The American Antitrust Institute

February 6, 2014

The Honorable Amy Klobuchar
302 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Patrick Leahy
437 Russell Senate Building
Washington, D.C. 20510

The Honorable Mike Lee
316 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Sheldon Whitehouse
530 Hart Senate Office Building
Washington, D.C. 20510

Re: Senate Bill 1720, the Patent Transparency and Improvements Act

Dear Senators,

The American Antitrust Institute[1] applauds your decision to introduce Senate Bill 1720, the Patent Transparency and Improvements Act. This bill corrects multiple defects in the patent system that have enabled patent assertion entities (PAEs, or patent trolls as they are more popularly known) and others to engage in abusive, anticompetitive enforcement activities. The next version should, however, on one issue follow the lead of the Innovation Act passed by the House of Representatives in December. Specifically, it should impose reasonable pleading requirements on plaintiffs in patent infringement lawsuits. With the ongoing abusive and costly conduct by PAEs against both manufacturers and users of high technology products and services,[2] we urge you to pass a revised version of this bill as soon as possible.

While we believe that the Federal Trade Commission (FTC) already possesses this statutory authority, the prohibition on bad faith demand letters under the FTC Act would remove all doubt and greatly deter PAE "mass attacks" against small businesses and other users of patented technologies. At present, PAEs can and do send vague form letters to thousands of parties threatening them with patent infringement lawsuits unless they pay the stated licensing fee. These letters often do not describe the particulars of the alleged infringement. They also falsely inform recipients that other parties have complied with the demand letters and that court proceedings have, in fact, been initiated against those that did not acquiesce. Recipients of PAE demand letters, who

[1] The AAI is an independent non-profit education, research, and advocacy organization. Its mission is to advance the role of competition in the economy, protect consumers, and sustain the vitality of the antitrust laws. For more information, see www.antitrustinstitute.org.

[2] *See, e.g.*, Intellectual Ventures I LLC v. Capital One Fin. Corp., 2013 U.S. Dist. LEXIS 177836 (E.D. Va. 2013); In re Innovatio IP Ventures, LLC Patent Litigation, 921 F. Supp. 2d. 903 (N.D. Ill. 2013); Dan Levine, *Google, Samsung, Huawei Sued over Nortel Patents*, REUTERS, Oct. 31, 2013.

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often lack knowledge of patent law, may feel compelled to agree to the demanded licensing fee. By prohibiting false claims and requiring demand letters to have a reasonable basis in law and fact, the Patent Transparency and Improvements Act raises the cost of mass attacks to PAEs and discourages the use of coercive demand letters.

The bill, by providing strong incentives for parties to record patent ownership and assignments with the Patent and Trademark Office (PTO), would create a more transparent market for patents. The opacity surrounding ownership and assignments of patent applications and issued patents has created an environment ripe for abuse. Parties that practice a patented technology have difficulty identifying who or even what type of entity owns the patent. They cannot easily determine who to contact about an appropriate license or anticipate if they will be the target of an infringement suit. PAEs, for example, are more likely to enforce their patents because, unlike manufacturing entities, they do not face the risk of infringement counterclaims or reputational harm among customers and standard setting organizations. In other instances, a manufacturing company can secretly transfer patents and patent portfolios to a PAE, which then brings infringement suits against competitors of the assignor. A more transparent market for patents would both increase licensing revenues for inventors and discourage opportunistic patent transfers and enforcement.

Your decision not to include a fee shifting provision in the bill represents good policy. The threat of fee shifting may discourage the filing of weak patent infringement claims. It can, however, also deter the filing of claims with reasonable merits. Litigation, in the patent context and elsewhere, is a costly, time-consuming, and uncertain process for plaintiffs. Fee shifting would only further tilt the scales against parties seeking to vindicate their rights in court. A fee-shifting provision, even if appropriate for PAE patent infringement suits, could easily, but mistakenly, be perceived as justified for other types of suits, as well. A narrowly targeted fee-shifting rule for PAE suits could facilitate undesirable "spillover" into other areas of law and have negative effects on the larger civil justice system. Abusive PAE conduct can be prevented through other means, like many of the provisions in the Patent Transparency and Improvements Act and more frequent imposition of Rule 11 sanctions on parties bringing unsupportable claims. A fee-shifting requirement is, at best, unnecessary and, at worst, detrimental to the pursuit of meritorious civil claims.

While the Patent Transparency and Improvements Act has many positive features, we hope the next version of your bill would incorporate the policies expressed in the House Innovation Act's section on pleading requirements. At present, plaintiffs in patent infringement lawsuits can file a complaint with vague or minimal factual allegations and still survive a defendant's motion-to-dismiss. They are not obliged, for example, to list the relevant patents and patent claims, identify other parties with an economic interest in the patents, describe the specific allegations of infringement, or indicate whether the patents are subject to any binding licensing commitments. These permissive pleading standards allow plaintiffs to file "barebones" complaints and extract coercive settlements. Patent infringement plaintiffs, unlike plaintiffs in most other civil enforcement contexts, are likely to possess more relevant factual information than defendants. They are in a better position to know the scope of the implicated patents and how the product manufactured or

used by the defendant may infringe on them. Although raising pleading standards is not appropriate as a general principle and would be problematic for most types of civil suits, reasonable pleading requirements can serve an important function in deterring meritless patent claims.

We commend your joint sponsorship of the Patent Transparency and Improvements Act. It remedies several critical deficiencies in the current patent system. These flaws have enabled anticompetitive and opportunistic patent enforcement activities. At the same time, we encourage you to include reasonable pleading requirements for patent infringement plaintiffs. In light of the costly, ongoing abusive conduct by PAEs and others against both manufacturers and users of high technology products and services, we urge you and your Senate colleagues to pass a revised version of the Patent Transparency and Improvements Act as soon as possible.

We would be pleased to discuss this topic further with you or your staff.

Respectfully,

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cc:

The Honorable John Conyers
The Honorable Bob Goodlatte