



April 8, 2015

Mr. Gary Shapiro
President and CEO
Consumer Electronics Association
1919 South Eads Street
Arlington, VA 22202

Dear Mr. Shapiro,

We write in response to the letters dated April 2, 2015 sent to members of the Association of Public and Land-grant Universities and Association of American Universities, among other higher education associations.

As the 145 leading U.S. research universities asserted in no uncertain terms in their letter of February 24 to leaders of the House and Senate Judiciary committees, the higher education community stands united in opposition to the abusive practices of patent trolls. We strongly agree that Congress should address the bad actors in the patent system. But we remain equally firm in our view that legislative efforts to curtail troll abuses should be narrowly tailored to address the abuses of this small minority of patent holders without substantially weakening the U.S. patent system as a whole. After careful and extensive study, and with the advice of patent legal counsel and a number of experts at our universities, we strongly believe H.R. 9 fails this test.

In your letter, you reference the abusive demand letters used by trolls to extort financial settlements from businesses unable to absorb the expense of defending a patent infringement lawsuit. Universities themselves receive such demand letters, and like many of the trolls' other targets, our institutions and the small startup companies created from university research lack extensive litigation budgets.

Accordingly, APLU and AAU vigorously support efforts to rein in abusive demand letters, which include giving the Federal Trade Commission even more muscular authority to treat troll demand letters as an abusive, deceptive, and potentially fraudulent business practice. Unfortunately, H.R. 9 overlooks this and other promising tools to combat trolls and, instead, focuses on overly broad – indeed highly unusual – changes to civil litigation practices that would negatively impact all patent holders. In fact, H.R. 9, would significantly increase the overall risks

and costs of legitimate patent enforcement for universities, startup companies, licensees of university research, and all other patent holders.

We disagree with your claim that the fee-shifting provisions in H.R. 9 are not a significant departure from a 1946 provision of U.S. patent law. Universities are not philosophically opposed to fee-shifting and recognize there is an appropriate role for a fee-shifting regime that would deter and punish frivolous litigation instigated by patent trolls. However, H.R. 9 is founded on a highly unusual presumption in favor of fee-shifting that those asserting their intellectual property rights would have to overcome. Given the prominence of intellectual property rights in the U.S. Constitution, and the value those rights bring to the economy, singling out patent enforcement for exceptional and largely untested treatment in our civil litigation system would not only be detrimental to the economy as a whole, but also be especially prejudicial to our country's most innovative enterprises.

We also disagree that the joinder requirements of H.R. 9 would not affect universities. Here too, H.R. 9 presumes that parties asserting their patents are bad actors and that those parties must bear the burden of overcoming that presumption. Although universities indeed may be able to meet the "no substantial interest" test, the legislation does not provide clear, objective direction on how to treat non-practicing entities.

Furthermore, we are concerned not only about the potential direct liability of universities, but also about how the legislation would broadly impact the innovation ecosystem. All entities without extensive litigation budgets, including nonprofit universities, startups, small companies, and individual inventors, are ill-equipped to operate in the environment that would be created under H.R. 9. The presumptions in favor of fee-shifting and joinder would increase the risk of expensive litigation to the point that such patent holders would in many cases be unable to assume the risk of enforcing intellectual property rights.

Patent holders' lack of substantial litigation resources to enforce their patent rights surely would not go unnoticed by those determining the risk of infringing on those entities' patents. If a patent cannot be enforced, it is of no value. Licensees have scant incentive to work with entities that are unable to protect their intellectual property rights. For universities in particular, a loss of confidence in the willingness and/or ability of universities to protect their intellectual property rights would seriously undermine the universities' capacity to transfer their research discoveries from campus to the private sector for society's benefit.

We note your reference to taxpayer-funded research. It is precisely because of the investment the federal government makes in research at U.S. universities that we have a responsibility to ensure our nation's patent system continues to support the success of the technology transfer process that converts that research into products and services that further our economy, improve health and quality of life, and enhance U.S. global competitiveness.

We invite your support for a more targeted approach that combats the abusive practices of a small number of parasitic patent holders while preserving the overall health of our patent system.

We are actively engaging in positive conversations with members of Congress, as well as with many stakeholders representing various perspectives on H.R. 9, and would be happy to discuss this further with you.

Sincerely,



Peter McPherson
President
Association of Public and Land-grant Universities



Hunter Rawlings
President
Association of American Universities