

Testimony of Harry Wolin
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Mr. Chairman, Ranking Member Grassley, Senator Cornyn, and other members of the Committee, thank you for the opportunity to share information about abuses plaguing the U.S. patent system and the significant harm they are causing to U.S. companies and the U.S. economy.

I currently serve as AMD's Senior Vice President, General Counsel and Secretary. I am a registered patent attorney and have spent the last 25 years working for technology companies on IP protection, licensing and enforcement. AMD has been both a plaintiff and defendant in patent litigation matters, and I bring that perspective to bear in my testimony today.

Innovation, and Consequently Patent Protection, is Crucial to AMD

Founded in 1969 in Sunnyvale, California, Advanced Micro Devices, Inc. (NYSE: AMD) is a semiconductor company headquartered in Silicon Valley that employs more than 10,000 engineers, professionals, and staff throughout the U.S. and around the world. We design and integrate technology that powers millions of intelligent devices, including personal computers, tablets, game consoles and cloud servers. Our business portfolio ranges from providing microprocessors for the U.S. Government's most powerful supercomputers and for notebook and desktop computers produced by companies such as HP, Dell, and Lenovo, to designing the chips that power the recently launched Microsoft Xbox One, Sony PlayStation 4, and Nintendo Wii U game consoles.

As a company that depends on innovation to drive our business, AMD invests approximately 20 percent of our annual revenues on research and development activities. **Over the years, we have built a patent portfolio of approximately 4,600 active U.S. patents, and since our inception we have easily had more than twice that number issued to AMD. This portfolio represents an investment of many billions of dollars in products and innovation, as well as approximately one billion dollars just to procure the patents themselves.** The result is that AMD's business, our ability to create and retain jobs, and our ability to innovate and deliver new technologies to our customers, depends on our ability to vigorously protect and defend our intellectual property. We are a staunch supporter of strong patent rights.

Abusive Litigation Tactics are a Drain on AMD's Resources and Our Economy as a Whole

Let me begin by stating that it is my strong belief that the current patent litigation system is broken and can be improved only through legislative action. Years of worsening abuse demonstrate that the courts do not have the tools needed to address these problems and confirm that, without reform, the current abuses in patent litigation will continue to spread, further harming American businesses, consumers, and the economy as a whole.

In the United States, abusive patent litigation practices are systemic and there is a growing body of research that indicates the problem is increasing and causing considerable economic damage. A recent report based on data from RPX found that the number of unique defendants targeted by patent assertion entities ("PAEs") tripled from 2006 to 2012, and that PAEs initiated 62% of all patent lawsuits in 2012. (Chien, 2013) Another well-known study estimates that PAE suits cost U.S. companies as much as \$80 billion in 2011, including \$29 billion in direct costs. (Bessen & Meurer, 2012) That same study reported that patent litigation costs as much as \$5 million per case, and that the total costs imposed account for more than 25% of the total amount that U.S. businesses spend on research and development each year.

For companies like AMD, patent litigation abuses are siphoning critical funds that we need to keep our companies healthy, create jobs, and drive innovation. In our industry, one million dollars can pay a years' wages for 8-10 engineers. **But, each year, AMD is forced to spend tens of millions of dollars to defend against and/or settle patent infringement allegations that are often completely unfounded and purely frivolous.** This diverts funds from critical areas of our business and has a direct impact on our employees and operations. For example, in 2012, AMD made the very difficult decision to have a reduction-in-force that affected a large number of our employees. **We could have saved a number of jobs, but for the significant and wasteful expense of abusive patent litigation.** Company operations are also affected by the cost of patent litigation because fewer dollars are available to invest in product research and development and other critical areas. **Each time we are forced to settle a frivolous claim because it is the least expensive solution, we are literally reducing the number of jobs we can create or retain and the amount we can invest in our business and the communities in which we operate.**

In my role as General Counsel of AMD, I see first-hand the patent litigation abuses faced by AMD and other companies. I can provide the Committee with a few examples to demonstrate the cost, harm, and disruption these problems cause companies in our industry.

My first example demonstrates the surprisingly high-cost of defending against even frivolous patent cases. Optimum Processing Solutions asserted a single patent against AMD "computer processor chips" as well as the products of several other defendants. **Although the allegations were clearly unsupported, AMD incurred over a million dollars in attorney fees and expenses before opting to settle the case solely because it would have cost more to prove that the plaintiff's allegations were specious.** As it turns out, the majority of the other defendants to that lawsuit also settled, leaving one defendant who did not negotiate a settlement. Ultimately the court vindicated AMD's initial assessment of the case by invalidating the asserted claims of the plaintiff's patent in a summary judgment order.

While the final outcome was favorable, the current patent litigation system clearly failed the defendants and the court.

Other recent examples show that some plaintiffs drive-up a defendant's discovery costs to essentially extort a settlement. In one case, the plaintiff asserted patents against basic circuits that clearly had been disclosed in patents from the early 1980's, many years prior to the inventions claimed by the asserted patents. However, despite overwhelming evidence of invalidity and non-infringement, the plaintiff continued to press its claim and demanded extensive discovery including highly confidential and detailed technical information regarding **all** aspects of **thousands** of AMD products, not just the portions of the products that were accused of infringement. After two years of litigation, disruption for numerous AMD employees, and roughly one million dollars in expenses, with no end in sight, AMD chose to pay a settlement, rather than continue to pay its lawyers to defend against these frivolous allegations solely for economic purposes. In another case, AMD provided extensive discovery on a set of accused products, only to have the plaintiff abandon its original allegations in favor of a new theory on an entirely different set of products several years into the case. As these two cases demonstrate, it is common to use discovery as a weapon, rather than as a way of discovering the facts to prove one's case. By requiring a plaintiff to identify its infringement allegations and pay for discovery beyond core documentary evidence relevant to those allegations, the legislation proposed to the Committee would curb these abuses.

The litigation rules that permit these abuses also lead to egregious conduct outside the courtroom. After investigating a demand letter (often through the use of expensive outside legal counsel and other technical experts), AMD often determines that there is no infringement and explains this to the patentee. But many of these patentees persist in their claims in pursuit of a settlement in spite of clear evidence refuting their claims. In fact, one patentee responded to AMD's evidence by completely ignoring the substantive merits of their patents, instead arguing that AMD should pay for a license because the costs of litigation could exceed the license amount requested. This type of "pay us with no risk, or pay for litigation and roll the dice" technique used by abusive litigants is, unfortunately, typical. To make matters worse, an increasing number of the worst offenders have learned to demand a non-disclosure agreement at the beginning of patent licensing discussions, which contractually precludes a recipient of these abusive tactics from later exposing egregious behavior to the public (or to Congress).

We hope these examples provide you with a sense of the egregious nature of patent litigation abuses that companies like AMD regularly face and the considerable negative impact they have on the health of American businesses, as well as job creation and the U.S. economy.

Immediate and Impactful Reform is Necessary

We are greatly encouraged by the interest from this Committee and the House to curb abuses in the patent system. **There is no one solution to these problems—they are intertwined with several fundamental aspects of the U.S. patent system, making the situation too complex for a single solution. Because different entities are using different means to exploit the system to the detriment of a wide variety of business, multiple reforms are necessary to provide effective relief.**

For example, certain provisions of the Patent Transparency and Improvements Act, introduced by Senators Leahy and Lee, can help address the problem, particularly for small businesses. The transparency provisions in Section 3 help to shed light on the patent marketplace and thereby discourage bad behavior. Section 5, regarding bad faith demand letters, will help curb the abusive practice of mass-mailing frivolous demand letters in the hopes of securing a settlement from victims.

These provisions alone, however, are insufficient to curb the abuse plaguing our patent system. To that end, we respectfully urge the Committee to include the provisions co-sponsored by Senators Cornyn and Grassley, such as heightened-pleading, discovery reforms, and fee shifting, in any bill. These measures, more than any others in our view, are essential to any meaningful and impactful reform. We note that versions of them are key parts of the Innovation Act (HR 3309), introduced by Chairman Goodlatte. Their importance is underscored by the fact that the House overwhelmingly passed the Innovation Act earlier this month, in a dramatic and encouraging showing of bipartisan support. That support was further emphasized in a statement issued by the White House. Let me explain their importance.

Heightened Pleading Requirements

Under current law, a plaintiff can file a patent infringement lawsuit by merely identifying the patent-in-suit and providing a general allegation that the defendant's products infringe. As a result, it can be months or even years before a defendant knows what is actually at issue. A plaintiff needn't identify what claims are being infringed, or what product infringes or how the product infringes. The result is an unnecessary waste of the parties' and the court's limited resources.

Heightened pleading requirements would add clarity to a patent infringement lawsuit from its inception. As proposed in the Innovation Act and as proposed by Senators Cornyn and Grassley, a plaintiff would be required to allege patent infringement with specificity, identifying not only the specific products at issue, but also the plaintiff's reason for believing that these products infringe.

There are numerous benefits to this proposal. First and foremost, it would require all plaintiffs to do their homework before subjecting a defendant to millions of dollars in attorney fees and expenses. This helps deter frivolous lawsuits and eliminates much of the wasted resources and expenses that are consumed at the beginning of a patent infringement lawsuit to determine what technology is at issue.

Equally importantly, this proposal presents no downside to a legitimate plaintiff. We don't take lightly any legislation that would place an additional burden on a plaintiff—AMD actively enforces its patent rights against infringers, and we occasionally have needed to resort to filing patent infringement lawsuits. However, a party seeking to enforce its patent rights, rather than seeking to extort a settlement, will investigate to determine which products are infringing and the basis upon which it finds infringement. In short, a legitimate plaintiff will have already done the homework required by the provisions of the Innovation Act and proposed by Senators Cornyn and Grassley. Although additional time will be required to prepare for litigation and draft the complaint, those additional hours represent a fraction of a legitimate plaintiff's effort and a sound investment in the efficiency of our patent system.

Discovery Reforms

In a patent infringement case, discovery can be financially debilitating. It underlies much of the abuse we see and the “troll” business model. Parties abuse discovery to increase an opponent’s cost to litigate. The resulting inefficiencies are well known, and widely felt: Parties are forced to produce millions of pages of documents, where only a few hundred documents are ultimately determined to be relevant, and only a handful are used at trial. AMD has firsthand experience with such practices, including a case that forced AMD to initially collect over 100 million pages of information, at a cost of nearly \$2 million, plus much more in attorney’s fees and expenses. In the end, less than one percent of these documents were tendered to the Court. Discovery reforms like those in Senator Cornyn’s bill and the Innovation Act are, thus, a crucial piece of meaningful legislation.

We encourage the Committee to move legislation that delays unnecessary discovery until the parties know what they are litigating, something that ought to be a matter of common sense. In patent litigation, a court determines whether a patent is infringed by looking to the language of the patent’s claims, which define the scope of the patentee’s right to exclude. Often, the meaning of the terms used in a claim is unclear, and the court is tasked with defining (or “construing”) those claim terms. The majority of cases are resolved (by the court or the parties) after disputed claim terms are construed because, frankly, the court’s construction of claim terms will often make it clear that a product either infringes or does not, or that a piece of prior art either invalidates the patent or does not. Even when a claim construction order does not fully resolve a case, it will narrow the issues disputed between the parties. Thus, discovery before the claim construction order is typically a significant and overbroad exercise that results in wasted expense. By staying most discovery prior to a claim construction order, the parties can efficiently focus their resources on the disputed issues in the case, if any remain.

In addition, discovery cost shifting reforms will help reduce the abusive discovery practices. The cost-shifting proposals present in the Innovation Act and Senator Cornyn’s bill require the producing party to pay to produce the most relevant documents and allow the other side the ability to request additional documents of questionable relevance at their own expense. This approach helps reduce the potential for abuse, while ensuring that all parties have access to relevant information.

Attorney-Fee Shifting

Unlike many American businesses, some patent holders have little to no litigation risk and, therefore, have an incentive to litigate meritless claims in the hopes of getting a lottery-like return. A defendant, on the other hand, is almost always assured of high litigation costs and the risk of crippling liability. This risk-reward imbalance results in uneven bargaining power, which is often used to unfairly extract licenses or settlements that substantially exceed the value of the asserted patents. In fact, several notorious PAE’s are known for pursuing frivolous claims against a large number of defendants with the expectation of receiving a settlement from each. (This is a profitable venture because such settlements are typically six-figures or low seven-figures.) Each settlement funds additional lawsuits filed against additional parties, creating a domino effect.

Entities who exploit the system know that a defendant is far more likely to pay to settle a lawsuit rather than pay the same or more in attorney fees and expenses to prove that the allegations are frivolous.

This imbalance can be corrected by enacting legislation that encourages district courts to award legal fees and expense to the prevailing party in abusive patent infringement lawsuits. The Innovation Act and Senator Cornyn's legislation correctly provide that fees are only awarded when the losing party did not have a justified position, protecting parties who legitimately believed they had a good case, but ultimately lost. **In our view, this is one of the most effective reforms the Committee can pursue.**

Conclusion

We urge the Committee to act quickly and decisively. This issue has been deferred time and time again, to the detriment of U.S. companies of all sizes and the U.S. economy as a whole.

Again, thank you for the opportunity to share information about the negative impact patent litigation abuses have on AMD and other U.S. companies, our employees, and the U.S. economy. We welcome any questions you may have.