March 9. 2009

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

Dear Chairman Leahy,

Please accept the following written testimony to be submitted in conjunction with the hearing on "Patent Reform in the 111th Congress: Legislation and Recent Court Decisions" for Tuesday, March 10, 2009 at 10:00 a.m.

My name is Karl Swierenga and I am Vice President of FotoTime, Inc. of Dallas, Texas. FotoTime is a small photo sharing company that was founded in 1999. My two business partners and I started FotoTime as a way for consumers to organize and share their digital photos. We financed our company entirely out of our own pockets and worked on the company nights and weekends for five years, while we each held full time jobs. In 2004, we finally reached a financial point where we could work for FotoTime on a full time basis, although we were still a small and struggling company.

All of our hard work and dreams were almost ruined in the summer of 2008, when we were sued for alleged patent violations by a company called FotoMedia. We felt strongly that we were not in violation of any of the patents owned by FotoMedia; however, a small company like FotoTime has very limited resources and time for litigating patent disputes. In our estimation, patent litigation would have cost between $5 and $10 million. In addition, litigating these allegations would have probably taken 1 to 2 years. As a small business, we could afford neither the dollar cost of the litigation nor the cost in manpower to fight it.

In the fall of 2008, with little hope for a resolution and facing overwhelming legal costs, we decided to cut our losses and settle with FotoMedia. Even though we have reached settlement with FotoMedia, the costs of the settlement have created a financial burden that potentially could cause us to go out of business – costing jobs and negatively impacting the local economy.

As a small technology company, FotoTime understands the need for and supports a patent system designed to protect innovation. However, our experience with the patent litigation process has made us believers in reforming the patent system to reinstitute fairness and reason.

We feel that patents are being issued that are too broad and too generic. In our case, the patents in question covered very broad and basic functionality of our business that were neither unique nor innovative. In addition, FotoMedia claimed their patents covered all aspects of our complex business when in reality their patents did not.

FOTO TIME

FotoTime also feels that the process of filing and litigating patents encourages frivolous lawsuits. At several points during our negotiations and discussions with FotoMedia, we requested from them specific information detailing the nature of the infringement they alleged. At no point did they produce that information.

Because FotoMedia is a non-practicing entity – they do not produce products or services and have no meaningful assets – it is not surprising they would not provide this information. They are not interested in using these patents to build a business and protect their innovations. They are only in business to make money off of litigation. Their business model is to generate revenue from litigation, not innovation.

Like other non-practicing entities, FotoMedia can file their lawsuits in one jurisdiction regardless of where the defendants reside. This creates added burden and expense for the defendants while allowing the plaintiffs low cost litigation. The system encourages FotoMedia and companies like them to file more and more lawsuits. In our estimation, litigating all patent lawsuits in one jurisdiction has the potential to lead to courtroom biases and corruption.

FotoTime's decision to settle this lawsuit was a purely economic decision. We weighed the costs of the litigation and the lost time to fight it and assessed the risk and threat of the potential damages award. Taken together, and factoring in the unpredictability of the damages awards, we determined those costs to be financially fatal to our small business. We believe the damages that a court can award the plaintiff should only be based on the part of the business that the patents covered and not the business as a whole. Because these damages decisions could encompass the total value of our business, the risks outweighed the costs of settlement.

When considering the Patent Reform Act of 2009, we hope you realize that the patent process affects all companies large and small. The Patent Reform Act attempts to address the inequities in the process to make it fairer for all parties. The system is currently being abused. Reforms are needed to protect innovators and small businesses like us.

Submitted by:

FotoTime, Inc
Karl Swierenga
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Dallas, TX