



**Committee on the Judiciary  
Subcommittee on Courts, Intellectual Property, and the Internet  
U.S. House of Representatives**

**Hearing  
“Examining Recent Supreme Court Cases in the Patent Arena”**

**Testimony of Krish Gupta  
Senior Vice President and Deputy General Counsel  
EMC Corporation**

**February 12, 2015**



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Chairman Issa, Ranking Member Nadler, and Members of the Subcommittee, my name is Krish Gupta, and I am Senior Vice President and Deputy General Counsel for EMC Corporation (EMC). I had the honor and privilege of testifying before the Judiciary Committee in October, 2013, to express our support for patent legislation to curb abusive patent litigation. Since that time, the Supreme Court of the United States has issued a number of decisions that have provided some relief from certain abuses. I appreciate the opportunity to testify on the impact of these decisions on patent litigation and H.R. 9, the Innovation Act of 2015 (“Innovation Act”). EMC applauds the introduction of the bipartisan Innovation Act and believes strongly that these important legislative reforms continue to be necessary to protect the patent system and spur innovation and competition.

As background, I am a registered patent attorney with more than 20 years of experience in patent law. At EMC, I have worldwide responsibility for intellectual property (IP) law and technology licensing matters, including IP policy, patent and trademark prosecution, and IP litigation. I would like to thank you for the opportunity to discuss the importance of patents to EMC, the current state of the patent litigation system, and the continued and urgent need for the reforms enumerated in the Innovation Act. The Innovation Act is a major step forward toward curbing abusive patent litigation and making it possible for innovators to focus on developing the next new technology for the benefit of the American consumer and economy, rather than defending meritless lawsuits.

**About EMC**

EMC was founded in Newton, Massachusetts, in 1979. Today, EMC is a global leader in enabling businesses and service providers to transform their operations and deliver IT-as-a-Service. Through innovative products and services, EMC accelerates the journey to cloud computing, thereby helping businesses store, manage, protect, and analyze their most valuable asset—information—in a more agile, trusted, and cost-efficient way.

Since 2003, EMC has invested approximately \$42 billion in research and development, as well as in acquisition of technologies that have revolutionized the world of information technology. EMC currently has an annual R&D investment of approximately \$3 billion. These investments have enabled EMC to broaden our product portfolio, enter new market segments, and expand our market opportunity.

Headquartered in Hopkinton, Massachusetts, with additional concentrations of employees in California, North Carolina, Utah, and Washington State, we employ approximately 68,000



people in 86 countries around the world. We rank 128<sup>th</sup> on the Fortune 500, based on 2014 revenues of \$24.4 billion.

### **Importance of Patents to EMC**

EMC's position of market leadership is the result of pioneering innovation, hard work, and substantial investment in new technologies. Innovation and intellectual property are our lifeblood, our keys to survival, and our future. We have a 36-year track record of anticipating future needs and building and acquiring technology solutions to solve problems in new and innovative ways.

EMC relies greatly on patents to establish and maintain our proprietary rights in our technology and products. EMC and its majority owned federated businesses hold more than 5,100 issued U.S. patents. EMC's patent portfolio is regularly recognized as one of the strongest and most impactful in the information technology business. In fact, the Wall Street Journal and the Patent Board recently ranked EMC as the 8<sup>th</sup> most innovative information technology company based on the quality and quantity of its patents.<sup>1</sup> These patents cover EMC's many innovations, including the hardware and software technologies used in our diverse products and offerings. In short, EMC is an advocate of a strong patent system; however, we want a system that protects and promotes innovation rather than inhibiting it, and a system that cannot be exploited by those who would use abusive tactics.

### **Abusive Patent Litigation is a Serious Problem**

In 2014 alone, more than 5,000 new patent lawsuits were filed.<sup>2</sup> That is nearly twice as many as were filed only four years earlier.<sup>3</sup> The number of patent lawsuits filed last year was the third highest ever.<sup>4</sup> After adding in patent disputes filed in administrative agencies, the total number increases to more than 6,600 patent disputes—the second highest level in history.<sup>5</sup>

In 2011, litigation costs arising from cases filed by so-called “patent assertion entities” were estimated at \$29 billion in direct out-of-pocket costs.<sup>6</sup> At that time, commentators

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<sup>1</sup> THE PATENT BOARD, <http://www.patentboard.com/> (last visited February 9, 2015).

<sup>2</sup> *Unified Patent's 2014 Litigation Report*, UNIFIED PATENTS (January 8, 2015), <http://unifiedpatents.com/2015/01/08/unified-patents-2014-litigation-report/>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *2014 Patent Dispute Report and Analytics*, UNIFIED PATENTS (January 26, 2015), <http://unifiedpatents.com/2015/01/26/2014-patent-dispute-report-and-analytics/>.

<sup>6</sup> James E. Bessen & Michael J. Meurer, *The Direct Costs from NPE Disputes*, 99 CORNELL L. REV. 387 (2014), available at <http://ssrn.com/abstract=2091210>; see also *Litigations Over Time*, PATENT FREEDOM,

estimated the total costs associated with abusive patent litigation at \$80 billion per year,<sup>7</sup> and those numbers certainly have increased since then. Abusive patent litigation is a costly problem that is stifling American innovation and impeding job creation each and every day.

Small, medium, and large enterprises are all affected by abusive patent litigation. 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.<sup>8</sup> Survey respondents cited monetary costs as well as distraction to management, engineers, and other employees. Respondents also described the human toll that these threats have taken on entrepreneurs, citing not only the impact on morale, but also the overall fear of losing a business. Further, the surveyed venture capitalists stated that if a company had an existing patent litigation threat against it, that fact could potentially be a major deterrent in deciding whether to invest. The survey succinctly summarized the responses on the impact of patent demands on startups: “[w]hen companies spend money protecting their intellectual property position, they are not expanding; and when companies spend time thinking about patent demands, they are not inventing.”<sup>9</sup>

Other commentators echo this core conclusion: abusive patent litigation harms innovation.<sup>10</sup> While Congress hears a lot from large companies like EMC, in fact, the biggest impact is on small startup firms.<sup>11</sup> Most of the cases filed by abusive litigants target companies with revenues of less than \$100 million a year.<sup>12</sup> A study conducted at the Massachusetts Institute of Technology concluded that frequent litigants caused a decline of \$22 billion in venture investing over a five-year period.<sup>13</sup> A Rutgers University study concluded that small companies that were hit with abusive lawsuits significantly decreased their spending on research and development.<sup>14</sup> 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

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<https://www.patentfreedom.com/about-npes/litigations/> (last visited February 8, 2015); Robin Feldman, Tom Ewing, & Sara Jeruss, *The AIA 500 Expanded: Effects of Patent Monetization Entities*, UC HASTINGS RESEARCH PAPER NO. 45, April 9, 2013, at 7, <http://ssrn.com/abstract=2247195> (patent monetization entities filed 58.7 percent of patent lawsuits in 2012).

<sup>7</sup> James E. Bessen, Jennifer Ford & Michael J. Meurer, *The Private and Social Costs of Patent Trolls*, REGULATION, Winter 2011-2012, at 26.

<sup>8</sup> Robin Feldman, *Patent Demands & Startup Companies: The View from the Venture Capital Community*, UC HASTINGS RESEARCH PAPER NO. 75, October 28, 2013, <http://ssrn.com/abstract=2346338>.

<sup>9</sup> *Id.*

<sup>10</sup> James Bessen, *The Evidence Is In: Patent Trolls Do Hurt Innovation*, HARV. BUS. REV., July 2014, available at <https://hbr.org/2014/07/the-evidence-is-in-patent-trolls-do-hurt-innovation>.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Catherine Tucker, *The Effect of Patent Litigation and Patent Assertion Entities on Entrepreneurial Activity*, MIT SLOAN SCHOOL WORKING PAPER 5095-14, June 22, 2014, at 31, <http://ssrn.com/abstract=2457611>.

<sup>14</sup> Roger Smeets, *Does Patent Litigation Reduce Corporate R&D? An Analysis of US Public Firms*, April 28, 2014, <http://ssrn.com/abstract=2443048>.



entities.<sup>15</sup> The evidence is clear: frivolous and abusive patent litigation results in less innovation and less investment in cutting-edge technologies and companies.

We at EMC wholeheartedly agree with these conclusions. Public confidence in our nation's patent system suffers, justifiably, when that system allows low-quality patents to be asserted in litigation and allows abusive litigation practices to be used. Baseless patent litigation distracts innovators, preventing them from spending their time productively contributing to technological progress and to the economy.

The staggering costs of such abusive patent litigation are borne by innovative companies in all industries. While sixty-three percent of the patent lawsuits filed last year were in the high-tech field,<sup>16</sup> a recent article suggested that patent assertion entities may soon increase lawsuits targeting biotech and pharmaceutical companies.<sup>17</sup> In short, the patent system that was created to promote innovation, has, in far too many instances, actually had a detrimental impact on innovation by taking money and resources from those who innovate and handing it over to those who do not.

### **EMC's Experience**

EMC is a frequent target of unscrupulous patentees with low-quality patents. Since 2005, EMC has faced unfounded 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. To us, to do so would be tantamount to giving in to extortion. 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.

Typically, at the outset of these cases, abusive patentees provide very little information about their allegations. EMC is forced to devote significant time, resources, and manpower to analyzing vague complaints that are directed at vast technology areas. This effort is needed because 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.

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<sup>15</sup> Lauren Cohen, Umit G. Gurun, and Scott Duke Kominers, *Patent Trolls: Evidence from Targeted Firms* HARVARD BUSINESS SCHOOL FINANCE WORKING PAPER NO. 15-002, August 7, 2014, <http://ssrn.com/abstract=2464303>.

<sup>16</sup> *Unified Patent's 2014 Litigation Report*, UNIFIED PATENTS (January 8, 2015), <http://unifiedpatents.com/2015/01/08/unified-patents-2014-litigation-report/>.

<sup>17</sup> Robin Feldman & W. Nicholson Price, *Patent Trolling — Why Bio & Pharmaceuticals Are at Risk*, UC HASTINGS RESEARCH PAPER NO. 93. Feb. 14, 2014, <http://ssrn.com/abstract=2395987>.

At the beginning of a lawsuit, EMC spends between \$100,000 and \$150,000 per month in outside legal fees for routine administration of a patent suit. Once a case becomes more active with discovery, depositions, expert reports, and Markman hearings, the fees typically range from \$150,000 to \$300,000 per month, but can be even higher. Added to such costs are expenses for outside vendors, experts, and prior art searching, which may cost several hundred thousand dollars each.

Further, we often challenge the validity of low-quality patents through a Petition for Inter Partes Review (IPR). These petitions—highly beneficial proceedings introduced by the AIA—are filed with the Patent and Appeals Board of the U.S. Patent and Trademark Office, an expert agency that is often better situated to evaluate patent validity than a court. Although EMC is a great proponent of this new proceeding, an IPR can cost between \$500,000 and \$1,000,000 per patent. In instances in which the district court does not stay its proceedings, this expense may need to be borne simultaneously with the above-described litigation costs.

In total, we can easily spend several million dollars to reach a resolution on the merits of one case. Some plaintiffs use their leverage associated with these costs to extort unreasonable settlements. This tactic is especially effective against startups and small companies that may not have the capital for a robust defense. Indeed, some patentees negotiate scores of cost-of-litigation settlements with the majority of defendants, then simply dismiss the rest rather than proceeding with litigation. Although this tactic demonstrates the frivolous nature of the lawsuit, defendants rarely have any recourse against patentees who conduct no business aside from filing meritless cases.

Discovery is a major contributor to the overall cost of litigation. Discovery costs in intellectual property cases are almost 62 percent higher than in other cases.<sup>18</sup> In a case brought by a patent assertion entity, these discovery costs are borne almost exclusively by defendants. This sort of plaintiff typically has few documents and fewer employees. No matter how many discovery requests they are served, they can often simply produce all their documents in a single banker's box. There is a significant incentive for a patent assertion entity to drown a large company defendant in discovery requests, seeking to force its engineers, its IT department, and its legal staff to unearth tens of thousands of requested documents. Such discovery costs are particularly troubling because they are unpredictable. Judges across the country, abetted by the lack of uniform national patent rules, have very different views on the proper scope of discovery.

These burdens are unnecessary and unwarranted. According to one estimate, less than one document in ten thousand produced in discovery is actually introduced at trial.<sup>19</sup> Email appears even more rarely.<sup>20</sup> Yet despite the irrelevance of most documents produced in

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<sup>18</sup> Chief Judge Randall B. Rader, *The State of Patent Litigation*, E.D. TEX. JUDICIAL CONFERENCE, Sept. 27, 2011, at 7, available at <http://patentlyo.com/media/docs/2011/09/raderstateofpatentlit.pdf>.

<sup>19</sup> *Id.* at 8.

<sup>20</sup> *Id.*



discovery, some plaintiffs still use the threat of exorbitant discovery costs to increase the incentives to settle.

One of the lawsuits in which EMC is involved provides a compelling example of the need for reform. When this case was first filed, the complaint listed eight patents, with no explanation of which of the hundreds of claims in those patents were allegedly infringed. The complaint generically accused two large EMC product lines of infringing, with no designation of which specific models infringed, and no explanation of why any EMC product supposedly infringed, or which claims might be infringed.

Based on the limited information it had, EMC set to work investigating the plaintiff's allegations and preparing its defenses. But six months later, the plaintiff amended its complaint, adding three new patents and a third, separate EMC product line. The plaintiff still failed to identify any specific claims or any specific model numbers. EMC again diligently attempted to investigate the allegations, but the sheer number of claims and the lack of any explanation as to how the claims were allegedly infringed required enormous effort, involving hundreds of hours of potentially unnecessary analysis. It was not until eight months into the litigation that specific claims were identified and claim charts provided.

Then, a year and four months into the lawsuit, the plaintiff again tried to expand the case, asking the Court for permission to add new products and previously undisclosed claims. EMC should not have to litigate for more than a year, investing enormous sums of money for its defense, only to have the case fundamentally change direction again and again.

As a result of all this uncertainty, EMC has spent hundreds of thousands of dollars *per month* combating allegations that are a fast-moving target. If the plaintiff had identified its theory of the case from day one, EMC could have conducted its own investigation into infringement and validity in short order, spending a fraction of the time and expenses that it will be forced to incur. Instead, as is common in abusive patent litigations, the ever-changing allegations make it impossible to efficiently and effectively prepare a defense. This is by design and in the plaintiff's interest, as so many companies would prefer to settle for a fraction of the litigation cost and avoid the aggravation rather than continue to fight on these uneven terms.

Discovery represents a significant part of EMC's overall expenses in this case. The plaintiff has accused EMC products that are complex, refrigerator-sized storage systems that may cost up to \$1 million or more. However, the alleged infringement is based solely on a relatively inexpensive commodity chipset that is supplied by a third party and embedded within the accused products. Thus, despite the narrow scope of the patent, EMC is forced to spend considerable money producing reams of technical and financial information that has nothing to do with the tiny chipset that is at the heart of the infringement allegations.

In short, 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. But, unless they are subject to counterclaims, they may share no part of the risk, and little part of the costs. Today, they are rarely held accountable for a defendant's attorneys' fees, even when the litigation they filed lacked any reasonable basis. The Innovation Act addresses these core issues and will ultimately change the system for the better.

### **Recent Supreme Court Cases and Related Developments**

Some have suggested that recent decisions by the Supreme Court of the United States reduce the need for Congress to act. However, the great majority of small, medium and large entities that have been negatively impacted by abusive patent litigation know that much still needs to be done, and legislative action is required to address the core aspects of abusive litigation. That is, legislative action is required to secure the patent system so that it operates in the manner in which it was originally intended—to promote innovation. I will spend a few minutes summarizing the relevant recent cases, and will then explain why Congressional action is sorely needed to promote consistency and predictability.

**Mayo.** In 2012, in a case called *Mayo Collaborative Services v. Prometheus Laboratories*,<sup>21</sup> the Supreme Court addressed when one can patent medical processes. The Court held that if a patent is directed to a natural process that takes place in the human body—a so-called “law of nature”—it must also contain an “inventive concept” to be eligible for a patent. Tacking on routine or conventional steps, like taking measurements from blood, to the natural law cannot make it eligible.

*Mayo* demonstrated how the Court would scrutinize patents to make sure they are “eligible”—that is, to ensure they are directed to the subject matter that Congress intended for patenting, namely inventions that improve processes, machines, articles of manufacture, or compositions of matter, not natural laws, abstract ideas, or products of nature. But *Mayo* did not solve the problem of abusive patent litigation. Most bad-faith patent lawsuits did not involve the type of subject matter directly addressed by *Mayo*.

**Myriad.** Then, in 2013, in a case called *Association for Molecular Pathology v. Myriad Genetics*,<sup>22</sup> the Court built on its earlier decision, determining whether human DNA could be patented. The Court held that naturally occurring DNA, even isolated strands, could not be patented. However, artificial sequences of DNA can be patented because they are manmade.

As with *Mayo*, *Myriad* did not do much to solve the problem of abusive patent litigation. Whether you can patent DNA is an interesting question, but DNA patents are not an issue that affect most companies facing these baseless lawsuits.

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<sup>21</sup> *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 132 S.Ct. 1289 (2012).

<sup>22</sup> *Association for Molecular Pathology v. Myriad*, 133 S.Ct. 2107 (2013).

**Limelight.** Last June, the Supreme Court decided *Limelight Networks, Inc. v. Akamai Technology*,<sup>23</sup> a case relating to induced infringement of method claims. A method claim is a patent claim that sets forth steps to be performed rather than physical components of a patented machine. In a claim of induced infringement, the defendant is accused of encouraging someone else to infringe a patent. In *Limelight*, the Supreme Court confirmed that there can be no induced infringement unless there is direct infringement.

This decision simply returned the law to the way it was before the Federal Circuit's decision in this case. Furthermore, the decision involved only the narrow category of cases involving allegations of induced infringement of a method claim where there was no direct infringement. Therefore, *Limelight* did not have a substantial impact on baseless patent litigation.

**Alice.** In *Alice Corporation v. CLS Bank*,<sup>24</sup> also decided last June, the Court finally turned to the category of patents that abusive plaintiffs more often assert in patent litigation: patents on computer-implemented business ideas. The Court held that you cannot get a patent on a fundamental economic practice, like the idea of escrow, even if you limit your patent to escrow performed on a computer. Computers are so ubiquitous, the Court explained, that merely taking a longstanding idea and doing it on a computer is not truly inventive.

While *Alice* is helpful in some cases, it impacts only a small percentage of patents. Further, even patent cases that do not survive motions to dismiss under *Alice* run up enormous costs for defendants. Plaintiffs who file bad-faith litigation understand these costs, and can still coerce settlements out of defendant operating companies that would rather pay less to settle than to litigate.

**Octane/Highmark.** Last year, the Court decided two cases addressing when courts can award attorneys' fees to the prevailing party in patent litigation. Currently, Section 285 of the Patent Act says that even when a defendant wins, the defendant still must pay its own attorney's fees unless the defendant demonstrates that the case was "exceptional." In *Octane Fitness v. Icon Health & Fitness*,<sup>25</sup> the Supreme Court interpreted this provision to mean that fees are available in any case that "stands out from others." In *Highmark v. Allcare Health Management System*,<sup>26</sup> 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, as I will explain, these decisions have been only moderately successful in increasing the success rates of defendants who seek to recover their attorneys' fees when they are faced with baseless patent litigation.

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<sup>23</sup> *Limelight Networks, Inc. v. Akamai Technology*, 134 S.Ct. 2111 (2014).

<sup>24</sup> *Alice Corporation Pty. Ltd. v. CLS Bank Int'l*, 134 S.Ct. 2347 (2014).

<sup>25</sup> *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S.Ct. 1749 (2014).

<sup>26</sup> *Highmark, Inc. v. Allcare Health Mgmt. Sys., Inc.*, 134 S.Ct. 1744 (2014).

**Nautilus.** In June of last year, the Court addressed how clear or “definite” patents must be in *Nautilus v. Biosig Instruments*.<sup>27</sup> The Court interpreted language in Section 112 of the Patent Act requiring that a patent “conclude with one more claims particularly pointing out and distinctly claiming the subject matter” of the invention as requiring the patent to provide “reasonable certainty” of what it covers. EMC filed an amicus brief in this case as well, successfully urging the Court to overrule the Federal Circuit’s overly-narrow view of when a patent should be held invalid for indefiniteness. Nevertheless, since the Supreme Court issued this decision, few patent claims have actually been invalidated as a result of the new standard.

**Teva.** In its recent decision in *Teva Pharmaceuticals USA v. Sandor*,<sup>28</sup> the Court took a step backwards in its line of patent decisions, addressing the Federal Circuit’s standard review of district court claim construction decisions. The Federal Circuit had always given a fresh look to such decisions, which enabled that court to ensure that a patent had been interpreted consistently across the district courts. But in January, the Supreme Court held that some aspects of a district court’s claim construction decision would be reviewed with deference—that is, the Federal Circuit should allow district courts some leeway in interpreting patents, even if they get it wrong.

EMC filed an amicus brief in this case as well, warning that giving deference to a district court’s claim construction decision would encourage abusive patent litigation. Patentees typically get to pick the district court in which they bring suit, and so they can shop for the forum most likely to interpret patents overly favorably. The Federal Circuit’s fresh review of district court interpretations of a patent had put a small check on such forum shopping. Now unscrupulous patentees have an additional incentive to pick the district court most favorable to them, and that court’s claim interpretation will be more insulated from Federal Circuit review.

**Twombly, Iqbal, and Form 18.** In 2007 and 2009, the Court decided *Bell Atlantic v. Twombly*<sup>29</sup> and *Ashcroft v. Iqbal*<sup>30</sup>, a pair of non-patent cases that increased, to a degree, the level of specificity required in a complaint by requiring the complaint to include enough facts to “plausibly” suggest that the plaintiff is entitled to relief.

Today, these cases do not directly apply to patent complaints that assert direct infringement (although they do apply where indirect infringement is alleged) because the Federal Rules of Civil Procedure include a sample form for patent infringement, Form 18, which requires less detail than is required by *Twombly* and *Iqbal*. Thus, today, a plaintiff need not fully identify the accused products; a plaintiff need not identify the asserted claims; and a plaintiff need not explain why it believes that the defendant infringes the asserted patent.

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<sup>27</sup> *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S.Ct. 2120 (2014).

<sup>28</sup> *Teva Pharmaceuticals USA, Inc. v. Sandoz Inc.*, No. 13-854 (U.S. Jan. 20, 2015) (slip. op.).

<sup>29</sup> *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955 (2007).

<sup>30</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937 (2009).

In September, the Judicial Conference of the United States, which is a 26-member committee of judges that suggests changes to the Federal Rules of Civil Procedure to the Supreme Court, recommended abolishing certain model forms, including Form 18.<sup>31</sup>

The abrogation of Form 18 would be a positive development, as it would lead to courts applying the stricter standard of *Twombly* and *Iqbal* to patent cases. But these cases do not set forth bright-line rules, and there will inevitably be satellite litigation regarding whether or not a particular complaint satisfies the requirements of these cases. Different judges in different districts will come to different conclusions, leading to variable outcomes. Legislation is needed to provide uniform, clear national standards so that defendants may prepare their case from the outset.

### **Legislation is Needed**

While helpful, recent developments in Supreme Court case law do not fully correct the core problems of patent litigation abuse. For example, they do not reduce the expense and burden of discovery. 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. And these decisions do not make fee-shifting the default rule rather than the exception. I will address each of these issues in turn.

**Discovery.** No recent development has managed to turn the tide of the abusive discovery tactics that plague the meritless cases EMC faces on a daily basis. As I explained earlier, discovery is a significant weapon used to extort cost-of-litigation settlements in meritless cases. Abusive discovery tactics are particularly effective when used by non-practicing entities because they typically have few employees and few records or documents, and are generally not subject to counter suit.

The Innovation Act sensibly limits discovery before the court issues its claim construction ruling to only discovery that relates to claim construction issues. This will help prevent wasted effort by either eliminating the need for discovery entirely (where, for example, the court's claim construction order effectively resolves the case), or at minimum by focusing the parties on truly relevant discovery, which can only be known after the court has told the parties how the claims will be interpreted.

The Innovation Act further ensures that the technical discovery that does take place will be tailored to the issues that actually matter, and that the costs of inefficient "fishing

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<sup>31</sup> See *Judicial Conference Receives Budget Update, Forwards Rule Package to Supreme Court*, UNITED STATES COURTS, September 16, 2014, <http://news.uscourts.gov/judicial-conference-receives-budget-update-forwards-rules-package-supreme-court>; Vin Gurrieri, *Judges Vote to Nix Rule Creating Patent Complaint Forms*, IP LAW 360, September 17, 2014, <http://www.law360.com/articles/578149/judges-vote-to-nix-rule-creating-patent-complaint-forms>.

expeditions” will be borne by the party serving the discovery request. By requiring the requesting party to cover the costs of unnecessary discovery, the Innovation Act will limit the extent to which those who would abuse the litigation system can use discovery costs as a bargaining chip.

**Pleading Specificity.** Businesses like EMC require certainty and predictability. Uniform, clear national standards, such as those included in the Innovation Act, can only be provided by Congress, and are needed. And those standards should require a plaintiff to explain why it believes the defendant infringes, so that the defendant can actually investigate the allegations and prepare its case, rather than face ever-shifting theories of infringement.

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 Act will have a real effect on those plaintiffs who file meritless, bad-faith lawsuits by making the lack of basis for the lawsuit apparent from the outset.

**Fee-shifting.** The Supreme Court’s decisions in *Highmark* and *Octane* are welcome, but do not go far enough. Fundamental change is needed to stop the onslaught of frivolous patent cases companies have faced in recent years.

In the two years before these cases were decided, motions for fees were fully granted 18 percent of the time and granted in part 20 percent of the time. They were denied in full 62 percent of the time.<sup>32</sup> According to our analysis, in the nine months since the Supreme Court issued its decisions in *Highmark* and *Octane*, the grant rate has increased. In that period, motion for fees were fully granted 32 percent of the time and granted in part 10 percent of the time. The rate of full denials decreased marginally, from 62 percent to 58 percent. Viewed as a whole, more motions for fees have been granted in full and fewer have been granted in part. The number of denials has decreased, but not by very much.

Although at first glance, these statistics suggest that the rate of fully-granted motions for fees has increased after *Highmark* and *Octane*, in reality, that increase is largely isolated to the first three months after the Supreme Court issued its decisions. In those three months, motions for fees were fully granted 40 percent of the time, partially granted 10 percent of the time, and fully denied 50 percent of the time. But in the most recent three months, motions for fees have been fully granted only 24 percent of the time and partially granted 13 percent of the time, with full denials at 63 percent. In other words, in the most recent three months, the rate of full denials of attorneys’ fees motions is about the same as it was

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<sup>32</sup> *Docket Navigator Litigation Activity*, <https://www.docketnavigator.com/stats> (last updated Feb. 5, 2015).



before the Supreme Court decided *Highmark* and *Octane*. As we can see, *Highmark* and *Octane* do not represent a panacea.

The upshot of this research is that fee-shifting is still the exception rather than the rule. For example, a judge on the Federal Circuit sitting as a district court judge by designation denied fees even though he found that the plaintiff's case "was certainly a weak one."<sup>33</sup> Critically, much is left to the discretion of district courts—discretion that is exercised very differently by different judges.

The Innovation Act would go further in leveling the playing field by requiring that fees be awarded to the prevailing party unless the losing party's position is substantially justified or special circumstances make an award unjust. We believe that this provision embodies the simplest way to discourage the filing of frivolous and abusive suits by imposing financial accountability in the patent system. Simply stated, some patent owners—especially non-practicing entities 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. Fee shifting would change that and bring some accountability to the system.

Congress is uniquely situated to make a real difference in these important areas. While the Supreme Court has been active in correcting some of the flaws in the patent system that frivolous litigants seek to exploit, the judiciary—even at the highest level—cannot bring about the comprehensive and prompt solution that Congress can structure. It takes time for a case to reach the Supreme Court and it only accepts for review a handful of IP cases each term. Congress on the other hand can enact comprehensive solutions in a single, coordinated approach, such as that outlined in the Innovation Act. The proliferation of abusive patent litigation is the kind of broad problem, causing billions of dollars in misdirected spending, that cries out for a legislative solution.

## **Conclusion**

In conclusion, legislative action to address patent litigation abuses is necessary to restore confidence and balance in our patent system. The courts have made great strides, but the decisions are not sufficient to address all of the tactics associated with abusive patent litigation, including vague pleadings and discovery misconduct, which force many companies into settlement. Since I last appeared before the Judiciary Committee, EMC, its customers, and many similarly situated companies continue to be subject to frivolous litigation. The money spent on this frivolous litigation could be better invested in jobs and research and development. I must tell you, unfortunately, that I am certain that unless Congress acts, the problem will continue, unabated. The efforts undertaken by the Judiciary Committee and this Subcommittee are essential to the health of our patent system and the innovation of businesses in the United States.

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<sup>33</sup> *Stragent LLC v. Intel Corp.*, Civ. No. 6-11-cv-00421, 2014 WL 6756304 (E.D. Tex. Aug. 6, 2014), at \*5.