

**Responses of Krish Gupta to the  
Written Questions of Chairman Grassley**

**Senate Judiciary Committee Hearing “The Impact of  
Abusive Patent Litigation Practices on the American Economy,”  
March 18, 2015**

**Question 1: Mr. Sauer testified that the new inter partes review (IPR) and post grant review (PGR) processes at the PTO have diminished the value of patents and resulted in a number of problems for patent holders. As you know, the IPR and PGR processes were established by the America Invents Act to provide a faster and cheaper way to challenge patents. Do you agree with Mr. Sauer that these processes are not working and are being abused? Do you support the changes proposed by Mr. Sauer, also contained in the STRONG Patents Act? Why or why not?**

**Gupta Response:** These provisions were the result of years of negotiations and were a careful balance of interests between the various stakeholders involved in the debate. In EMC’s view, the post-grant procedures have been a phenomenal success and served as Congress intended. As of mid-February 2015, approximately 2,500 IPR petitions had been filed. 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 would be premature. Despite the success of these new proceedings, the PTO has solicited public input on America Invents Act (“AIA”) trial procedures and policies, and based on the comments it received, is already reviewing and further improving the post-grant processes. Indeed, only last week, PTO Director Lee announced two upcoming rules packages that directly address feedback the PTO has received regarding its AIA trials. Together, the rules changes make it easier for a patent owner to amend claims; expand the evidence that may be included in the patent owner’s preliminary response to a petition; set forth the claim construction standard to be used in evaluating expired patents; clarify the extent of discovery available on questions of standing and estoppel; address how to handle multiple proceedings involving the same patent; provide for circumstances in which live testimony may be heard; and expand the page limits for certain filings to ensure that litigants have a full and fair opportunity to present their case. The PTO is also contemplating further procedural changes, which might include a requirement that a single judge rule on whether trial should be instituted, and that a three-judge panel (two of whom would not have considered the institution decision) issue the final written decision on validity.

I strongly believe Congress should not legislate changes to these successful post-grant processes, particularly before giving the PTO an opportunity to address any criticisms on its own.

I believe that the majority of provisions in the STRONG Patents Act are unnecessary, and in some cases, harmful to the patent system. I am concerned with the changes that the STRONG Patents Act makes to presumption of validity in PTO post grant proceedings – raising the standard to clear and convincing evidence to invalidate. The PTO is the government agency tasked with issuing patents; it should not be held to a higher standard to correct a mistake it may have made in first allowing the patent.

The STRONG Patents Act also includes a proposal that would prevent an administrative law judge on the Patent Trial and Appeals Board (PTAB) who participates in the decision to grant a PGR/IPR from participating in the decision on the merits. I believe this proposal is counterproductive. It would force additional administrative law judges to get up to speed on the case, thereby losing the benefit of the time spent and knowledge gained in reviewing the PGR/IPR petition. This is a waste of time and resources that the PTO cannot afford, especially in light of the explosive popularity of these new proceedings. Such a rule is tantamount to saying a district court judge who denies a motion to dismiss cannot then participate in the rest of the case.

Finally, the STRONG Patents Act proposes to unnecessarily limit post grant review processes to parties charged with infringement. Allowing third parties to use post grant review processes was a key change in the AIA that enabled the processes to be used more often to cull overly broad or bad patents from the system. Precluding parties not subject to suit from challenging a patent would result in a number of troublesome scenarios. For example, in situations where a customer is charged with infringement but the manufacturer is not, the manufacturer may be unable to protect its customers by challenging the validity of the patent through an IPR. Further, a party who is indemnifying a defendant in a patent infringement lawsuit may likewise be unable to protect its own interests through the IPR process. Finally, a party who sees a patentee suing its competitors, knowing it is next in line, may likewise be unable to preemptively challenge the patent. We believe that these proposed limitations are unwarranted.

It is worth noting that we 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 Federal Circuit also recently affirmed the BRI standard in *In re Cuozzo Speed Technologies, LLC*. Rolling back this standard would allow overly broad patents to continue to be used as weapons to abuse the patent litigation system; thereby making the current state of affairs worse.

**Question 2: Do you believe the STRONG Patents Act would be effective in putting a stop to the patent troll abuses that EMC is experiencing?**

**Gupta Response:** I do not believe that the STRONG Patents Act would be effective in stopping abuses EMC encounters in patent litigation. 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. The STRONG Patent Act does not address any of these issues.

I am concerned that provisions in the STRONG Patents Act would weaken post grant processes, as I discussed in my previous answers, and make it easier for bad-faith plaintiffs to assert vague and invalid patents. Other provisions included in the bill raise equally serious concerns.

First, the proposed changes to the standard for willful infringement would create a new avenue for potential abuse of the litigation system. 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 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 provides another opportunity to abuse the patent system. I strongly believe that such a change would be unwarranted and harmful.

Second, I oppose the provision in the STRONG Patents Act 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 expand the scope of poorly-drafted patent claims, undermine certainty in patent law, and upend the well-settled expectations of businesses regarding what does and does not constitute patent infringement.

**Question 3: Universities and other groups are concerned about possible adverse impacts of provisions contained in the Innovation Act on venture capital investment. Do you agree with these concerns?**

**Gupta Response:** I do not agree with these concerns. In a recent letter, dozens of venture capitalists, who invest hundreds of millions of dollars in angel and venture capital, urged Congress to enact comprehensive patent reform legislation. Their message was clear. Changes are necessary to provide small companies the tools to fight back against abusive patent litigation. They specifically called for specificity of allegations of infringement in complaints and demand letters, limits on the scope of expensive litigation discovery, and fee shifting – the Innovation Act addresses all of these in an appropriately balanced manner.

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. The surveyed venture capitalists stated that if a company had an existing patent litigation threat against it, it could be a major deterrent in deciding whether to invest. This point is reinforced by a recent Massachusetts Institute of Technology study finding that frequent litigants caused a decline of \$22 billion in venture investing over a five-year period. Further, a Rutgers University study concluded that small companies that were hit with abusive lawsuits significantly decreased their spending on research and development. 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.

Finally, a recent letter to Congress signed by 51 economics and intellectual property scholars explained that the clear conclusion of over two dozen empirical studies on patent litigation and its economic impacts conducted by academic researchers with diverse views and using different methodologies is that the net effect of patent litigation is to raise the cost of innovation and inhibit technological progress.

**Question 4: Isn't fee shifting in the Patent Act already? What's wrong with the current statute that provides for fee shifting, and do the recent Supreme Court cases make a difference? Can you please explain how changes to the fee shifting standard in the Patent Act would change the incentives and dynamics in patent litigation?**

**Gupta Response:** The Patent Act does include a fee shifting provision. However, it has not been sufficient to curb the abusive practices engaged in by patent trolls. Currently, under Section 285 of the Patent Act, a defendant who prevails in litigation must demonstrate that the case was "exceptional" in order for a judge to order its fees be paid. In practice, it has been extremely difficult to convince a district court judge to award fees in patent cases.

In *Octane Fitness v. Icon Health & Fitness*, the Supreme Court interpreted "exceptional" to mean that fees are available in any case that "stands out from others." In *Highmark v. Allcare Health Management System*, 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, these decisions have had no meaningful impact on increasing the success rates of defendants who seek to recover their attorneys' fees when they are faced with baseless patent litigation. These decisions do not go far enough. Fundamental change, such as fee-shifting for unmeritorious suits, is needed to stop the onslaught of frivolous patent cases companies have faced in recent years.

It's important to note that organizations with diverse memberships, such as the Intellectual Property Owners Association ("IPO") and the Coalition for 21st Century Patent Reform ("21C") support fee shifting. IPO is a trade association that serves intellectual property owners in all industries and fields of technology. 21C is a broad and diverse group of nearly 50 global corporations that employ hundreds of thousands of Americans. These organizations have members from many different industries, including biotech and pharma. Even BIO's witness at the hearing, Dr. Hans Sauer, acknowledged in his written testimony that its members hold a diversity of views on this subject, resulting in BIO's neutral stance. The breadth of stakeholders who support fee-shifting is quite significant.

The Innovation Act (H.R. 9) would require, upon motion, a court to award fees to the prevailing party, unless the losing party can show that its position is substantially justified or special circumstances make an award unjust. The Innovation Act thus properly shifts the burden of proof to the non-prevailing party to show why fees should not be awarded. 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. A more effective fee-

shifting rule would change that, and bring 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.

There is also a need for a reasonable and workable standard that effectively anticipates some of the gaming activities that abusive plaintiffs, and especially Patent Assertion Entities (PAEs), could use to undercut the effectiveness of a fee-shifting provision. PAEs, for example, often organize themselves into judgment-proof shell corporations, unable to satisfy an award of attorneys' fees. Without a recovery mechanism, fee-shifting is not a deterrent. The Innovation Act also includes a fee recovery and accountability provision to ensure that abusive litigants will have to pay if fees are awarded to the other party.

Some universities have expressed concern about the Innovation Act's fee-shifting proposal. But according to a study conducted by PricewaterhouseCoopers analyzing patent holder success rates between 1995 and 2013, universities and other non-profit entities involved as the patentee in patent litigation prevail 45% of the time. And according to the Government Accountability Office, universities and research firms filed fewer than 3% of patent infringement lawsuits between 2007 and 2011. Assuming universities' success rates are constant over time, cases in which courts would even consider whether a university patentee should be required to pay fees represent less than approximately 1% of patent litigation overall. And the instances where a university (or any other party) would actually be required to pay fees would be limited to circumstances where it is unable to show that its litigation position was substantially justified.

Universities are not exempt from an award of attorneys' fees under current law. Today, in an exceptional case, a non-prevailing university (like any other party) must pay the other side's attorneys' fees. Thus, the Innovation Act would not impose any substantial new burden on universities. It is entirely fair to hold universities, like other parties, to the eminently reasonable standard set out in the Innovation Act.

**Question 5: Many see the elimination of Form 18 and the Supreme Court's *Iqbal/Twombly* decisions as positive developments in terms of requiring more substantive patent pleading standards. Do you think that these developments are good enough to deal with the abuses by the patent trolls?**

**Gupta Response:** The pleading standards set forth by the Court in *Iqbal* and *Twombly* are unlikely to be sufficient to address pleading abuses in patent litigation. In *Iqbal* and *Twombly*, the Supreme Court addressed the level of specificity required in a complaint. With the Judicial Conference recommending the elimination of Form 18, it is expected that *Iqbal* and *Twombly* will apply to patent pleadings as well. However, these cases do not set forth bright-line rules for patent litigation, which is a specialized area of the law. Without clear standards in patent cases, many courts will undoubtedly continue to allow vague pleadings.

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.

Businesses of all sizes, including EMC, benefit from a certain and predictable legal environment. There is broad consensus on the need for increased specificity. It's important to note that organizations with diverse memberships, such as the Intellectual Property Owners Association (IPO) and the Coalition for 21st Century Patent Reform (21C), both agree that patent complaints need to be more specific than they are today under Form 18. The debate is over how much specificity is enough. Our view is simple: a complaint should include sufficient information for a non-lawyer to understand the nature of the alleged infringement. This standard should not be difficult to meet for a patent owner who has exercised the requisite due diligence prior to initiating a suit to establish a good-faith basis for its accusation of infringement.

Furthermore, in the context of the need to deter frivolous demand letters, there is broad support for the Innovation Act's requirement of specificity. The Act states that demand letters should include information about the patent in question, what is being infringed, and how it is being infringed. Complaints for patent infringement should be required to include the same level of detail as demand letters. If there were no such requirement, a plaintiff could avoid the specificity requirement for demand letters by instead filing a bare-bones patent infringement complaint in court. If demand letters are regulated and pleadings are not, businesses will be

faced with an onslaught of vague federal court lawsuits instead of demand letters. This would increase, rather than decrease, the unwarranted burden on businesses facing unmeritorious claims of patent infringement.

**Question 6: There have been reports that the number of patent troll lawsuits has been dropping over the last year and, consequently, Congress should adopt a wait and see approach. Do you agree? Is the problem of abusive patent litigation over? Can you speak to the overall rate of litigation that is actually taking place in context to what it has been traditionally?**

**Gupta Response:** Congress already has spent many years debating the problem of abusive patent litigation and the most appropriate manner in which to address it. The problem has continued despite recent Court decisions. In 2014 alone, more than 5,000 new patent lawsuits were filed. Thus, 2014 saw the third highest number of new patent lawsuits filed, exceeded only by 2012 and 2013.

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 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. Specifically, as compared to the same month the previous year, new patent cases were up by 4% in December 2014; by 36% in January 2015; and by 10% in February 2015. 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.

As a practicing lawyer, I can tell you the problem is still enormous. Three areas—fee-shifting with accountability, pleading specificity, and discovery—require immediate legislative intervention. The judiciary cannot bring about the prompt solution that Congress can structure to ensure consistency and predictability in the patent system.

**Question 7: How much does EMC spend each year on patent troll litigation, and what is the impact on EMC's investments/research and development in the United States? In your opinion, does this kind of patent litigation encourage or discourage innovation?**

**Response:** 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.

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. 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, faced with vague pleadings, 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.

For example, in a recent case, for an extended period, one of EMC's star engineers was required to formally set aside ten percent of his 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. 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.

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.

**Question 8: What do you believe are the most promising proposals currently being considered by Congress that would help deter abusive activity in the patent system? How do you see the patent litigation environment changing if those reforms are enacted?**

**Response:** I believe the House's Innovation Act (H.R. 9), is the most promising proposal currently being considered by Congress, as it effectively addresses the three issues that 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.

As I have explained in response to prior questions above, the recently proposed rule amendments by the Judicial Conference and recent Supreme Court decisions will 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 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.

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. They are rarely held accountable for a defendant's attorneys' fees, even when the litigation they filed lacked any reasonable basis. Only Congress can effect these changes.

By enacting legislation like the Innovation Act, Congress can restore accountability and balance back into the world's premiere patent system and alleviate the unfair burdens that abusive patentees are able to impose on hardworking companies like EMC that are the life-blood of our economy.