuits in which EMC is involved provides a compelling example of the need for reform. When this case was first filed, the complaint listed eight patents, with no explanation of which of the hundreds of claims in those patents were allegedly infringed. The complaint generically accused two large EMC product lines of infringing, with no designation of which specific models infringed, and no explanation of why any EMC product supposedly infringed, or which claims might be infringed.

Based on the limited information we had, we at EMC set to work investigating the plaintiff's allegations and preparing our defenses. But six months later, the plaintiff amended its complaint, adding three new patents with dozens of additional claims and a third, separate EMC product line. The plaintiff still failed to identify any specific claims or any specific model numbers. EMC again diligently attempted to investigate the allegations, but the sheer number of claims and the lack of any explanation as to how the claims were allegedly infringed resulted in a monumental task, involving hundreds of hours of potentially unnecessary analysis. It was not until eight months into the litigation that specific claims were identified and claim charts provided.

³³ Chief Judge Randall B. Rader, *The State of Patent Litigation*, E.D. TEX. JUDICIAL CONFERENCE, Sept. 27, 2011, at 7, available at <http://patentlyo.com/media/docs/2011/09/raderstateofpatentlit.pdf>.

³⁴ *Id.* at 8.

³⁵ *Id.*



Then, a year and four months into the lawsuit, the plaintiff again tried to expand the case, asking the Court for permission to add new products and previously undisclosed claims. EMC should not have to litigate for more than a year, investing enormous sums of money for its defense, only to have the case fundamentally change direction again and again.

As a result of all this uncertainty, EMC has spent hundreds of thousands of dollars *per month* combating allegations that are a fast-moving target. If the plaintiff had identified its theory of the case from day one, we at EMC could have conducted our own investigation into infringement and validity in short order, spending a fraction of the time and expenses that we have been forced to incur. Instead, as is common in abusive patent litigations, the ever-changing allegations make it impossible to efficiently and effectively prepare a defense. This is by design and in the plaintiff's interest, as so many companies would prefer to settle for a fraction of the litigation cost and avoid the aggravation rather than continue to fight on these uneven terms.

Discovery represents a significant part of EMC's overall expenses in this case. The plaintiff has accused EMC products that are complex, refrigerator-sized storage systems that may cost up to \$1 million or more. However, the alleged infringement is based solely on a relatively inexpensive commodity chipset that is supplied to us by a third party and embedded within the accused products. The plaintiff's damages contentions ignore this fact, improperly claiming damages based on the entire market value of EMC's products. Despite the narrow scope of the patent, EMC is forced to spend considerable money producing reams of technical and financial information that has nothing to do with the tiny third party chipset that is at the heart of the infringement allegations.

But the money EMC spends in connection with these discovery burdens does not begin to capture the total cost to EMC, which includes the lost time of our engineers, executives, and other valued employees. For example, one of EMC's star engineers was required to formally set aside ten percent of his time for an extended period of time to assist with document collection efforts. This single engineer devoted over one hundred hours of time tracking down relevant documents. Some of the documents were so old and irrelevant to EMC's current business that additional employees needed to be consulted for the sole purpose of determining where this obsolete information resided. And this one engineer was only one of more than 100 employees who were asked to assist and dedicate their time to the process of locating documents.

In short, the system as it exists today is highly skewed. Patentees who file frivolous cases can gain significant unfair leverage by increasing the risk and costs on the part of defendants. They are rarely, if ever, subject to counterclaims, so they share no part of the risk, and little part of the costs. Today, they are rarely held accountable for a defendant's attorneys' fees, even when the litigation they filed lacked any reasonable basis. We urge the Committee to address these core issues and ultimately allow for a healthier system.

Recent Supreme Court Cases and Related Developments

Some have suggested that recent decisions by the Supreme Court of the United States reduce the need for Congress to act. While these decisions help bring clarity to, and therefore benefit the patent system, the great majority of small, medium and large entities that have been negatively impacted by abusive patent litigation know that much still needs to be done, and that legislative action is required to address the core aspects of abusive litigation. That is, legislative action is required to secure the patent system so that it operates in the manner in which it was originally intended—to promote innovation. I will summarize the relevant recent cases and explain why Congressional action is sorely needed to promote consistency and predictability.

Limelight. Last June, the Supreme Court decided *Limelight Networks, Inc. v. Akamai Technology*,³⁶ a case relating to induced infringement of method claims. A method claim is a patent claim that sets forth steps to be performed rather than physical components of a patented machine. In a claim of induced infringement, the defendant is accused of encouraging someone else to infringe a patent. In *Limelight*, the Supreme Court confirmed that there can be no induced infringement unless there is direct infringement. This decision properly returned the law to the way it was before the Federal Circuit's decision in this case, but did not have any additional impact on baseless patent litigation.

Alice. In *Alice Corporation v. CLS Bank*,³⁷ also decided last June, the Court turned to the category of patents that abusive plaintiffs more often assert in patent litigation: patents on computer-implemented business ideas. The Court held that you cannot get a patent on a fundamental economic practice, like the idea of escrow, even if you limit your patent to escrow performed on a computer. Computers are so ubiquitous, the Court explained, that merely taking a longstanding idea and doing it on a computer is not truly inventive.

While *Alice* is helpful in some cases, it impacts only a small percentage of patents. Even patent cases that do not survive motions to dismiss under *Alice* run up enormous costs for defendants. Plaintiffs who file bad-faith litigation understand these costs, and can still coerce settlements out of defendant operating companies that would rather pay less to settle than to litigate.

Octane/Highmark. Last year, the Court decided two cases addressing when courts can award attorneys' fees to the prevailing party in patent litigation. Currently, Section 285 of the Patent Act says that even when a defendant wins, the defendant still must pay its own attorney's fees unless the defendant demonstrates that the case was "exceptional." In *Octane Fitness v. Icon Health & Fitness*,³⁸ the Supreme Court interpreted this provision to mean that fees are available in any case that "stands out from others." In *Highmark v.*

³⁶ *Limelight Networks, Inc. v. Akamai Technology*, 134 S.Ct. 2111 (2014).

³⁷ *Alice Corporation Pty. Ltd. v. CLS Bank Int'l*, 134 S.Ct. 2347 (2014).

³⁸ *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S.Ct. 1749 (2014).

Allcare Health Management System,³⁹ the Court held that district courts have great discretion in deciding whether to award fees. EMC filed amicus briefs in these cases urging the Court to make it easier for district courts to award fees, and these cases did loosen the prior standards applicable to deciding motions for fees. Unfortunately, as I will explain, these decisions have been only moderately successful in increasing the success rates of defendants who seek to recover their attorneys' fees when they are faced with baseless patent litigation.

Nautilus. In June of last year, the Court addressed how clear or “definite” patents must be in *Nautilus v. Biosig Instruments*.⁴⁰ The Court interpreted language in Section 112 of the Patent Act requiring that a patent “conclude with one more claims particularly pointing out and distinctly claiming the subject matter” of the invention as requiring the patent to provide “reasonable certainty” of what it covers. EMC filed an amicus brief in this case as well, successfully urging the Court to overrule the Federal Circuit’s overly-narrow view of when a patent should be held invalid for indefiniteness. Nevertheless, since the Supreme Court issued this decision, few patent claims have actually been invalidated as a result of the new standard, and the Federal Circuit continues to reverse cases where indefiniteness was found in the district court.⁴¹

Teva. In its recent decision in *Teva Pharmaceuticals USA v. Sandoz*,⁴² the Court took a step backwards in its line of patent decisions, addressing the Federal Circuit’s standard review of district court claim construction decisions. The Federal Circuit had always given a fresh look to such decisions, which enabled that court to ensure that a patent had been interpreted consistently across the district courts. But in January, the Supreme Court held that some aspects of a district court’s claim construction decision would be reviewed with deference—that is, the Federal Circuit should allow district courts some leeway in interpreting patents, even if they get it wrong.

EMC filed an amicus brief in this case as well, warning that giving deference to a district court’s claim construction decision would encourage abusive patent litigation. Patentees typically get to pick the district court in which they bring suit, and so they can shop for the forum most likely to interpret patents overly favorably. The Federal Circuit’s fresh review of district court interpretations of a patent had put a small check on such forum shopping. Now unscrupulous patentees have an additional incentive to pick the district court most favorable to them, and that court’s claim interpretation will be more insulated from Federal Circuit review.

Twombly, Iqbal, and Form 18. In 2007 and 2009, the Court decided *Bell Atlantic v. Twombly*⁴³ and *Ashcroft v. Iqbal*⁴⁴, a pair of non-patent cases that increased, to a degree, the

³⁹ *Highmark, Inc. v. Allcare Health Mgmt. Sys., Inc.*, 134 S.Ct. 1744 (2014).

⁴⁰ *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S.Ct. 2120 (2014).

⁴¹ See *Eidos Display, LLC v. AU Optronics Corp.*, ___ F.3d ___, 2015 WL 1035284 (Fed. Cir. March 10, 2015).

⁴² *Teva Pharmaceuticals USA, Inc. v. Sandoz Inc.*, No. 13-854 (U.S. Jan. 20, 2015) (slip. op.).

⁴³ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955 (2007).

level of specificity required in a complaint by requiring the complaint to include enough facts to “plausibly” suggest that the plaintiff is entitled to relief.

Today, these cases do not directly apply to patent complaints that assert direct infringement (although they do apply where indirect infringement is alleged) because the Federal Rules of Civil Procedure include a sample form for patent infringement, Form 18, which requires less detail than is required by *Twombly* and *Iqbal*. Thus, today, a plaintiff need not fully identify the accused products; a plaintiff need not identify the asserted claims; and a plaintiff need not explain why it believes that the defendant infringes the asserted patent.

In September, the Judicial Conference of the United States, which is a 26-member committee of judges that suggests changes to the Federal Rules of Civil Procedure to the Supreme Court, recommended abolishing certain model forms, including Form 18.⁴⁵

The abrogation of Form 18 would be a positive development, as it would lead to courts applying the stricter standard of *Twombly* and *Iqbal* to patent cases. But these cases do not set forth bright-line rules, and inevitably there will be satellite litigation regarding whether or not a particular complaint satisfies the requirements of these cases. Different judges in different districts will come to different conclusions, leading to variable outcomes. Legislation is needed to provide uniform, clear national standards that create balance in the patent system and allow defendants to properly respond to accusations and prepare their case from the outset.

Thoughtful Legislation is Needed

A healthy and robust patent system promotes innovation and contributes to the continued economic success of our country. Unfortunately, abuses of the system undermine faith in the system and the system itself. Three issues cause most of the burden associated with lawsuits brought by unscrupulous patentees: (1) *vague pleadings*, (2) *excessively broad discovery demands*, and (3) *a lack of financial accountability on the part of losing patentees who bring baseless lawsuits*. We have heard some argue that the recent proposed rule amendments by the Judicial Conference and recent Supreme Court decisions will dramatically change the patent litigation landscape. We strongly disagree. These changes do not fully address the core problems of patent litigation abuse. They do not require a patentee to initially disclose which claims of a patent it is asserting, which of the

⁴⁴ *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937 (2009).

⁴⁵ See *Judicial Conference Receives Budget Update, Forwards Rule Package to Supreme Court*, UNITED STATES COURTS, September 16, 2014, <http://news.uscourts.gov/judicial-conference-receives-budget-update-forwards-rules-package-supreme-court>; Vin Gurrieri, *Judges Vote to Nix Rule Creating Patent Complaint Forms*, IP LAW 360, September 17, 2014, <http://www.law360.com/articles/578149/judges-vote-to-nix-rule-creating-patent-complaint-forms>.

defendants' products it is accusing, or how the accused products supposedly infringe the patents. They do not reduce the expense and burden of discovery. And they do not make fee-shifting the default rule rather than the exception. Only Congress can effect these changes. And, after over a decade debating this issue while the problem continues to grow, we believe now is the time for you to do so.

I believe each of these issues is effectively addressed in H.R. 9, the Innovation Act of 2015 ("Innovation Act"), which was reintroduced this year and overwhelmingly passed the House by a vote of 325-91 on December 5, 2013. I urge the Senate to enact comparable legislation for the reasons stated below.

Pleading Specificity. Businesses of all sizes, including EMC, benefit from a certain and predictable legal environment. Uniform, clear national standards, such as those included in the Innovation Act, can only be provided by Congress, and are direly needed. Those standards should require a plaintiff to explain why it believes the defendant infringes, so that the defendant can actually investigate the allegations and prepare its case, rather than face ever-shifting theories of infringement.

The Innovation Act recognizes the need to provide uniform pleading requirements for patent infringement cases. The Act would require a patentee to set out in its complaint each asserted claim, each accused product, and an explanation of how each accused product supposedly infringes every asserted claim. This imposes no new burden on good-faith plaintiffs, who are required to have conducted due diligence and arrived at a tenable, good-faith theory of infringement before filing suit. The bill's heightened pleading requirement merely requires plaintiffs to disclose the results of their required analysis. The real impact of this provision would be on those plaintiffs who file meritless, bad-faith lawsuits by making the lack of basis for the lawsuit apparent from the outset.

While several local patent rules require early disclosure of patent infringement contentions, those disclosures are not required until well after the filing of the complaint. These rules do nothing to ensure that plaintiffs have satisfied their pre-suit due diligence requirements. They do nothing to reduce the early burdens on defendants associated with investigating vague allegations of patent infringement. They do nothing to reduce the burdens associated with early discovery regarding the accused products, which is required under some local rules before the plaintiff must serve infringement contentions. And local rules certainly do not promote uniformity, since each of the country's 94 judicial districts has its own set of local rules, not all of which include local patent rules.

Discovery. None of the recent Supreme Court cases or proposed rule changes promises to turn the tide of the abusive discovery tactics that plague the meritless cases EMC faces on a daily basis. As I explained earlier, discovery is a significant weapon used to extort cost-of-litigation settlements in meritless cases. Abusive discovery tactics are particularly effective when used by PAEs because they typically have few employees and few records or documents, and are generally not subject to counter suit.

The Judicial Conference has proposed amendments to the Federal Rules relating to discovery. For example, the Judicial Conference has proposed modifying Rule 26 to require that the proposed discovery be “proportional to the needs of the case.” This requirement is a step in the right direction. But when considering what is “proportional to the needs of the case,” the proposed amendment requires consideration of the “amount in controversy,” a factor that is easily manipulated by plaintiffs. Indeed, in two recent patent cases filed against EMC, patentees have entirely ignored financial documents provided by EMC and instead submitted their own damages calculations that are entirely divorced from economic reality. Patentees would accelerate this trend under the new rule, bootstrapping their own unfounded damages estimates into an argument supporting unbounded, burdensome discovery requests.

Other changes require district court judges to manage discovery disputes earlier, more often, and more actively. These amendments are welcome. But they ultimately do not provide the bright-line guidance to courts needed to make a meaningful difference in the burdens associated with abusive discovery tactics in patent cases. The Judicial Conference’s proposed changes will demand more time and attention from already overburdened district courts. The average time from case filing to claim construction decision—a crucial milestone in a patent case—was already nearly two years⁴⁶ between 2008 and 2014.⁴⁷ The average time to trial was over three years⁴⁸ during the same period.⁴⁹ Requiring overburdened district judges to spend even more time than they already do on discovery issues will necessarily mean they have less time to spend on substantive issues and will, inevitably, delay resolution of patent cases. Further, more judicial attention to discovery issues may have the opposite of the desired impact, leading the parties to spend more time on discovery disputes with the hope of obtaining favorable pretrial procedural rulings. Thus, asking judges to devote more attention to discovery matters will merely trade one cost (compliance with burdensome discovery requests) for another (costly, repetitive discovery disputes). We need a better solution.

The Innovation Act sensibly limits discovery before the court issues its claim construction ruling to only discovery that relates to claim construction issues. This would help prevent wasted effort by either eliminating the need for further discovery entirely (where, for example, the court’s claim construction order effectively resolves the case); or, at minimum, by focusing the parties on truly relevant discovery, that can only be known after the court has told the parties how the claims will be interpreted.

The Innovation Act further ensures that the technical discovery that does take place would be tailored to the issues that actually matter, and that the costs of additional and inefficient “fishing expeditions” would be borne by the party serving the discovery request. By

⁴⁶ 712.7 days; or 635.1 days counting only the nine courts with the most active patent dockets.

⁴⁷ Year in Review: 2014, PATENT NAVIGATOR (last accessed March 10, 2015) at 21, <http://home.docketnavigator.com/year-review/>.

⁴⁸ 1224.3 days, or 1197.2 days counting only the nine courts with the most active patent dockets.

⁴⁹ Year in Review: 2014, *supra* n.47, at 24.

requiring the requesting party to cover the costs of unnecessary discovery, the Innovation Act limits the extent to which those who would abuse the litigation system can use discovery costs as a bargaining chip.

Fee-shifting. The Supreme Court's decisions in *Highmark* and *Octane* are welcome, but do not go far enough. Fundamental change is needed to stop the onslaught of frivolous patent cases companies have faced in recent years.

In the two years before these cases were decided, motions for fees were fully granted 18 percent of the time and granted in part 20 percent of the time. They were denied in full 62 percent of the time.⁵⁰ According to our analysis, in the nine month period after the Supreme Court issued its decisions in *Highmark* and *Octane* (ending in January 2015), the grant rate temporarily increased. In that period, motions for fees were fully granted 32 percent of the time and granted in part 10 percent of the time. The rate of full denials decreased marginally, from 62 percent to 58 percent. Viewed as a whole, more motions for fees have been granted in full and fewer have been granted in part. The number of denials has decreased, but only slightly.

Although at first glance, these statistics suggest that the rate of fully-granted motions for fees has risen after *Highmark* and *Octane*, in reality, that increase is largely isolated to the first three months after the Supreme Court issued its decisions. In those three months, motions for fees were fully granted 40 percent of the time, partially granted 10 percent of the time, and fully denied 50 percent of the time. But in the most recent three months, motions for fees have been fully granted only 24 percent of the time and partially granted 13 percent of the time, with full denials at 63 percent. In other words, in the most recent three months, the rate of full denials of attorneys' fees motions has gone back to where it was before the Supreme Court decided *Highmark* and *Octane*.

As this data suggests, fee-shifting remains the exception rather than the rule. At least one highly experienced and respected district judge has stated that *Octane* does not affect what cases he would consider to be exceptional.⁵¹ Furthermore, the Federal Circuit's recent decision vacating a district court's award of fees to a prevailing defendant introduces uncertainty to this area of jurisprudence.⁵² And a judge on the Federal Circuit sitting as a district court judge by designation denied fees even though he found that the plaintiff's case "was certainly a weak one."⁵³ As we can see, *Highmark* and *Octane* will not provide the sea change needed to effect fundamental reform. Critically, much is left to the discretion of district courts—discretion that is exercised very differently by different judges.

⁵⁰ *Docket Navigator Litigation Activity*, <https://www.docketnavigator.com/stats> (last updated Feb. 5, 2015).

⁵¹ See Jess Davis, *Judge Gilstrap Keeps Eastern District's Tight Ship Afloat*, IP LAW 360 (March 6, 2015), <http://www.law360.com/ip/articles/628732>.

⁵² See *Biax Corp. v. Nvidia Corp.*, No. 2013-1649, 2015 WL 755940, at *4 (Fed. Cir. Feb. 24, 2015).

⁵³ *Stragent LLC v. Intel Corp.*, Civ. No. 6-11-cv-00421, 2014 WL 6756304 (E.D. Tex. Aug. 6, 2014), at *5.



The Innovation Act would level the playing field by requiring, upon motion, that fees be awarded to the prevailing party unless the losing party's position is substantially justified or special circumstances make an award unjust. We believe that this provision embodies the most effective way to discourage the filing of frivolous and abusive suits by imposing financial accountability in the patent system. Simply stated, some patent owners—especially PAEs that are not generally subject to counter suits—have nothing to lose and everything to gain by filing suits, whether they have merit or not. Fee shifting would change that and bring some accountability to the system. Further, it would encourage parties who believe they have been wrongfully accused of infringement to pursue a vigorous defense if they believe they might recover their fees, rather than agree to nuisance settlements to avoid the expense of patent litigation.

The Innovation Act also requires disclosure of the real party in interest and permits joinder of that party. These provisions allow a prevailing party to recover fees, and to file counterclaims, against the entity that is truly behind the lawsuit. PAEs are often shell companies, with another entity providing the financial backing for the case. That entity may receive a “back end” in proceeds of the litigation. It may retain significant control over the PAE. It may be directing the litigation in the background. It may have granted licenses in the past, or committed to license its patents on reasonable and non-discriminatory terms.

This real party in interest should be required to be a party to the litigation. It should be liable for attorneys' fees if it permits a meritless case to go forward. And it should be subject to counterclaims in the event the real party in interest is infringing claims of patents owned by the defendant in the litigation. These changes would give operating companies like EMC more leverage, level the playing field and bring more fairness to suits brought by PAEs and other abusive patentees.

Post-Grant Review Processes. This Committee has debated the merits of reform for well over a decade and has considered all manner of legislation since the introduction of the Patent Reform Act of 2006 by Senators Hatch (R-UT) and Leahy (D-VT). These efforts culminated in the passage of the landmark Leahy-Smith America Invents Act of 2011, which most notably invigorated the post-grant review procedures at the Patent and Trademark Office (PTO). These procedures have proven to be effective and useful reforms for challenging the validity of patent claims and they are helpful tools to eliminate, narrow, and clarify broad, ambiguous patents. These changes were based on the sound recommendations of the National Academy of Sciences to Congress and have been implemented as Congress intended.

In our view, the post-grant procedures have been a phenomenal success. Inter Partes Review (IPR) proceedings, in particular, have been very popular with patent practitioners.

As of mid-February 2015, approximately 2,500 IPR petitions had been filed.⁵⁴ EMC has filed 19 petitions requesting the PTO to institute IPR proceedings and has defended 7 IPR petitions against its patents. Based on our experience in these proceedings, as both petitioner and patent owner, we believe the IPR process is operating as Congress intended and has proven to be a powerful and effective tool for culling out bad patents from the system.

Legislative proposals that change the post-grant review processes are premature and untimely. Despite the success of these new proceedings, the PTO is already reviewing and further improving the post-grant processes. According to PTO Director Michelle Lee, the PTO is holding roadshows and seeking public comments and plans to issue interim rules soon that she considers “quick fixes” to the post-grant review process. Additional rules are slated for later this year to address more challenging changes.⁵⁵ Director Lee stated, “Let me be clear that the Agency is open to considering changes to ensure the most effective and fair AIA trials possible in compliance with our legislative mandate. We aim to implement final rules by the end of this year.”⁵⁶ I strongly believe Congress should not interfere with post-grant processes that are working and are in the process of further evaluation and improvement.

I also believe the current broadest reasonable interpretation (BRI) standard is appropriate for post-grant review. The BRI standard appropriately places the burden on the patentee to draft claims that are clearly novel and nonobvious over the prior art. The BRI standard is based on a well-established body of law and has been in effect for nearly a century at the PTO. There is no reason why the standard the patent office uses in IPR proceedings should be any different from the standard it uses in every other patent proceeding, including prosecution, interference, and reexamination.

The BRI standard was also recently affirmed by the Federal Circuit in *In re Cuozzo Speed Technologies, LLC*, holding that “[a]pplying the broadest reasonable interpretation standard reduce[s] the possibility that, after the patent is granted, the claims may be interpreted as giving broader coverage than is justified.”⁵⁷ We are concerned that rolling back this standard would allow overly broad patents to continue to be used as weapons to abuse the patent litigation system.

Willful Infringement. Patent law has long required that willful infringement only be found where there is clear and convincing evidence that (1) an adjudged infringer took its wrongful actions “despite an objectively high likelihood that its actions constituted

⁵⁴ Remarks by Deputy Director Michelle K. Lee at the IPO Education Foundation PTO IPO Day Luncheon, March 10, 2015, available at <http://www.uspto.gov/about-us/news-updates/remarks-deputy-director-michelle-k-lee-ipo-education-foundation-pto-ipo-day>.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *In re Cuozzo Speed Technologies, LLC*, __ F.3d __, No. 2014-1301, 2015 WL 448667, at *6 (Fed. Cir. Feb. 4, 2015) (citations and internal quotation marks omitted).

infringement of a valid patent,” and (2) that the objectively-defined risk was or should have been known to the infringer. This standard is based on a well-developed body of case law that has limited willful infringement and, relatedly, treble damages to only the most egregious of abuses.

I believe legislative proposals that lower the willful infringement standard to establishment by a “preponderance of the evidence” would increase the leverage that abusive litigants currently enjoy in the economics of patent litigation. A finding of willful infringement results in an award of punitive damages. In other civil litigation contexts, an award of punitive damages ordinarily requires proof by clear and convincing evidence. There is no reason to depart from this standard in the context of willful patent infringement. Lowering the standard of proof would lead to an explosion of willful infringement claims and only provide opportunity for further abuse of the patent system. I strongly believe that such a change would be unwarranted and harmful.

Divided Infringement. I also oppose legislation that overturns the Supreme Court’s most recent decision in *Limelight Networks, Inc. v. Akamai Technology*. There is no reason to change the long-standing rule that a single defendant must perform or control all of the steps of a method claim for there to be infringement. Overturning the *Limelight* decision would merely belatedly expand the scope of poorly-drafted patent claims. This change would undermine certainty in patent law and upend the well-settled expectations of businesses regarding what does and does not constitute patent infringement.

Conclusion

Congress is uniquely situated to make a real difference in these important areas. While the Supreme Court has been active in correcting some of the flaws in the patent system that frivolous litigants seek to exploit, the judiciary—even at the highest level—cannot bring about the prompt and comprehensive solution that Congress can structure. It takes time for a case to reach the Supreme Court and it only accepts for review a handful of IP cases each term. Congress on the other hand can enact balanced solutions in a single, coordinated approach, such as that set forth in the Innovation Act. The proliferation of abusive patent litigation is the kind of broad problem, causing billions of dollars in misdirected spending, that cries out for a legislative solution.

Legislative action to address patent litigation abuses is necessary to restore confidence and balance in our patent system. The courts have made great strides, but the decisions are not sufficient to address all of the tactics associated with abusive patent litigation, including vague pleadings and discovery misconduct, which force many companies into settlement. The money spent on this frivolous litigation would be better invested in jobs and research and development. I must tell you, unfortunately, that I am certain that unless Congress acts, the problem will continue, unabated. The efforts undertaken by this Committee will be essential to the health of our patent system and the innovation of businesses in the United States.