Internet Association

February 12, 2015

The Honorable Darrell Issa
Chairman
Subcommittee on Courts, Intellectual Property, and the Internet
Committee on the Judiciary
U.S. House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515

The Honorable Jerrold Nadler
Ranking Member
Subcommittee on Courts, Intellectual Property, and the Internet
Committee on the Judiciary
U.S. House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Issa and Ranking Member Nadler:

The Internet Association respectfully requests that this letter be submitted to the record for today's hearing entitled "Examining Recent Supreme Court Cases in the Patent Arena."

The Internet Association is the unified voice of the Internet economy, representing the interests of leading Internet companies[1] and their global community of users. We are dedicated to advancing public policy solutions to strengthen and protect Internet freedom, foster innovation and economic growth, and empower users. While the Internet Association represents many established Internet platforms, we also represent less established platforms, many of them recent start-ups seeking to build a business using limited resources. Even though our members differ in terms of size and scope, one thing they have in common is patent trolls who extort money from them in order to settle frivolous lawsuits. We share our concerns about patent trolls with highly regarded Internet venture capitalists, including Marc Andreessen and Mark Cuban[2], both of whom have extensive, first-hand experience of the negative and debilitating impact trolls have on start-up activity.

The questions raised by today's hearing are important ones, and the subcommittee should be commended for doing due diligence on procedural changes to the patent litigation landscape since the Innovation Act passed in December 2013.

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[1] The Internet Association's members include Airbnb, Amazon.com, AOL, auction.com, eBay, Etsy, Expedia, Facebook, Gilt, Google, Intuit, LinkedIn, Lyft, Monster Worldwide, Netflix, Pandora, Practice Fusion, Rackspace, reddit, salesforce.com, Sidecar, SurveyMonkey, TripAdvisor, Twitter, Yahoo!, Yelp, Uber and Zynga.

[2] *See, e.g.*, http://www.politico.com/magazine/story/2014/04/tame-the-trolls-105251_Page2.html#.VNzLh0s05Hg (Cuban); and https://twitter.com/pmarca/status/482395929626939392 (Andreessen).

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Here are some hard facts to consider[3]:

- Even in 2014, trolls accounted for 62% of all patent cases filed.
- Companies with less than $100 million in revenue accounted for more than 40% of total troll defendants added to cases in 2014.
- Trolls brought cases against 3,615 defendants in 2014; 1,078 of these companies were targeted for the first time in 2014 in a troll patent infringement case.
- Even if troll litigation dropped slightly from 2013 to 2014, it is important to consider that troll litigation reached a record high in 2013 after increasing through the past decade and skyrocketing over the past three years.
- Consequently, troll litigation rates remain six times higher in 2014 than they were in 2004.

Opponents of patent reform cite three significant recent Supreme Court cases to support their argument that Congress no longer needs to act to reform abusive patent litigation. These cases are *Alice Corp v. CLS Bank Intl*[4]; *Octane Fitness v. Icon Health & Fitness*[5]; and *Highmark Inc. v. Allcare Health Management Systems, Inc.*[6] While each of these cases, and some other developments outside of Congress, brought about incremental changes to patent litigation, none of them can or should be considered a silver bullet - or even a lead bullet, for that matter - when it comes to stopping abuse of the patent litigation system.

First, the Court's analysis in *Alice* applies to only a small subset of the patents asserted by trolls. The fact that courts have invalidated perhaps 20 patents since the *Alice* decision can hardly be considered a solution to the troll problem when thousands of suits are filed each year. More importantly, invoking *Alice* still requires defendants to litigate a case to the point where a judge will rule on the validity of the patent at issue. Reaching this juncture in patent litigation can generate millions of dollars in discovery costs, a price that the vast majority of defendants – even the IA's established members - simply cannot afford in every case filed against them.

Similarly, *Octane Fitness* and *Highmark* made incremental changes to the fee shifting standard in patent litigation cases, but as required by the current statute, the Court allowed fee shifting only in an "exceptional case," meaning one that is "rare" and "stands out." Unfortunately, meritless cases are all too prevalent in 2015 and yet troll litigation continues unabated in several Federal district courts. There is still no meaningful fee shifting deterrent, even in cases where both the facts and the abuse of the system are truly "exceptional." A stronger fee shifting standard that will be consistently applied to trolls is needed. As with *Alice,* it is also important to understand that any fee shifting standard only kicks in at the end of protracted and costly discovery – in other words after the damage has been done and the majority of defendants have settled a frivolous lawsuit.

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[3] See RPX Blog, *2014 NPE Litigation: New and Smaller Targets,* (Jan. 9, 2015), available at http://www.rpxcorp.com/rpx-blog/; Patent Freedom, *Litigations Over Time,* available at https://www.patentfreedom.com/about-npes/litigations/.
[4] 134 S. Ct. 2347 (2014).
[5] 134 S. Ct. 1749 (2014).
[6] 134 S. Ct. 1744 (2014).

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Patent litigation reform remains as much a problem in need of a practical solution in 2015, as it was in 2013 when the Innovation Act passed in the House with overwhelming bipartisan support. The changes to the law brought about by the Supreme Court (which could be reversed or diluted in future cases) cannot be compared to the comprehensive and meaningful reform only Congress can implement. In particular, only Congress can recalibrate the key weapon in the patent trolls' arsenal: the ability to leverage asymmetrical litigation costs against defendants – whether those defendants are household names or struggling start ups - in order to coerce settlements of their meritless patent lawsuits. This weapon remained untouched by the Supreme Court in recent cases, allowing the troll business model to continue to thrive.

We thank you for your continued interest in this important issue and look forward to working with your subcommittee in the coming weeks and months to bring to an end abusive patent troll litigation.

Respectfully,

Michael Beckerman
President & CEO
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