

# Adam Mossoff on Patented Innovation, Licensing & Litigation (Transcript)

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*Below is the text of the oral testimony provided by Professor Adam Mossoff to the Senate Commerce, Science and Transportation Committee, the Consumer Protection, Product Safety, and Insurance Subcommittee, in its November 7, 2013 hearing on “Demand Letters and Consumer Protection: Examining Deceptive Practices by Patent Assertion Entities.” Information on the hearing is [here](#), including an archived webcast of the hearing.*

*Please note that Professor Mossoff is incorrectly identified as speaking on behalf of CPIP. He in fact testified in his personal capacity as a Professor of Law at George Mason University School of Law, given his academic research into the history of the patent system and the role of licensing and commercialization in the distribution of patented innovation. He spoke for neither George Mason University nor CPIP, and thus he is solely responsible for the content of his research and remarks.*

Chairman McCaskill, Ranking Member Heller, and Members of the Subcommittee:

Thank you for this opportunity to speak with you today.

There certainly are bad actors, deceptive demand letters, and frivolous litigation in the patent system. The important question, though, is whether there is a *systemic problem* requiring further *systemic revisions* to the patent system. There is no answer to this question, and this is the case for three reasons.

## **Harm to Innovation**

First, the calls to rush to enact systemic revisions to the patent system are being made without established evidence there is in fact systemic harm to innovation, let alone any harm to the consumers that [Section 5](#) authorizes the FTC to protect. As the Government Accountability Office found in its [August 2013 report](#) on patent litigation, the frequently-cited studies claiming harms are actually “[nonrandom and nongeneralizable](#),” which means they are unscientific and unreliable. These [anecdotal reports](#) and [unreliable studies](#) do not prove there is a systemic problem requiring a systemic revision to patent licensing practices.

Of even greater concern is that the many changes to the patent system Congress is considering, incl. **extending the FTC's authority** over demand letters, would **impose serious costs on real innovators** and thus **do actual harm** to America's innovation economy and job growth.

From **Charles Goodyear** and **Thomas Edison** in the nineteenth century to **IBM** and **Microsoft** today, **patent licensing** has been essential in bringing patented innovation to the marketplace, creating economic growth and a flourishing society. But expanding FTC authority to regulate requests for licensing royalties under vague evidentiary and legal standards only weakens patents and create costly uncertainty.

This will **hamper America's innovation economy**—causing reduced economic growth, lost jobs, and reduced standards of living for everyone, incl. the consumers the FTC is charged to protect.

### **Existing Tools**

Second, the Patent and Trademark Office (PTO) and courts have long had the legal tools to weed out bad patents and punish bad actors, and these tools were **massively expanded** just two years ago with the enactment of the **America Invents Act**.

This is important because the real concern with demand letters is that the underlying patents are *invalid*.

No one denies that owners of valid patents have the right to license their property or to sue infringers, or that patent owners can even make patent licensing their sole business model, as did Charles Goodyear and **Elias Howe** in the mid-nineteenth century.

There are too many of these tools to discuss in my brief remarks, but to name just a few: recipients of demand letters can sue patent owners in courts through **declaratory judgment** actions and invalidate bad patents. And the PTO now has *four* separate programs dedicated *solely* to weeding out bad patents.

For those who lack the knowledge or resources to access these legal tools, there are now numerous **legal clinics, law firms and policy organizations** that actively offer assistance.

Again, further systemic changes to the patent system are unwarranted because there are existing legal tools with established legal standards to address the bad actors and their bad patents.

If Congress enacts a law this year, then it should secure full funding for the PTO. Weakening patents and creating more uncertainties in the licensing process is not the solution.

## Rhetoric

Lastly, Congress is being driven to revise the patent system on the basis of rhetoric and anecdote instead of **objective evidence** and **reasoned explanations**. While there are bad actors in the patent system, terms like PAE or patent troll **constantly shift in meaning**. These terms have been used to cover anyone who licenses patents, including universities, startups, companies that engage in R&D, and many others.

Classic American innovators in the nineteenth century like **Thomas Edison, Charles Goodyear, and Elias Howe** would be called PAEs or patent trolls today. In fact, they and other patent owners made **royalty demands against thousands of end users**.

Congress should exercise restraint when it is being asked to enact systemic legislative or regulatory changes on the basis of pejorative labels that would lead us to condemn or discriminate against classic innovators like Edison who have contributed immensely to America's innovation economy.

## Conclusion

In conclusion, the benefits or costs of patent licensing to the innovation economy is an important empirical and policy question, but systemic changes to the patent system should not be based on rhetoric, anecdotes, invalid studies, and incorrect claims about the historical and economic significance of patent licensing

As former PTO Director David Kappos **stated** last week in his testimony before the House Judiciary Committee: "we are reworking the greatest innovation engine the world has ever known, almost instantly after it has just been significantly overhauled. If there were ever a case where caution is called for, this is it."

Thank you.

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