October 18, 2013

The Honorable Patrick J. Leahy
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Bob Goodlatte
Chairman, Committee on the Judiciary
U.S. House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515

The Honorable Chuck Grassley
Ranking Member, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

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

Dear Messrs. Chairmen and Ranking Members:

Thank you for the leadership that you and your committees have shown in recognizing the need to reform the nation's patent system. America's patent system must promote innovation. It must ensure that companies large and small can devote resources to productive, pro-growth innovation in the marketplace instead of burdensome, unjustified patent litigation that stifles innovation.

Yet some entities use patents to tax innovation, not to promote it. Such companies accuse innovators of infringement – not to capture the value of the patent, but to demand settlements based on what their targets would have to spend to fight them in court.[1] The enormous cost of defending against an infringement allegation raises particular concerns when a small business is the defendant. For these businesses, the cost of defense may exceed their revenue, all but compelling settlement regardless of the merits.

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[1] *See, e.g.*, BRIAN T. YEH, CONG. RESEARCH SERV., R42668, AN OVERVIEW OF THE "PATENT TROLLS" DEBATE 1 (2012) (stating that "vast majority" of cases brought by patent assertion entities "end in settlements because litigation is risky, costly, and disruptive for defendants, and PAEs often offer to settle for amounts well below litigation costs to make the business decision to settle an obvious one").

We urge you to enact the following patent litigation reform measures, which will make patent litigation more efficient in order to reduce the incentive to bring such nuisance patent suits:

- *Genuine notice pleading in patent cases.* Under current law, entities that accuse innovators of patent infringement need not tell their targets in the complaint which claims of the patent they allege are infringed or which products or services allegedly infringe. A target that does not know the precise allegations against it can run up high, wasteful legal bills pursuing arguments that turn out to be irrelevant once the accuser finally makes its case clear. Section 2 of S. 1013 and Section 2 of H.R. 2639 both aim to correct this problem.[2]
- *Efficient management of patent cases.* In patent cases, the judge typically issues a so-called *Markman* ruling that construes the terms in the patent claims and lets the parties know the patent's scope. Under current law, expensive discovery often happens before that ruling, even though the ruling can render much of that discovery a waste of time and money. Knowing that, some accusers use early discovery burdens to force a settlement based on the cost of litigation, rather than the merits of the case. We support proposals – such as Section 4(a) of S. 1013 and Section 5 of H.R. 2639 – that stay any unnecessary discovery until the court has told the parties what the patent covers.
- *Curbing discovery abuse in patent cases.* Some patent accusers aim to leverage the cost of excessive discovery to force a settlement that has little to do with the merits of the case. We support proposals that, like Section 4(b) of S. 1013, allow for discovery of core documentary evidence in patent cases in the usual way, but that require the accuser to pay the costs of producing any additional discovery in patent cases.
- *Patent fee shifting.* In addition, we also support appropriate fee-shifting reform. The Patent Act has included a fee-shifting provision since 1952. We encourage Congress to provide more clarity regarding patent fee shifting. Done correctly, fee-shifting reform will deter nuisance patent lawsuits, particularly those based on weak patents, and ensure fairness in the patent system.

Reforms to mitigate the estoppel bar for administrative review of issued patents are also important. In addition, the reforms above are essential because they will make patent litigation less expensive and more efficient. They will help weed out the exploitative cases in which the accuser seeks to extract a settlement based on the cost of litigation, rather than on the merits of the cases. They will have little impact on cases founded on the merits of the patented technology, ensuring that inventors can receive their due reward for their work. We look forward to working with you to ensure that these proposals succeed in freeing the patent system to fulfill its function: encouraging innovation and boosting the American economy.

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[2] S. 1013 was introduced by Sen. Cornyn on May 22, 2013. H.R. 2639 was introduced by Reps. Farenthold and Jeffries on July 10, 2013.

Sincerely,

ADTRAN, Inc.
Huntsville, Alabama

American Consumer Institute
Washington, DC

Apple Inc.
Cupertino, California

Application Developers Alliance
Washington, DC

Avaya Inc.
Santa Clara, California

BlackBerry Limited
Irving, Texas

BSA | The Software Alliance
Washington, DC

Ciena Corporation
Hanover, Maryland

Cisco Systems, Inc.
San Jose, California

Coalition for Patent Fairness
Washington, DC

Consolidated Communications
Mattoon, Illinois

Consumer Action
Washington, DC

Consumer Electronics Association
Arlington, Virginia

DIRECTV
El Segundo, California

DISH Network
Englewood, Colorado

Dropbox, Inc.
San Francisco, California

eBay Inc.
San Jose, California

Electronic Frontier Foundation
San Francisco, California

Engine
San Francisco, California

Entertainment Software Association
Washington, DC

Facebook
Menlo Park, California

FairPoint Communications, Inc.
Charlotte, North Carolina

Ford Motor Company
Dearborn, Michigan

Frontier Communications Corporation
Stamford, Connecticut

Google Inc.
Mountain View, California

Groupon, Inc.
Chicago, Illinois

GVTC Communications
New Braunfels, Texas

Hawaiian Telcom
Honolulu, Hawaii

Hewlett-Packard Company
Palo Alto, California

HTC America
Bellevue, Washington

IBM Corporation
Armonk, New York

Juniper Networks, Inc.
Sunnyvale, California

Limelight Networks, Inc.
Tempe, Arizona

LinkedIn
Mountain View, California

MediaFire
Houston, Texas

Meetup, Inc.
New York, New York

Microsoft Corporation
Redmond, Washington

National Retail Federation
Washington, DC

NCTA – The National Cable & Telecommunications Association
Washington, DC

Netflix, Inc.
Los Gatos, California

New York Tech Meetup
New York, New York

North State Communications
High Point, North Carolina

NTCA – The Rural Broadband Association
Arlington, Virginia

Oracle
Redwood City, California

Personal Democracy Media
New York, New York

Public Knowledge
Washington, DC

QVC, Inc.
West Chester, Pennsylvania

Rackspace
San Antonio, Texas

Red Hat, Inc.
Raleigh, North Carolina

Safeway Inc.
Pleasanton, California

SAS Institute Inc.
Cary, North Carolina

Shenandoah Telecommunications Company
Edinburg, Virginia

Southwest Texas Telephone Company
Rocksprings, Texas

TechAmerica
Washington, DC

Twitter, Inc.
San Francisco, California

USTelecom Association
Washington, DC

Verizon Communications Inc.
New York, New York

VIZIO, Inc.
Irvine, California

Waterfall Mobile, Inc.
San Francisco, California

Windstream Communications
Little Rock, Arkansas

XO Communications
Herndon, Virginia

cc: Members of Senate and House Committees on the Judiciary