

## "Protecting Small Businesses and Promoting Innovation by Limiting Patent Troll Abuse"

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### Introduction

Mr. Chairman, Ranking Member Grassley and members of the Committee, thank you for convening this hearing and for drawing attention to the importance of a well-functioning patent system to our nation's economic strength and vitality.

I would also like to thank Chairman Leahy and Senator Lee for introducing S. 1720, the Patent Transparency and Improvements Act of 2013. In addition, I would like to thank Senators Hatch, Cornyn and Grassley for introducing very important bills that will help curb abusive practices by patent litigants. Together, these legislative proposals provide much-needed solutions to the patent issues I will talk about today. I believe that all of these bills merit the support of this Committee and action by Senate.

My name is Dana Rao, and I appear before you on behalf of Adobe Systems Incorporated, where I serve as Vice President and Associate General Counsel of Intellectual Property and Litigation. I oversee all aspects of our intellectual property and litigation matters, including obtaining, licensing and defending Adobe's patents, trademarks and copyrights.

I am pleased to have the opportunity to testify in front of this Committee about the problems that patent trolls cause our country. There are two points in particular that I want to keep at the forefront of this discussion:

1. Bad actors are taking advantage of asymmetrical costs of patent litigation to pressure defendants into settlements.
2. Legislation now pending in this Committee will go a long way toward fixing this problem. Specifically, the legislative proposals that I mentioned above can work together in a complementary fashion to restore balance denying predatory litigants the ability to exert undue leverage over defendants.

The patent system has become an avenue for abuse and economic gain for opportunists, and Adobe is one of the many U.S. companies being victimized. Traditionally, the potential of a patent counterclaim ensured that patent holders chose good patents and performed reasonable due diligence before

bringing a suit against a competitor. But patent trolls make no product and therefore they do not have the natural disincentive to bring meritless lawsuits. Unfortunately, the patent litigation system has not developed to provide any other barriers to that behavior. In fact, the current system is quite easy for predatory litigants to exploit. For example:

- The current fee-shifting standard is too high to provide any real disincentive for bad actors to bring questionable patent lawsuits.
- The pleading standard is lower than many other areas of the law, making it easy to file a vague complaint without performing any due diligence.
- The minimal information required in the current pleading standard allows broad discovery on any product a defendant sells, which drives up the cost of defense for the defendant.
- Courts often do not decide dispositive motions or hearings early in a patent case, thus lengthening the time a defendant must pay legal fees before being able to prove that the asserted patent has no merit.
- Patent trolls have chosen to target end users, who have the least knowledge of the infringing technology.

All of these factors create a system in which a patent troll has all of the economic advantages, and defendants face a Hobson's choice of settling to avoid these costs or paying a prohibitively high price to prove their innocence.

The measures that I believe need to be included in any final legislative package are:

1. **Strong fee shifting** to address the imbalance in financial incentives that encourage opportunists to adopt predatory patent litigation as a business model.
2. **Bonding** to render the tactic of setting up judgment-proof shell companies ineffective.
3. **Customer stays** to protect end users from being sued directly and improve judicial economy by reducing the number of cases in the court system.
4. **Heightened pleading** to require patent plaintiffs to perform some minimal amount of pre-suit investigation before launching a patent suit, so fewer meritless cases are initiated.
5. **Discovery cost shifting and sequencing** to control the cost of discovery in patent cases, which trolls can now use to exert pressure on defendants.
6. **Demand letter reform** to deprive patent trolls of another tool in their chest: the use of vague and misleading threats to convince businesses to pay a settlement before being sued.

These reforms are long overdue. Together, they insert heightened standards of quality throughout our patent litigation system and thereby allow it to be used for its intended purpose — to promote the sciences by allowing patent holders to validate their valuable innovations.

In addition to these patent litigation reforms, improving patent quality also should remain a high priority. Under Chairman Leahy's leadership, the America Invents Act (AIA) made a number of important changes. As a result, I believe the Patent and Trademark Office is functioning better and patent quality is improving. For example, to challenge the validity of poor-quality patents, the AIA created post-grant and *inter partes* proceedings, and it established ways to challenge business method patents related to

financial services. These post-grant procedures are now in the early stages of implementation. We have confidence they will work well. But I also believe strongly that now is not the time to make major changes to legislatively expand or revise these procedures. I fear that premature changes will do far more harm than good.

### **Background on Adobe**

Adobe is, by any account, a tremendous international success story that exemplifies American ingenuity and innovation. Founded in 1982 by two computer scientists, John Warnock and Charles Geschke, Adobe's products have created thousands of jobs directly and thousands of businesses indirectly. Adobe brought the world Postscript, enabling printers to print easily from computers; Photoshop, creating an industry around professional digital imaging; and Acrobat and the Adobe Reader, bringing the world innovations in electronic document creation, publication, and management. More recently, Adobe has entered into Digital Marketing, providing retailers and e-tailers the ability to customize and optimize their web content. Charles Geschke and John Warnock created not only an iconic company 30 years ago, but also a culture of innovation and entrepreneurship that lasts to this day.

From its beginning — two scientists with a good idea — Adobe today generates \$4.4 billion in annual revenues, employs more than 12,000 people, and continues to invest in innovation. Last year Adobe invested 17 percent of its revenue in research and development, about \$740 million dollars.

As a company, Adobe is a strong believer in the U.S. patent system's importance to American innovation. With over 3,000 patents and applications, Adobe has protected its leading-edge inventions in photography, document management, web analytics and web software. The inventions of Adobe's scientists may be intangible, but they represent genuine breakthroughs in 21<sup>st</sup> century technologies. Our technologies allow computers to recognize faces of loved ones or scenes from vacations and automatically classify them into photo albums. They can remove blur from photographs, and can use a video camera to create a 3D animated figure that mimics the movements of your head. We can recommend goods for consumers to buy; we can predict how a blog will be perceived by the public before it's released; and we can report to a company how social media sentiment is rising or falling based on its latest ad campaign.

These amazing inventions are the building blocks of the future — and they are all implemented in software. The software industry is now, and will remain for many decades to come, a critical sector of our economy, contributing more than \$400 billion to our nation's gross domestic product, employing more than two million U.S. workers, and paying salaries that are roughly double the national average.

### **The Current Landscape**

I believe the challenge our patent system faces today is caused by bad actors taking advantage of asymmetries in litigation costs. Trolls make no investments and have nothing at risk, but their targets, such as the credit unions and print shops appearing here today, face the risk of paying off the troll or losing their livelihood. The solution to this problem is to recalibrate the troll's cost-benefit analysis by taking away the leverage that creates the potential for windfall profits.

I have heard some complain that the problem is the availability of patents for software, so software should not be patentable. Adobe does not agree. The bad actors who choose poor patents and stretch their claims beyond meaning are at fault. Software remains a vibrant fountain of innovation and the source of many of the greatest inventions happening in our country today.

I believe we should continue to use the traditional rules for determining if an idea is patentable. This means we should not be allowed to patent abstract ideas. At the same time, we should not confuse what is “abstract” with the “intangible” innovations found in software. A great many of the 21<sup>st</sup> century’s businesses are built on intangible ideas, and this trend will only continue. It is no coincidence that America is the leader in providing patent protection for software and that America is also the world leader in software innovation. Congress should continue to support that protection going forward.

That being said, we should always be looking for ways to improve the patent system. The America Invents Act was a landmark piece of legislation, a major overhaul of the patent system to modernize our practices and prepare us for the next century. With harmonization as a key goal of the AIA, America is now ready to lead the world discussion on the importance of patent rights. In addition, the AIA added some important measures for helping improve the quality of patents, which has been and will continue to be a critical focus for the United States Patent and Trademark Office, patent applicants and industry participants. The AIA, however, did not focus on the problems currently associated with abusive patent litigation practices. The problem was there, and it has only become worse.

### **Problem of Abusive Litigation Practices**

Before 2009, Adobe had only faced 19 lawsuits in its entire history. This year, we have had more than 20 patent litigations. Before 2009, we had received demand letters only eight times. In 2012 alone, we received 33.

Nationally, the problem is worse. In 2007, patent trolls targeted 834 defendants. In 2011, they quadrupled their targets, suing 3,401 defendants, according to the GAO report.<sup>1</sup> A majority of patent litigation is now brought by patent trolls. Patent monetization entities (typically trolls) filed 58.7 percent of patent lawsuits, up from 24.6 percent in 2007.<sup>2</sup>

Not only have patent trolls dramatically increased the frequency of patent suits; they have also changed the nature of these suits. Instead of suing the party allegedly responsible for the use of the patented technology, the patent trolls are targeting customers who are the end users of the patents, a phenomenon unheard of just a few years ago. Since 2009, Adobe has received more than 130 indemnification requests. The reason for this change in target is an unfortunate one. Trolls are targeting those most vulnerable and least suited to defend the case, which maximizes the advantages they have in their cost-of-defense strategy. They know that end-user defendants — such as sporting goods stores,

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<sup>1</sup> GAO-13-465, INTELLECTUAL PROPERTY: Assessing Factors That Affect Patent Infringement Litigation Could Help Improve Patent Quality, pp18-19.

<sup>2</sup> Feldman, Robin, et al., “The America Invents Act 500 Expanded: Effects of Patent Monetization Entities,” forthcoming UCLA J. L. & Tech. 2013

clothing retailers and coffee shops — will pay a few hundred thousand dollars rather than incur the millions of dollars required to mount an effective defense.

Adobe sees this type of extortive demand continually from these new patent litigation plaintiffs. We have received offers for settlement of \$50,000, \$30,000, and even \$11,000. They ask for these small amounts, which are far less than the cost to defend ourselves in litigation, in exchange for us walking away without forcing the patent troll to prosecute their patent. It is quite obvious that the patent trolls do not want to see their patents tested. In fact, one study has shown that patent trolls will lose more than 90 percent of their cases if the patents are taken to final judgment.<sup>3</sup> They know this, and so they price their patent settlements accordingly.

Unfortunately, settling with the patent trolls does not always help. Adobe has been sued by one entity through three different shell companies three times in just the last two years. Appeasement is not a strategy that works, and Adobe no longer settles with meritless patent holders. Rather, we are now forced to pay the millions of dollars of defense costs to make the point. It costs, on average, \$3 million to \$8 million for Adobe to defend itself in a patent lawsuit through trial. While Adobe has now chosen to pay that cost to fight back against these trolls, many of the start-up companies and small businesses targeted by patent troll litigation cannot.

Spending millions of dollars on litigation has an impact to Adobe. Adobe has more than 12,000 employees. The millions we are spending on legal defense costs could be used to expand our hiring in several of our U.S. facilities, collaborating with universities to bring forward the next great feature in Photoshop, and investing in our communities.

Instead, the money is going to patent trolls. And make no mistake, these patent trolls are not the little guy. They are multi-million dollar ventures, in some cases publically funded. But patent trolls certainly have no compunction about targeting the little guy. In a recent study, 55 percent of the NPE lawsuits target companies that make under \$10 million in annual revenue.<sup>4</sup> Targeting small companies makes sense for this business model, as trolls know start-ups can't afford protracted and expensive litigation. These decisions have real impact, not just in money, but in jobs, products and innovation. The same study notated that 28 percent of the surveyed start-ups had one or more significant operational impacts from an NPE assertion, and 12 percent had to exit a business line altogether. Forcing start-ups out of business in favor of a paper-holding patent troll is not beneficial to society.

And this not just a problem for start-ups. In my career, I have had to tell a business partner that a patent license settlement with a troll was going to cost several hundred thousand dollars. The business owner responded that it was going to force them to layoff engineers to fund the license. Unfortunately, there was nothing I could do to avoid paying this cost. No one wins when the patent trolls are allowed to flourish. Their behavior is having a real impact on real people, and only Congress can stop the abuse.

## **Remedies**

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<sup>3</sup> Mark A. Lemley, & Joshua Walker, *Patent Quality and Settlement Among Repeat Patent Litigants*, 99 Geo. L. J. 677, 694 (2011).

<sup>4</sup> Colleen Chien, *Startups and Patent Trolls*, Santa Clara Univ. School of Law, Accepted Paper No. 09-12 (Sept. 28, 2012)

It is easy to see that meritless litigation designed to force victims to pay extortionate settlements is the heart of the problem. The way to curb this abusive behavior is to rebalance the costs of patent litigation. Any solution must take into account future changes in technologies and business models. That is why proposals focusing on specific types of plaintiffs or types of technology are problematic. Proposals aimed at curbing bad behavior — no matter who is doing it — are the right way to go.

## 1. Fee Shifting

Congress has already recognized that patent litigation is uniquely ripe for abuse. 35 U.S.C. §285 is one of the few areas of the law that provides for fee shifting. Unfortunately, §285 requires a case to be “exceptional” for fees to be shifted, and the lack of real-world outcomes shows that the standard is too high. Very few judges award litigation costs to a winning party who has been the victim of meritless litigation. In an op-ed in the *New York Times*, Chief Judge Rader noted that only 20 of 3,000 cases received fee shifting in 2011. It is certainly our experience that fee shifting is rare, and it is almost not worth the cost to bring a fee shifting motion given this high threshold. A court must find that the bad actor was objectively unreasonable and had subjective bad faith in order to shift fees under the current §285. When asked about their reluctance to shift fees, judges consistently cite the complexity of patent cases and the difficulty of showing that a plaintiff had an unreasonable position, given their unfamiliarity with the technology. Unlike copyright law, which also has fee shifting, the complexity of patent litigation requires that the fee-shifting standard for patent litigation create greater certainty, or the desired deterrent effect will not be achieved.

There are several legislative options before this Committee that would help provide that certainty, and thus the deterrent effect the patent system needs. Two Senate bills — one from Senators Cornyn and Grassley (S.1013) and one from Senator Hatch (S. 1612) — along with the recently passed House bill (H.R. 3309) all have similar provisions. The House bill provides that the non-prevailing party must pay the fees of the prevailing party unless the non-prevailing party’s position has a reasonable basis in law or fact, or the court determines special circumstances apply, such as that the shifting of fees would cause severe economic hardship to the non-prevailing party. The Cornyn-Grassley bill would shift fees to the non-prevailing party unless the non-prevailing party’s position was substantially justified or the court determines in its discretion that special circumstances exist. Senator Hatch’s legislation provides a similar position, but also takes into account conduct as a factor by which to determine whether fees should be shifted.

All of these bills would establish effective, balanced, and fair fee shifting mechanisms. In one recent case for Adobe, a patent troll litigated a case against an Adobe customer. We stepped in to defend the case. Before the merits would be heard, the patent troll wanted to walk away from the lawsuit. The troll offered increasing smaller settlement amounts, but we declined. Finally, the troll gave up and granted Adobe a free covenant not to sue. We moved for fees, but the court determined this was not an “exceptional case,” because the plaintiff’s position was not objectively unreasonable. The court found that since the case hadn’t reached the merits, it had no way of knowing what the plaintiff’s position would be. For that primary reason, it chose not to shift fees. This is a good example of how the current law fails in today’s patent litigation landscape. The patent troll can settle with hundreds of defendants

and avoid fee shifting by walking away from a meritless case before the weaknesses are exposed or before it can prosecute the case in its chosen plaintiff-friendly forum. Under any one of the three proposed fee-shifting standards, the patent troll would pay in this situation. The new bills would create incentives for patent holders to bring only cases for which they have a reasonable position. That is how our patent system should work.

I should also note that the Supreme Court is currently reviewing the fee-shifting standard in 35 U.S. C. §285. The statute is interpreted today to require both objective baselessness and subjective bad faith to satisfy exceptionality. The Court may lower the threshold to find exceptionality. However, as noted above, it is unlikely that it can sufficiently modify the standard to meet the problems of today. The Court is still bound by the word “exceptional,” and that word creates an unreasonably high bar. The problem of abusive litigation practices is a policy matter, and Congress is better suited to address the inadequacy caused by the burdensome high standard in today’s statute. Given the central importance of fee shifting to solve the patent troll problem and rebalance patent litigation to focus on merit based suits, we strongly believe that a fee-shifting amendment must be added to any legislation that is passed by the Senate.

## 2. Discretionary Bonding

It is not sufficient merely to shift fees. In today’s litigation landscape, the patent trolls are very creative and establish shell companies through which they bring their meritless cases. The patent troll stands in the shadows behind these shell companies. A fee-shifting statute must reach the patent troll, who is the real party in interest. In other words, the deterrent effect of the improved fee shifting only works if those who are receiving the direct financial reward for these suits are held accountable. Obtaining a fee award against a judgment-proof shell company will have no deterrent effect on the patent trolls.

There are several approaches to securing fees against the real party in interest. The best of these approaches is Senator Hatch’s discretionary bond provision. This carefully nuanced provision balances the need for a bond against the importance of not unnecessarily or unfairly burdening every plaintiff with the requirement of posting a bond. For example, this bond provision clearly addresses concerns about burdening a small start-up or independent inventor. One of the key factors a court is asked to consider is whether or not a bond would burden the patent holder’s non-patent activity. A small start-up with a real business would not be required to post a bond under this provision. In addition, any party that can demonstrate that they are able to pay for shifted fees and anyone who can find an entity willing to be responsible for such fees on their behalf could also be exempted by a court from posting a bond. These factors ensure that the court’s discretion will be focused on the real abusers of our patent system, and those legitimate patent holders would be exempt.

There have been several bills that attempt to address this issue through expanding the rules on joinder. We have some concerns with these proposals. First, we believe there are due process concerns with joining a non-party without sufficient notice. Some proposals have attempted to address this problem by creating complicated and expensive notice processes that potentially pose expensive burdens on the defendants at a time when it is not clear fee shifting will be an issue. In addition, venue requirements

can be easily avoided by the trolls. Given the problems with making joinder an effective tool to ensure that the shifted fees serve as a real deterrent, we prefer a discretionary bonding provision as discussed above.

### 3. Customer Stay

As mentioned above, the patent trolls have shifted their focus to customers to fuel their business model of predatory litigation. This is a very troubling development, disruptive to the economy as a whole and to our specific relationships with our customers. It also unnecessarily diverts valuable judicial resources. We urge the Committee to take action to address this problem. Trolls' targeting of customers and retailers has led manufacturers to defend their customers all over the country. This is an expensive process. In one case, a patent troll filed 12 actions in 11 different districts against more than 200 defendants related to one of Adobe's products. In that suit, Adobe had to defend 10 of its customers in six of those districts. To address this expense, manufacturers attempt to win stays against the patent holder, to efficiently resolve the dispute in a single courtroom. There are often common issues of infringement and validity that can be better considered in a single courtroom rather than spread out over the country. In most cases, damages can also be considered equitably in the same courtroom.

There is little legitimate reason to prosecute multiple cases on the same patent against the same product against a number of defendants, unless you are hoping to force settlements. However, since these are not legitimate suits, the trolls oppose the manufacturer motions for stays and often are successful in having them denied. In the case described above, Adobe's motions for stay were denied for several of our cases and granted in others. One court merely pointed to prejudice to the patent holder by having to wait for the manufacturer's case to go forward, which is, of course, always going to be the case as the customer's case is first filed (or this problematic situation does not exist). This kind of routine denial of stays impairs the ability of a manufacturer to defend its customers and is of no benefit to judicial economy. The split in the courts' use of the common law customer suit exception also dictates that a uniform national law would better serve the industry.

S. 1720, the Patent Transparency and Improvements Act, provides a statutory system for making it easier for manufacturers to defend their customers. A stay is granted if the manufacturer and customer agree to be bound by common issues, the manufacturer and customer agree in writing, and the same patents and products are targeted in the two suits. However, to protect the patent holder, the stay can be lifted if the stay would be prejudicial to the case of the patent holder. This common sense provision carefully balances the interests of the end user, the patent holder and the manufacturer. We support the approach of the S. 1720.

### 4. Heightened Pleading

Another area of important focus is the reduction of discovery costs through an increased requirement for detailed pleadings. Heightened pleading requirements and discovery cost shifting are closely related, as a heightened pleading standard will provide a focused scope under which subsequent discovery will be requested. In addition, both concepts strengthen another tool against the troll: a requirement that patent trolls incur the expense of doing some pre-suit investigation, which should reduce overbroad



discovery. This helps remove discovery costs as a weapon to be used against the other party. Ensuring that the conduct of patent litigation is not turned into a tool for bad behavior is an important policy objective, and one where we urge Congress to act.

Today, the pleading standard for patent litigation is very low. We routinely receive complaints that do little more than announce the name of the company and the patent, and make a general assertion that some Adobe product is infringing. There is no discussion about what product or what claim in the patent is at issue. There is no provision describing the theory of infringement. There is no discussion of who the real party in interest is, or if there are any licenses or standards commitments that might affect the suit. Today, all that is required is compliance with Form 18 of the Federal Rules of Civil Procedure. This lax standard fuels the rise of meritless patent litigation, as patent holders are able to easily file suits with no pre-suit investigation and then begin their campaign for extortive settlements. It is typical for Adobe to receive a call for a settlement days after a bare-bones complaint has been filed. The patent holder still has no idea what product or claim is at issue, or why Adobe infringes. But since there is no requirement for specificity, they are able to use the leverage of the lawsuit to extract a settlement.

There are several pending legislative proposals that address this issue, by eliminating Form 18 and adding requirements for heightened pleading. H.R. 3309 and S. 1013 both provide for these measures. Adopting these positions would merely bring patent litigation in line with the recent Supreme Court pleading standards set forth in *Twombly* and *Iqbal*.

H.R. 3309 adds important additional safeguards for the patent holder, including protecting trade secret information from being disclosed in the pleadings and ensuring that the heightened information is only required if reasonably accessible. As a patent holder, Adobe would like to see both of these safeguards added to final legislation on this issue.

## 5. Discovery Cost Shifting and Sequencing

Discovery costs are another weapon in the patent troll's arsenal. In an American Intellectual Property Law Association (AIPLA) survey, patent defendants revealed that cost of discovery can range from \$350,000 to \$3 million<sup>5</sup> Adobe's costs are typically in this range for cases that go the full length of discovery. There might be a justification for spending this amount if these documents produced by Adobe were actually used. But they are not. The GAO study issued this past summer noted that one judge stated less than one in 10,000 documents are actually used at trial. This is commensurate with Adobe's experience as well. As a software company, we willingly provide source code in discovery subject to appropriate safeguards. We believe that in most cases the plaintiff's entire infringement case can be built from this one response to discovery request. However, plaintiffs still ask for thousands of documents in order to put pressure on us to settle. There is no legitimate reason for seeking such large productions of documentation with low relevance. However, if the goal is to raise the cost of litigation, seeking broad discovery requests fits nicely within that strategy.

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<sup>5</sup> Report of the Economic Survey 2011 (Arlington VA: July 2011)

The current proposals to allow discovery cost shifting in excess of core documents also allow the overall cost of litigation to be reduced for the defendant at an earlier point than any end-of-case fee shifting decision. By minimizing the discovery costs during the case, it is likely more cases will be heard on the merits.

Another key element of reducing the overall cost of litigation is to properly sequence discovery in patent cases. The most important component of a patent case is the Markman decision, where the claims of the patents are interpreted and become the law of the case. After this hearing, it can be quite clear to both sides who has the winning position. Cases are often settled after Markman. In one recent (and typical) case, Adobe had a successful Markman decision and the patent plaintiff decided to stipulate to non-infringement and appeal the Markman decision. If affirmed, the case would end. Given the importance of the Markman decision, it only makes sense that it should be rendered early in a patent case, and discovery should be limited only to the question of claim construction for most cases until the Markman decision has issued. Both patent holder and patent defendant benefit from reaching the merits of the case as quickly as possible for as low a cost as possible. Many cases could be conducted for a far lower cost if the case proceeded to a Markman decision first, with limited discovery. Discovery on other aspects of the case can continue after Markman, assuming the case needs to go forward. Prior to Markman, because of the lack of understanding of the scope of the claims, discovery can be very broad and often results in document production and review of very little relevance, given the later interpretation of the claims by the court. Both S. 1013 and H.R. 3309 have provisions to sequence discovery in this manner. In addition, both provide discretion to the court to allow other discovery to occur as appropriate. As a defendant, Adobe prefers the court to maintain discretion to allow other discovery early to allow other dispositive motions to be brought as appropriate. However, for the ordinary patent case, claim construction will be the most important component of the case, and limiting early discovery to those issues will make for a more efficient and cost-effective litigation. Adobe does support providing an exception for cases in which the patent holder is seeking a preliminary injunction. For those cases, time to resolution is of maximum importance and it seems appropriate that discovery on all issues proceed in parallel.

In addition, Adobe supports the principle that the judiciary is best able to dictate the specifics of their case management practice, to address the different scenarios they routinely face. However, Adobe strongly believes that Congress should set the policy goals as discussed above, to ensure the framework of patent litigation is not enabling the abuses that are occurring today. To that end, Congress should provide specific guidance to the Judicial Conference to ensure that those goals are met. In addition, given the urgent and growing nature of this problem, Adobe believes that Congress should set a date certain by which the Judicial Conference promulgates its rules, and such date should be set as early as practical after the passage of this legislation.

## 6. Demand Letters

Finally, Congress should act to protect against the abuse of demand letters in patent assertions. Legitimate patent licensing, where a patent holder is aware of a particular infringement and uses a letter

to initiate discussion, is perfectly appropriate and protected speech. However, the demand letters being sent in today's environment often are deceptive and misleading.

In one situation, a patent holder is sending letters to Adobe customers asking for money to settle the lawsuit. The patent is one for which Adobe has taken a license on behalf of itself and its customers. Despite this, the patent holder fails to mention Adobe's license in its letters. The only conceivable motivation for this behavior is to hope that customers unaware of that license and pay the patent holder out of ignorance. Adobe has had to move to intervene in one of the lawsuits filed merely to publicize and have a court finding on the fact that its customers are covered by the contract, a fact that the patent holder does not dispute. In a separate example, a patent holder continues to send demand letters about a patent it has asserted against Adobe. However, in the case against Adobe, a material question has surfaced regarding whether the troll even owns the patent. This issue was sufficiently credible to cause the judge to stay the case on the eve of trial. However, while we are waiting to litigate the ownership issue, the patent troll is continuing to send out demand letters to Adobe's customers without any reference to the fact that the troll may not be actually own the patent. If a customer pays the patent holder, and the patent holder is found not to be the true and correct owner of the patent, the customer could also be forced to pay the new patent holder on top of the previous payment.

This sort of behavior needs to stop. It is all a piece of the campaign to use patents to force extortion settlements. S. 1720 would address this problem by asking the FTC to use its Section 5 authority to enforce against deceptive and misleading practices. S.1720 would specifically require demand letters to include information about licenses and ownership, two easily provided and critical pieces of information in any demand letter. In addition, a requirement to provide reasons for infringement will enable recipients of the letter to assess the relevance of the threat, rather than merely acting out of the fear of the unknown. We do have concerns with enforcing against a patent troll that falsely threatens that "judicial relief will be sought." Namely, we are worried it will actually lead to more lawsuits being filed to satisfy this criteria , which is not the best outcome.

### **Importance of a Unitary Patent System**

Some have argued that the real cause of the patent troll problem is that patents are available for computer-implemented inventions, or software patents. I strongly disagree. At Adobe, we believe all technologies should be treated equally under the patent system. Our software patents are sound and protect true innovations. These patents play an indispensable role in making our company viable. Diluting or casting a shadow over these essential components of what makes Adobe competitive would be a huge problem.

At the same time, improving patent quality is essential and was the central focus of the AIA, which established a number of important measures that we believe are making a real difference. Some are in the early stages of implementations. The ability to challenge issued granted patents in order to weed out patents that should not have been granted is making a real difference. The AIA created two permanent ways to challenge issued patents — *inter partes* re-examination and post-grant review — which balanced the need for patent validity review with the need for a patent owner to have certainty

as to the value of their patent. The AIA's Section 18 created a third, and purposefully narrow way to challenge business method patents related to financial services. Section 18 is a transitional component of the law and was not meant to be a permanent feature. Section 18 targets a very small sector of improvidently granted patents. That was and should remain its focus.

I fear that call for expanding the scope of Section 18 challenges to cover all or virtually all software patents would be harmful, especially given the evidence that the *inter partes* review process is working as intended. Such an expansion would impose unnecessary cost and burden on the patent owner and significantly delays the enforcement of valid patents, creating opportunities for litigation abuse by infringers.

### **Improvements to Post Grant Proceedings**

The Post Grant proceedings, a central feature of the American Invents Act, are a valuable tool for improving patent quality. Adobe supports the removal of the "reasonably could have been raised" estoppel requirement in the Post Grant Review procedure (PGR). This very broad estoppel standard would effectively preclude any practical utility of the PGR process, as challengers would have to give up too many rights in order to seek the benefits of this provision. Within the first nine months of patent issuance, challengers are not well positioned to bring every possible defense they "reasonably could have raised" in a PGR proceeding. However, creating estoppel for arguments actually raised during the proceeding is fair, and serves the purpose of this Program.

In addition, Adobe supports maintaining the "broadest reasonable interpretation" (BRI) standard for post-grant proceedings. This standard, supported by the Patent Office, ensures a consistent interpretation of claims by the Patent Office where the applicant has an opportunity to amend their claims. Using the BRI standard also allows the Patent Office Trial and Appeal Board to review petitioner's petition without any further input from the patent holder on the proper interpretation of the claims, as might be required if another, fact-intensive, standard were applied. This serves the goal of ensuring that the post-grant proceedings are conducted expeditiously and inexpensively. Adobe does support requiring the PTAB to consider other factors such as patent prosecution history estoppel or district court claim constructions, as they interpret claims under the BRI standard.

### **Conclusion**

Thank you again for allowing me to testify. The problem of patent litigation abuse has evolved and grown. It is an urgent threat that costs our economy billions of dollars and causes real-world impact in jobs and innovation. There are a number of common-sense, fair and balanced reforms Congress can enact to address these problems. They include fee shifting, to restore the economic balance in the litigation system; discretionary bonding, to ensure the fees are actually paid; heightened pleading and discovery reform, to lower the costs of patent litigation for all parties; customer suit protection, to redirect litigation toward the proper parties; and demand letter reform, to help the end users defend

themselves against patent misuse. Together, these provisions will restore the integrity of patents and the patent litigation system that our economy needs.

Fortunately, the Leahy-Lee bill contains several of these measures. Combined with the other legislative proposals I have discussed, it will have a positive impact on the U.S. economy by restoring a strong and flourishing patent system, free from the taint of abuse. I think we all understand how vital this is to the continued growth of American innovation.

I look forward to answering your questions.